No. 13-551

IN THE
Supreme Court of the United States

ROBERT R. TOLAN,

Petitioner,

v.

JEFFREY WAYNE COTTON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, the NAACP Legal Defense & Educational Fund, Inc. ("LDF"), respectfully requests leave to file the attached brief *amicus curiae* in support of Petitioner Robert R. Tolan. Petitioner has consented to the filing of the brief. Respondent has not consented to the filing of the brief.

LDF is the nation's first civil rights law firm. LDF was founded as an arm of the NAACP in 1940 by Charles Hamilton Houston and Thurgood Marshall to redress injustice caused by racial discrimination and to assist African Americans in securing their constitutional and statutory rights. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

As described more fully in the accompanying brief *amicus curiae*, LDF has a longstanding concern with the influence of race on the administration of the criminal justice system and with laws, policies, and practices that impose a disproportionately negative impact on communities of color. Thus, LDF recently called on the United States Congress to address Stand Your Ground laws, which have proven to be uniquely vulnerable to racial bias, by requiring training of state and local law enforcement, implementa-

tion of violence-reduction strategies, and collection and reporting of data regarding the laws' application. LDF also has served as counsel of record and *amicus curiae* in federal and state court litigation challenging the arbitrary role of race in capital sentencing, the influence of race on prosecutorial discretion, the correlation between felon disenfranchisement, racial bias, and racial disproportionality in the criminal justice system, and the discriminatory use of peremptory challenges.

In this case, the events underlying Petitioner's Fourth-Amendment claim of excessive force under 42 U.S.C. § 1983 highlight the potential influence of subconscious stereotypes falsely associating race with criminality, aggression, and violence on decisions whether to use defensive deadly force. Whether the assailant is a police officer, or a private citizen "standing his ground," such implicit bias has repeatedly led to the unjustified use of lethal force against young African-American men. Not considering this phenomenon, the United States Court of Appeals for the Fifth Circuit awarded Respondent qualified immunity from liability in a decision that was both legally and factually flawed. Moreover, because the Fifth Circuit's decision conflicts with this Court's precedents regarding the test for qualified immunity and broadens the defense beyond proper limits, *amicus* has an interest in having that decision corrected.

For the foregoing reasons, *amicus* can bring an important perspective to the issues before this Court and respectfully requests that leave to file the attached brief *amicus curiae* in support of the petition for *certiorari* be granted.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF"), is the nation's first civil rights law firm. LDF was founded as an arm of the NAACP in 1940 by Charles Hamilton Houston and Thurgood Marshall to redress injustice caused by racial discrimination and to assist African Americans in securing their constitutional and statutory rights. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

LDF has a longstanding concern with the influence of race on the administration of the criminal justice system and with laws, policies, and practices that impose a disproportionately negative impact on communities of color. Thus, LDF recently called on the United States Congress to address Stand Your Ground laws, which have proven to be uniquely vulnerable to racial bias, by requiring training of state and local law enforcement, implementation of violence-reduction strategies, and collection and reporting of data regarding the laws' application. *See* Letter from Sherrilyn Ifill, President and Director-

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for both parties received notice of *amicus curiae*'s intention to file this brief at least 10 days prior to the due date. Petitioner consented to the filing of this brief, and his letter of consent has been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

Counsel, NAACP Legal Defense & Educational Fund, Inc., to the United States Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Human Rights (Oct. 29, 2013) (on file with author).

LDF also has served as counsel of record and *amicus curiae* in federal and state court litigation challenging the arbitrary role of race in capital sentencing, *see McCleskey v. Kemp*, 481 U.S. 279 (1987); *Furman v. Georgia*, 408 U.S. 238 (1972); the influence of race on prosecutorial discretion, *see United States v. Armstrong*, 517 U.S. 456 (1996); *United States v. Bass*, 266 F.3d 532 (6th Cir. 2001); the correlation between felon disenfranchisement, racial bias, and racial disproportionality in the criminal justice system, *see Farrakhan v. Gregoire,* 590 F.3d 989 (9th Cir. 2010); and the discriminatory use of peremptory challenges, *see Miller-El v. Dretke*, 545 U.S. 231 (2005); *Johnson v. California*, 545 U.S. 162 (2005); *Batson v. Kentucky*, 476 U.S. 79 (1986).

Given its expertise in matters concerning the influence of race on the operation of the justice system, LDF believes its perspective would be helpful to the Court in resolving the issues presented by this case.

SUMMARY OF ARGUMENT

In his own driveway, suspected of having stolen his own car, and despite verification of his residency and innocence from his middle-aged parents who had exited their home wearing their pajamas, unarmed Petitioner Robbie Tolan was shot at three times and grievously injured by Respondent Sergeant Jeffrey Cotton. Sergeant Cotton had been at the scene for

just 32 seconds before drawing and discharging his weapon in this near-fatal shooting. Misstating the law and improperly construing the facts, a panel of the Court of Appeals for the Fifth Circuit held Sergeant Cotton immune from liability for excessive force under 42 U.S.C. § 1983. *See* Petitioner's Appendix ("Pet. App.") 12.

The Court should grant the Petition for a Writ of *Certiorari* ("Pet.") in this case to clarify the appropriate qualified-immunity standard for claims of unreasonable search or seizure in violation of the Fourth Amendment. As set forth therein, *see* Pet. 10–19, the Fifth Circuit's decision leaves the relevant standard in disarray and perpetuates a split of authority among the Courts of Appeal on the proper articulation and application of the second qualified-immunity question, which asks whether the constitutional or statutory "right [at issue] was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

Despite this Court's consistent endorsement of a qualified-immunity test with "two prongs," *id.*, the Fifth Circuit divided the second prong into "two separate inquiries: whether the allegedly violated constitutional rights were clearly established at the time of the incident; and, if so, whether the defendant's conduct was objectively unreasonable in the light of that then clearly established law." Pet. App. 10; *see also id.* at 14 (calling identification of "clearly established" legal rule "only half of the equation for second-prong analysis"). The panel then

shoehorned an unbridled and subjective reasonableness determination into the newly invented third immunity prong and resolved contested questions of fact against the non-movant on summary judgment. *See* Pet. 25–27.

Neither the shooting of Robbie Tolan nor the decision depriving him of a jury determination of the legality of that shooting finds support in the law. The panel decision makes it onerously difficult to surmount a qualified-immunity defense and usurps the jury function in excessive-force cases. The goal of qualified immunity is to protect officials from liability for reasonable mistakes in novel situations, *see Harlow*, 457 U.S. at 819, not to wrest otherwise worthy cases from juries in a manner that insulates the actions of law enforcement from review.

These errors are particularly problematic where, as here, indicia of racial bias taint the underlying facts. Specifically, without warning, a police officer shot an unarmed person of color—who was wrongly suspected of vehicle theft—simply for shouting at the officer and beginning to get up from a prone position in response to the officer's manhandling of the victim's mother. *See* Pet. App. 6, 11, 14–15. In assessing Sergeant Cotton's conduct "from the perspective of a reasonable officer on the scene" tasked with making a split-second decision whether to use deadly force, *id.* at 12 (quotation marks omitted), the Court of Appeals did not consider the influence of subconscious stereotypes falsely associating race with criminality, aggression, and violence. Whether the assailant is a police officer, or a private citizen "standing his ground," such implicit

bias has repeatedly led to the unjustified use of lethal force against young African-American men—as occurred here.

Accordingly, the Court should grant *certiorari* to remedy the multiple errors in the Fifth Circuit's decision and to clarify the law in this important area.

ARGUMENT

I. The Fifth Circuit Incorrectly Added a Third Step to the Court's Two-Step Qualified-Immunity Test.

A. The Properly Viewed Facts.

In ruling on a motion for summary judgment, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* Properly viewed under these standards, the record evidence in this case revealed as follows:

Robbie Tolan was pulling into his driveway with his cousin when he was approached by a police officer (Officer John Edwards) who had incorrectly run the vehicle's license plate number, prompting suspicion that the car was stolen. Pet App. 25–26, 64–65. After the pair had exited the vehicle, the officer ordered them to get on the ground. *Id.* at 27. At some point, responding to a call for backup, a second officer (Sergeant Cotton) arrived on the scene. *Id.* at 28, 65. Hearing the commotion outside, Robbie Tolan's parents (Mr. and Mrs. Tolan) came out of the

house in their pajamas and told the young men to follow the officer's orders. *Id.* at 11, 27–28, 65, 97. They did. *Id.* at 27–28.

Mr. and Mrs. Tolan then calmly explained to the officers that they had lived in the home for 15 years, that the suspected auto thieves were actually not thieves but their son and nephew, and that they owned the putatively stolen car. *Id.* at 5, 65–66, 97. Instead of de-escalating the situation based on this new information, one of the officers slammed Mrs. Tolan against the house's garage door, at which point her son sat up and yelled at the officer. *Id.* at 70, 75–76, 98. Without warning—and only 32 seconds after arriving on the scene—the officer whose job was to provide backup drew his gun and shot Robbie Tolan in the chest, collapsing his lung. *Id.* at 6, 42, 98. Robbie Tolan did not reach into or towards his waistband before being shot. *Id.* at 11, 80.

These facts, when viewed in light of the applicable law, do not justify the Fifth Circuit's qualified-immunity determination.

B. The Fifth Circuit Incorrectly Modified the Qualified-Immunity Standard.

This Court's qualified-immunity jurisprudence is clear and well developed. "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Accordingly, "government officials performing discretionary

functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. Correctly applied, the defense "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *al-Kidd*, 131 S. Ct. at 2085.

In *Saucier v. Katz*, 533 U.S. 194 (2001), *modified in part by Pearson*, 555 U.S. at 236, the Court delineated two questions that control the qualified-immunity analysis:

One, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* at 201.

And two, did "the law clearly establish[ ] that the officer's conduct was unlawful in the circumstances of the case"? *Id.*; *see Pearson*, 555 U.S. at 236 (holding that questions may be answered in any order).

An excessive-force determination turns on reasonableness. *See, e.g.*, *Graham v. Connor*, 490 U.S. 386, 396 (1989). So too does the second prong of the qualified-immunity analysis, which asks whether a reasonable officer would have appreciated that "his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. Crucially, however, "[t]he inquiries of qualified immunity and excessive force remain distinct." *Id.* at 204. Evaluating clearly established law based on the circumstances an officer

confronted simply connects the legal standard to the facts to aid in articulating the implicated right. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."); *see also, e.g.*, *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1245 (2012) (reiterating second step's concern with "the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken" (quotation marks omitted)); *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (reducing immunity inquiry to whether officer "reasonably misapprehend[ed] the law governing the circumstances she confronted").

Nothing in *Saucier* or this Court's decisions since, however, permits "bifurcation of the 'clearly established' analysis" into distinct components, "divorcing the reasonableness inquiry from the state of the law at the time of the conduct in question." *Walczyk v. Rio*, 496 F.3d 139, 167 (2d Cir. 2007) (Sotomayor, J., concurring). With good reason: as then-Judge Sotomayor has warned, "introducing reasonableness as a separate step" impermissibly "permit[s] courts to decide that official conduct was 'reasonable'" irrespective of whether "it violated clearly established law." *Id.* at 168–69. It thus "give[s] defendants a second bite at the immunity apple, thereby thwarting a careful balance that" this Court has struck between vindication of private rights and performance of public duties. *Id.* at 169.

Nevertheless, the Fifth Circuit here divided the second, "clearly established" qualified-immunity

prong in just such a fashion. *See* Pet. App. 10 ("The second prong of the qualified immunity test is . . . understood as two separate inquiries . . . ." (quotation marks omitted)).[2] In the panel's view, that "it was clearly established that shooting an unarmed, non-threatening suspect is a Fourth-Amendment violation" was "only half of the equation for second-prong analysis; the remainder depends upon the totality of the circumstances as viewed by a reasonable, on-the-scene officer without the benefit of retrospection." *Id.* at 13–14. This misstatement created an illegitimately broad zone of immunity for the defendant, at once promoting casual treatment of the record evidence, treading on the jury's realm, and sowing confusion in the law to the detriment of civil rights plaintiffs. *See infra* Parts I.C–D. In short, it had "real consequences" on the outcome of this case, *Walczyk*, 496 F.3d at 168 (Sotomayor, J., concurring), as it will on future cases.

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[2] Courts in the Second, Sixth, and Ninth Circuits have similarly bifurcated the "clearly established" prong. *See Bailey v. Pataki*, 708 F.3d 391, 404 n.8 (2d Cir. 2013); *Quigley v. Tuong Vinh Thai*, 707 F.3d 675, 680 n.2 (6th Cir. 2013); *CarePartners, LLC v. Lashway*, 545 F.3d 867, 876 & n.6 (9th Cir. 2008). Other Circuits apply the prong faithfully. *See Jones v. Wilhelm*, 425 F.3d 455, 460–61 (7th Cir. 2005) (rejecting addition of third *Saucier* prong that would make "reasonableness of an official's actions an independent factor in determining whether a right is clearly established"); *see also Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009).

C. The Fifth Circuit's Application of Its Modified Qualified-Immunity Standard Resulted in Material Error.

As Judge Dennis aptly noted in dissent from the denial of rehearing *en banc*, the panel's second-prong *Saucier* misadventure resulted in a "confused jumble of parts of each prong," leading to the incorrect application of "either prong of the *Saucier* analysis." Pet. App. 93. Indeed, rather than look to the circumstances Sergeant Cotton confronted to determine whether the involved right was clearly established, *see Anderson*, 483 U.S. at 640, the panel examined the factual record to determine whether, in light of clearly established law, the officer nevertheless acted reasonably in the broadest imaginable sense. This was error.[3] Given "the situation he confronted," *Saucier*, 533 U.S. at 202, Sergeant Cotton's alleged actions contravened clearly established law.

In fact, the panel correctly recognized "that shooting an unarmed, non-threatening suspect is a Fourth Amendment violation." Pet. App. 14 (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)). At that point, the inquiry was complete: on Robbie Tolan's account (and in reality), Sergeant Cotton shot "an unarmed, non-threatening suspect." *Id.*

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[3] The panel also misstated the "the first prong of the qualified-immunity analysis" as requiring injury "result[ing] from the use of force that was clearly excessive to the need and . . . the excessiveness of which was clearly unreasonable." Pet. App. 9 (quotation marks omitted). Such error highlights the perils of the Court's tolerating continued distortion of *Saucier*'s prongs.

In concluding that immunity was warranted, however, the panel did not meaningfully distinguish *Garner*'s facts. *See, e.g.*, *Saucier*, 533 U.S. at 202 (holding "clearly established" inquiry informed by whether prior cases are "distinguishable in a fair way from the facts presented in the case at hand"). Nor did the panel survey case law to judge whether Sergeant Cotton had "fair warning" that the level of force used was excessive under the circumstances. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *see id.* at 753 (Thomas, J., dissenting) ("In conducting this inquiry, it is crucial to look at precedent applying the relevant legal rule in similar factual circumstances."); *see also Reichle v. Howards*, 132 S. Ct. 2088, 2093–96 (2012) (surveying law of this Court and of Courts of Appeal in analyzing whether proposed right to freedom from retaliatory arrest based on probable cause was "clearly established"); *al-Kidd*, 131 S. Ct. at 2083 (focusing "clearly established" inquiry on "existing precedent," which "must have placed the statutory or constitutional question beyond debate").

Instead, the panel determined whether the force used by Sergeant Cotton was reasonable—or, in other words, not excessive—as a matter of second-step, qualified-immunity law.[4] It premised that analysis on the *Graham v. Connor* directive that force's excessiveness "be judged from the perspective

[4] While the analysis resembled that of *Saucier*'s first step, the panel expressly declined to "reach whether Sergeant Cotton's shooting Robbie Tolan violated his Fourth Amendment right against excessive force." Pet. App. 17.

of a reasonable officer on the scene." 490 U.S. at 396. *Graham* involved an arrest during an investigatory stop, however, and not a police shooting. Thus, while its general principles endure, its specific factual context is of "scant applicability to" a police shooting case. *Scott v. Harris*, 550 U.S. 372, 381–83 (2007); *cf. Saucier*, 553 U.S. at 201–02 (observing that *Graham* alone furnishes insufficient guidance for evaluating clarity of implicated right in excessive-force cases).[5]

This errant analysis produced a conclusion that Sergeant Cotton did not, in fact, face "an unarmed, *non-threatening* suspect." Pet. App. 14 (emphasis added). Someone in Sergeant Cotton's position, held the panel, could reasonably have believed that Robbie Tolan "presented an immediate threat to the safety of the officers." *Id.* (quotation marks omitted). In so deciding, however, the panel did not construe the evidence in the light most favorable to the non-movant, as it was required to do on summary judgment. It largely did the opposite.

First, the panel unjustifiably "resolv[ed] material facts genuinely at issue in the defendant's favor rather than in favor of the plaintiff." *Id.* at 99. Specifically, the panel:

- despite Robbie Tolan's testimony that the area was "reasonably well-lit," *id.* at 4, by floodlights over the garage, a lantern in the yard, and a police car and flashlight, *id.* at 96, described the area as "dimly-lit," *id.* at 14;

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[5] Nor does *Graham* set forth any pertinent principle of qualified immunity. *See* 490 U.S. at 399 n.12.

- despite testimony that Mrs. Tolan "was calm and merely explained to both officers that she and her husband owned the Nissan and house and that Robbie lived there with them," *id.* at 96; *see id.* at 30–31, 41, concluded that Mrs. Tolan "refus[ed] orders to remain quiet and calm," *id.* at 15;
- ignored testimony that Sergeant Cotton "shoved" Mrs. Tolan into the garage, *id.* at 38, producing a "loud noise," *id.* at 31, or a "big bang," *id.* at 39, and instead opined that Sergeant Cotton used "minimal physical force to move [Mrs.] Tolan away from Officer Edwards' line of sight," *id.* at 18; and
- rejected testimony and physical evidence supporting a finding that Robbie Tolan had not moved towards Sergeant Cotton before being shot, *see id.* at 31–36, 71, in stating that Robbie Tolan had "abruptly attempt[ed] to approach Sergeant Cotton," *id.* at 16.

Second, the panel improperly "dismiss[ed]" certain material "facts as inconsequential." *Id.* at 99. For example, the panel:

- decided that whether Robbie Tolan reached for his waistband was immaterial, *id.* at 15, despite noting the conflicting testimony in this regard, *see id.* at 6, 11, and also pointing out that Robbie Tolan was wearing a "'hoodie'" that "conceal[ed] his waistband," *id.* at 6;
- failed to consider a reasonable officer's reaction to Mr. and Mrs. Tolan's explanation that their vehicle was *not* stolen, *see id.* at 5,

in light of the young men's compliance with the directions of law enforcement in response to the Tolans' instructions, *see id.* at 3–4, while stressing Officer Edwards's error in mistyping the vehicle's license plate number into a search database, which led the officers to "believe they were dealing with a felony vehicle theft," *id.* at 11;

- without relaying that two of the identified persons were middle-aged and wearing pajamas and that the other two were prone on the ground, relied on the fact that the officers were "outnumbered on the scene" by four other persons, *id.* at 15.

Third, the panel drew unwarranted evidentiary inferences for the movant and advanced those inferences as historic fact. For instance, the panel:

- failed to acknowledge that Sergeant Cotton's aggression towards the Tolans might have stirred confrontation, *see* Pet. App. 30–31, 96, and simply declared the scene outside the Tolan home "chaotic and confusing," *id.* at 4;
- foreclosed the inference that Sergeant Cotton was unreasonable in ignoring Mrs. Tolan's "protestations" that "the car was not stolen, and [that] they had lived in the house for 15 years," *id.* at 5, and instead ruled that Sergeant Cotton was "[j]ustified in his believing [that] Robbie Tolan . . . had stolen a vehicle," *id.* at 14;
- inferred that Mrs. Tolan's "demeanor" (again, the subject of a factual dispute) "frustrated"

Sergeant Cotton's ability to secure the scene, *id.* at 5;

- deemed Robbie Tolan's message to Sergeant Cotton to "get your fucking hands off my mom!" not an appropriately upset plea to unhand the speaker's mother, *see id.* at 31, but a "verbal[ ] threat," *id.* at 14; and
- construed Robbie Tolan's pushing himself up to his knees and turning around not as a son's attempting to assess his mother's safety, but as his "moving to intervene" in Sergeant Cotton's police work, *id.* at 12.

A glaring example of factfinding by the panel occurred in its cursory discussion of the *Tennessee v. Garner* requirement of "some warning," whenever "feasible," before an officer may shoot even a "suspect [who is] threaten[ing] the officer with a weapon." 471 U.S. at 11–12. The panel inferred a "clear and obvious warning" from the officers' communicating their belief that the Tolans' vehicle was stolen and from Sergeant Cotton's drawing "his pistol upon his arriving on the scene." Pet. App. 16. *But see id.* at 36 (testimony of Robbie Tolan that Sergeant Cotton unholstered his weapon and discharged it "practically immediately" thereafter); *id.* at 105–06 (testimony of Mrs. Tolan that Sergeant Cotton "didn't say a word" before firing). Even assuming that identifying a vehicle as stolen and drawing a weapon might satisfy *Garner*, the efficacy of such an implied warning and whether "absence of a final warning . . . exacerbate[d] the circumstances" are

quintessential jury questions. *Ludwig v. Anderson*, 54 F.3d 465, 474 (8th Cir. 1995).

Given the material disputed facts, the panel could not have properly resolved whether Sergeant Cotton acted reasonably under *Garner*—and, indeed, it expressly elected not to do so—under the first *Saucier* step. Yet it nonetheless injected improper factfinding into the second qualified-immunity prong, which solely concerns identifying whether the pertinent legal rule is clearly established. The panel's treatment of the record evidence is a byproduct of, and inseparable from, its flawed articulation of the qualified-immunity test.

D. The Court Should Remedy The Fifth Circuit's Misapplication of Qualified Immunity To Promote Fair Adjudication of Civil Rights Claims.

The challenged panel decision sets a dire precedent, realizing previously expressed concerns over a three-pronged qualified-immunity test. *See Walczyk*, 496 F.3d at 168–69 (Sotomayor, J., concurring). The point of qualified immunity is to protect reasonable official activity where the governing constitutional or statutory law is not clearly established. *See, e.g.*, *al-Kidd*, 131 S. Ct. at 2083–84. It is not to provide "breathing room" for police to shoot unarmed people of color without fear of repercussions in cases where courts honor the police version of events. *Id.* at 2085.

The panel decision also sows needless confusion in the law, to the detriment of civil rights plaintiffs. Surmounting a qualified immunity defense should

not be made onerously difficult. "[F]ormulating the inquiry as both a two- and three-step analysis," however, risks that courts, as here, "will interpret the third step—the 'objective reasonableness' inquiry—as a hurdle that is somehow distinct from, and in addition to, the 'reasonableness' inquiry that is already a part of the second step." *Taravella v. Town of Wolcott*, 599 F.3d 129, 138 (2d Cir. 2010) (Straub, J., dissenting). That distinct and additional hurdle proved dispositive here. Indeed, the First Circuit, which "abandon[ed] previous usage of a three-step analysis," *Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009), has noted the "added measure of protection provided by the third prong of the qualified immunity analysis," *Jennings v. Jones*, 499 F.3d 2, 19 (1st Cir. 2007) (quotation marks omitted).

Finally, just as pernicious, the panel's distortion of the second qualified-immunity step from *Saucier* will encourage usurpation of the jury's function in excessive-force cases. The putative third *Saucier* step on summary judgment invites impermissible examination and characterization of the record evidence regarding the particular circumstances an officer confronted, to determine whether the officer acted reasonably despite allegedly violating clearly established law. *Cf.* Henk J. Brands, Qualified Immunity and the Allocation of Decision-Making Functions Between Judge and Jury, 90 Colum. L. Rev. 1045, 1059 (1990) (stating that conflating "any qualified immunity inquiry in[to] terms of what a reasonable person would have known or believed" presents "arguably a question for the jury"). Adding

a third "reasonableness" layer to qualified immunity thus invites judges to substitute their own experiences and sympathies for those of the jury in assessing the reasonableness (or unreasonableness) of the defendant's conduct as a matter of law.

Here, the panel's foray into factfinding contravened the bedrock principle that "[w]hen considering a motion for summary judgment, a trial court's function is to ascertain whether disputed facts exist, not to try them." *McSurely v. McClellan*, 697 F.2d 309, 321 (D.C. Cir. 1982) (per curiam). Other courts may read the panel decision as license to misapply the second *Saucier* step in similar fashion. *See Taravella*, 599 F.3d at 138 (Straub, J., dissenting). Moreover, if the outer boundary of step-two factual "reasonableness" exceeds that of step-one factual "reasonableness," as is likely, then fewer excessive-force cases will be submitted to juries and more will be decided by courts. Such an outcome must be prevented "to give intelligible content to the right of jury trial," which is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004) (making point in sentencing context); *see Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 540 (1958) (affirming longstanding "federal practice of jury determination of disputed factual issues," including those relating to immunity defenses); *see also* Pet. 22–23 and sources cited.

II. The Fifth Circuit's Errors Magnify the Potential Impact of Implicit Bias on the Events at Issue.

The Fifth Circuit's misapplication of qualified immunity is particularly troublesome where, as here, the facts suggest that unconscious bias may have influenced the actions of law enforcement. As has been recounted, Sergeant Cotton wrongly suspected Robbie Tolan of having stolen his own vehicle, despite verification of his innocence from his pajama-clad parents. Sergeant Cotton then shot an unarmed Robbie Tolan—who, in light of the facts presented and inferences as they must be drawn at summary judgment, did not motion towards his waistband or present any sort of threat—in asserted self-defense. *See* Pet App. 6, 11, 14–15. Sergeant Cotton's perception of danger where none actually existed suggests the taint of unconscious bias.

Scientific research spanning decades establishes that much of how we think, behave, and judge the world around us is influenced by mental processes that occur automatically. We employ these processes by necessity—our brains are constantly inundated by stimuli that must be processed, interpreted, and recorded into memories, often instantaneously. To permit us to function, our brains must condense and simplify this flood of information.[6]

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[6] Researchers describe this constellation of mental processes variously as "heuristics," *e.g.*, Daniel Kahneman, Thinking, Fast and Slow (2011); "schemas," *e.g.*, Susan T. Fiske & Shelley E. Taylor, Social Cognition (2d ed. 1991); and "concepts," *e.g.*, Ziva Kunda, Social Cognition: Making Sense of People (1999).

Although these mental shortcuts are often accurate and efficient means of processing information, they also produce errors in judgment that affect understanding and cognition. *See* L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 Iowa L. Rev. 293, 298 (2012); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Sci. 1124, 1124–31 (1974). These errors—known as "implicit biases"—are systemic and widespread: whatever we think we think, implicit bias contaminates our perceptions and judgments.

Because implicit bias, by definition, occurs unconsciously, psychologists and other social scientists have developed special testing methods to understand its contours. The "state-of-the-art" Implicit Association Test—examining how tightly subjects associate any two concepts with one another—is the most common and well-established mechanism for measuring implicit bias. Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489, 1508–11 (2005) (describing implicit-association testing methods and "dissociation between explicit self-reports and implicit measures" of bias).

The results of these tests are sadly predictable. Although implicit bias may take many forms, it is most pervasive along racial lines and, as empirical studies have demonstrated, it is particularly acute against African Americans. These studies have shown that individuals quickly match "black" or "African-American" with widely held negative stereotypes like violence, dangerousness, and criminality. *See, e.g.*, Jennifer L. Eberhardt, *et al.*,

Seeing Black: Race, Crime, and Visual Processing, 87 J. Personality & Soc. Psychol. 876, 876 (2004).

Accordingly, individuals are more likely to perceive ambiguously aggressive behavior of an African-American than of a white person as a threat. *See* Patricia G. Divine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. Personality & Soc. Psychol. 5 (1989); *see also* Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 Psychol. Sci. 640, 643 (2003) (concluding that individuals are more likely to perceive hostility in African-American faces than in white faces). Brain-mapping functional magnetic resonance imaging (fMRI) tests have evidenced significantly greater activation in the part of the brain involved in fear conditioning and perception of threatening stimuli when white study participants are subliminally shown African-American faces than when they are shown white faces. *See, e.g.*, Kang, *Trojan Horses of Race*, *supra*, at 1510–11; Kevin N. Ochsner & Matthew D. Lieberman, *The Emergence of Social Cognitive Neuroscience*, 56 Am. Psychologist 717, 720 (2001).

Perhaps most disturbing, studies have specifically demonstrated that individuals are more likely to perceive guns (as opposed to tools) in the hands of African Americans than white people. *See* B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. Personality & Soc. Psychol. 181, 183–86 (2001); Eberhardt, *et al.*, *Seeing Black*, *supra*, at 889–90.

Likewise, when tasked with deciding whether or not to shoot a target in a video game depending on whether the target is carrying a gun (as opposed to a wallet, soda can, or cell phone), individuals are both more likely and quicker to shoot unarmed African-American targets than they are unarmed white targets. *See* Anthony G. Greenwald, *et al.*, *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. Experimental Soc. Psychol. 399, 403 (2003); Joshua Correll, *et al.*, *The Police Officer's Dilemma: Using Ethnicity To Disambiguate Potentially Threatening Individuals*, 83 J. Personality & Soc. Psychol. 1314, 1319 (2002).

Moreover, as the Second Circuit noted in *Young v. Conway*, 698 F.3d 69 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 20 (2013), an extensive body of scientific literature "indicates that certain circumstances surrounding a crime," which include "the stress of the situation," and "the cross-racial nature of the crime . . . may impair the ability of a witness . . . to accurately process what she observed," *id.* at 78–79 (citing studies in vacating criminal conviction on habeas review).[7] Similarly, scientists have proven that high levels of stress produce a defensive mental state, which results in diminished capacity to process or to remember events accurately. *See* Kenneth A. Deffenbacher, *et al.*, *A Meta-Analytic Review of the*

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[7] This literature has been peer-reviewed, replicated, and retested; it is considered the "gold standard in terms of the applicability of social science research to the law." *Young*, 698 F.3d at 79 (quotation marks omitted); *see also State v. Henderson*, 27 A.3d 872 (N.J. 2011).

Effects of High Stress on Eyewitness Memory, 28 Law & Hum. Behav. 687, 699 (2004).

Some decisions are more prone to bias, however, than others. Researchers like Nobel Prize-winner Daniel Kahneman have demonstrated that human beings use two cognitive systems to interpret information and stimuli. *See* Daniel Kahneman, Thinking, Fast and Slow (2011); Tversky & Kahneman, *Judgment Under Uncertainty*, *supra,* at 1124–31. The first of these, "System 1," governs the split-second judgments we make using mental shortcuts like heuristics. As shown, System 1 thinking is prone to systemic errors like implicit bias against African Americans. The second cognitive system, "System 2," employs the self-reflective, deliberative processes of critical thinking. In other words, "System 1 provides snap judgments and offers a form of rough-and-ready, bias-prone thinking that leans heavily on factual context and previously held beliefs. System 2 kicks in after a time delay and corrects errors." Richardson & Goff, *Self-Defense*, *supra*, at 301 (quotation marks omitted).

Line-level law enforcement officers rely on System 1 thinking to navigate the emergent and potentially dangerous situations they face every day. Indeed, their profession demands it. Thus, Fourth Amendment decisional law provides substantial leeway for mistaken snap judgments. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the

amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396–97.

The leeway afforded to snap judgments, however, cannot be absolute, especially given the potential for action that is biased and wrong. "[T]o counter otherwise automatic behavior, one must accept the existence of the problem in the first place." Kang, *Trojan Horses of Race*, *supra*, at 1529. Thus, courts should scrutinize for signs of implicit bias where, as here, the evidence prompts "suspicion" that official decision-making was influenced by "impermissible assumptions" or "invidious stereotypes." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 464–65 (1985) (Marshall, J., concurring in part and dissenting in part); *see also id.* at 471 ("Where such constraints . . . are present, and where history teaches that they have systemically been ignored, a 'more searching judicial inquiry' is required." (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)). At a minimum, assiduous application of the proper qualified-immunity and summary-judgment standards is vital: the broader the unearned leeway for defendants, the longer these important issues may remain unresolved.

Here, Sergeant Cotton's evaluation of the scene, prompting the use of lethal force in asserted self-defense, may have been shaped by the implicit biases just described. Indeed, despite other evidence to the contrary, Sergeant Cotton testified that he thought an unarmed "Robbie Tolan was pulling a weapon from his waistband area." Pet. App. 72; *see id.* at 50, 81–84, 86–88, 104. Rather than subject this claim to careful analysis or admit the possibility

that Sergeant Cotton was unreasonably mistaken, the panel dismissed the asserted waistband-reach as immaterial, relying on other, more tenuous circumstances to support its decision—*i.e.*, that Robbie Tolan "verbally threatened" the officer and that he "did a push-up maneuver." *Id.* at 14–15. Respectfully, such a decision lacks justification and threatens to bring the law into disrepute.

CONCLUSION

The established practice of "doubling the 'objectively reasonable' inquiry" in excessive force cases already "holds large potential to confuse." *Saucier*, 533 U.S. at 210–11 (Ginsburg, J., concurring). Tripled, the inquiry becomes inscrutable. This is especially ominous where, as here, the influence of subconscious stereotypes falsely associating race with criminality, aggression, and violence may have led to the unjustified use of lethal force against an unarmed young African-American man.

For the foregoing reasons, *amicus* urges the Court to grant the Petition for a Writ of *Certiorari*.

Respectfully submitted,

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