No.

IN THE
Supreme Court of the United States

CITY OF CLEVELAND, KAREN LAMENDOLA, ADMINISTRATOR FOR ESTATE OF FRANK STOIKER, AND J. REID YODER, ADMINISTRATOR FOR ESTATES OF EUGENE TERPAY, JAMES T. FARMER, AND JOHN STAIMPEL,

Petitioners,

v.

RICKY JACKSON, KWAME AJAMU, FKA RONNIE BRIDGEMAN, AND WILEY EDWARD BRIDGEMAN,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal civil rights actions under 42 U.S.C. § 1983 are to be administered in accordance with federal law. 42 U.S.C. § 1988(a). If federal law is silent on an issue, § 1988 directs that "the common law, as modified and changed by the constitution and statutes of the [forum] State" shall "govern." *Ibid.* Section 1988 authorizes a departure from state law only if it is "inconsistent" with the Constitution and laws of the United States. *Ibid.* The questions presented are:

1. Whether § 1988 requires the survival of § 1983 claims to be determined using the state-law survival rule for the most closely analogous state cause of action, or whether all § 1983 claims must be evaluated under the general state-law survival rule for personal-injury claims, without regard to the nature of the § 1983 claims.

2. Whether the court of appeals erred in holding that, by 1975, clearly established law extended the disclosure obligations created by *Brady* v. *Maryland*, 373 U.S. 83 (1963), from prosecutors to police officers.

PARTIES TO THE PROCEEDINGS BELOW

Ricky Jackson, Kwame Ajamu (formerly known as Ronnie Bridgeman), and Wiley Edward Bridgeman were the plaintiffs in the district court and the appellants in the court of appeals.

The City of Cleveland, the Estate of Eugene Terpay, the Estate of James T. Farmer, and the Estate of John Staimpel were defendants in the district court and the appellees in the court of appeals. Following the court of appeals' decision, J. Reid Yoder, the Administrator for the Estates of Eugene Terpay, James T. Farmer, and John Staimpel, was substituted for the estates as a defendant.

Karen Lamendola, acting as the court-appointed *guardian ad litem* for Frank Stoiker, was also a defendant in the district court and an appellee in the court of appeals. Following Stoiker's death on July 7, 2019, Lamendola was appointed as the Administrator for the Estate of Frank Stoiker.

Jerold Englehart was a defendant in the district court and, initially, an appellee in the court of appeals. The claims against Englehart were abandoned on appeal. Michael Cummings, James White, and the Estate of Peter Comodeca were defendants in the district court. The claims against them were dismissed, and they did not participate in the court of appeals proceedings below.

STATEMENT OF RELATED PROCEEDINGS

The proceedings directly related to this petition within the meaning of Rule 14.1(b)(iii) are:

- *Ricky Jackson* v. *City of Cleveland, et al.*, No. 1:15-cv-989 (CAB) (N.D. Ohio), judgment entered on August 4, 2017;
- *Kwame Ajamu, et al.* v. *City of Cleveland, et al.*, No. 1:15-cv-1320 (CAB) (N.D. Ohio), judgment entered on August 4, 2017; and
- *Ricky Jackson, et al.* v. *City of Cleveland, et al.*, Nos. 17-3840 and 17-3843 (6th Cir.), judgment entered on March 29, 2019, and, following the opinion's amendment, entered again on May 20, 2019.

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PETITION FOR A WRIT OF CERTIORARI

The City of Cleveland, Karen Lamendola (Administrator for Estate of Frank Stoiker), and J. Reid Yoder (Administrator for Estates of Eugene Terpay, James T. Farmer, and John Staimpel) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion, as amended (Pet. App. 1a-73a), is reported at 925 F.3d 793. The district orders

(Pet. App. 148a-268a) are unreported, except the order denying reconsideration (Pet. App. 169a-178a), reported at 219 F. Supp. 3d 639.

STATEMENT OF JURISDICTION

The court of appeals entered its original decision on March 28, 2019, Pet. App. 74a-147a, and amended it on May 20, 2019, Pet. App. 1a-73a. Rehearing and rehearing en banc were denied on June 27, 2019. Pet. App. 267a-268a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of 42 U.S.C. §§ 1983 and 1988 are set forth in the Appendix. Pet. App. 269a-270a.

STATEMENT

This action under 42 U.S.C. § 1983 concerns (now-overturned) convictions from 1975. All the individual defendants are deceased. Under Ohio law, incorporated by 42 U.S.C. § 1988, claims against those defendants would abate upon death. Construing § 1988 in conflict with at least four other circuits, the Sixth Circuit held that the claims survive nonetheless. The Sixth Circuit also created a circuit conflict on the scope of *Brady* v. *Maryland*, 373 U.S. 83 (1963), a case involving the disclosure obligations of *prosecutors*. The panel held that, by 1975, "clearly established law" had placed "beyond debate" that *Brady* imposes disclosure duties on *police officers*. Other courts of appeals have held the opposite.

I. Legal Framework

A. Section 1983 affords a cause of action to "[e]very person who, under color of" state law, is "depriv[ed] of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. Section 1983 thus provides a mechanism for vin-

dicating federal rights. See *Monroe* v. *Pape*, 365 U.S. 167, 172-183 (1961). But Congress had "no intention to do away with" the "common-law principles" that governed "ordinary tort litigation" against government officials. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). Rather, § 1983 created another "species of tort liability" to be administered "in harmony with general principles of tort." *Imbler* v. *Pachtman*, 424 U.S. 409, 417-418 (1976).

Section 1988(a) reflects that principle. Although § 1983 actions are resolved "in conformity with" federal law, 42 U.S.C. § 1988(a), "federal law simply does not cover every issue that may arise in the context of a federal civil rights action," *Robertson* v. *Wegmann*, 436 U.S. 584, 588 (1978) (internal quotation marks omitted). Section 1988 directs that, absent a governing federal rule, "the common law, as modified and changed by the constitution and statutes of the [forum] State" shall "govern." § 1988(a). State law is not incorporated only insofar as it is "inconsistent with the Constitution and laws of the United States." *Ibid.*

B. Federal law is silent on "'the survival of civil rights actions under § 1983 upon the death of either the plaintiff or defendant.'" *Robertson*, 436 U.S. at 589. Consequently, whether a § 1983 action survives death is governed by "principles of the common law, as altered by state law." *Moor* v. *Cty. of Alameda*, 411 U.S. 693, 703 (1973). Traditional common-law rules often abated personal-injury claims. *Robertson*, 436 U.S. at 589. But States have adopted a "wide[]" variety of statutes "to modify" the common law. *Ibid.* Federal courts therefore "refer to state statutes" to determine "both the types of claims that survive and the parties as to whom survivorship is allowed." *Id.* at 589, 593. Departure from those

statutes is authorized only if they are "'inconsistent'" with federal law. *Id.* at 593.

C. Like other tort actions against government officers, § 1983 actions are subject to absolute- and qualified-immunity defenses. *Imbler*, 424 U.S. at 419. Although derived from common law, those immunities are federal. See *Malley* v. *Briggs*, 475 U.S. 335, 340 (1986). Qualified immunity "shield[s]" officials from suit "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity thus protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

"Whether qualified immunity can be invoked turns on the 'objective legal reasonableness' of the official's acts" in "'light of the legal rules that were clearly established at the time.'" *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1866 (2017). Although a "'case directly on point'" is not required, "'existing precedent must have placed the statutory or constitutional question beyond debate.'" *White* v. *Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam). "Clearly established law must be 'particularized' to the facts of the case." *Id.* at 552. "[I]f a reasonable officer might not have known for certain that the conduct was unlawful," the "officer is immune from liability." *Ziglar*, 137 S. Ct. at 1867.

D. Finally, while § 1983 claims extend to "municipalities and other local governments," Congress "did not intend" them to "be held liable * * * on a *respondeat superior* theory." *Monell* v. *Dep't of Social Servs. of City of New York*, 436 U.S. 658, 690-691 (1978). Congress limited liability to actions "'for which the municipality is actually responsible.'" *Connick* v. *Thompson*, 563 U.S.

51, 60-61 (2011). Section 1983 plaintiffs thus "must prove that 'action pursuant to *official municipal policy*' * * * caused their injury." *Id.* at 60 (emphasis added). While official "policies" can include a failure "to train * * * employees about their legal duty," that is the "most tenuous" basis for municipal liability. *Id.* at 61. A municipality can be held liable for a failure to train only if it was "deliberately indifferent" to citizens' rights. *Ibid.*

"'[D]eliberate indifference' is a stringent standard of fault." *Bd. of Cty. Comm'rs of Bryan Cty.* v. *Brown*, 520 U.S. 397, 410 (1997). "'[O]rdinarily,'" a "pattern of similar constitutional violations by untrained employees" is "'necessary' to demonstrate deliberate indifference." *Connick*, 563 U.S. at 62. While such a "pattern * * * might not be necessary" in "'a narrow range of circumstances,'" the "unconstitutional consequences of failing to train" employees would have to be "patently obvious." *Id.* at 63-64.

II. Proceedings Below

A. The § 1983 Claims

In 1975, respondents Ricky Jackson, Kwame Ajamu, and Wiley Bridgeman were convicted of murder. Pet. App. 3a, 8a. A 12-year-old boy, Edward Vernon, was a principal witness against them. Pet. App. 6a, 8a. He testified that he had "seen [them] commit the crime." Pet. App. 8a. Decades later, Vernon recanted, resulting in respondents' exoneration in 2014. Pet. App. 9a. Under Ohio law, respondents each were entitled to more than $40,000 for each year they were wrongfully incarcerated, plus economic damages. See Ohio Rev. Code § 2743.48. Each has received between $1.98 million and $3.71 million in compensation. See Settlement Agreement ¶8, *Jackson* v. *Ohio*, No. 2015-00127-WI (Ohio Ct. Cl. Apr. 5,

2016); Settlement Agreement ¶¶8-9, *Ajamu* v. *Ohio*, No. 2015-00149-WI (Ohio Ct. Cl. Feb. 17, 2016).

In May 2015, respondents filed §1983 actions against former police officers, deceased officers' estates, and the City of Cleveland. Pet. App. 3a, 9a-10a. The principal officers accused of wrongdoing (Eugene Terpay, James Farmer, and John Staimpel) and their sergeant (Peter Comodeca) were already deceased. Pet. App. 149a-150a. Another officer, Frank Stoiker, had "Alzheimer's type Dementia," leaving him with no "memory of the people or events." D. Ct. Dkt. 21-1, ¶¶6, 12 (No. 1:15-cv-989). A guardian *ad litem* had to be appointed. Pet. App. 9a n.2. The claims against the other officers sued were later abandoned. See Pet. App. 9a n.3, 168a, 229a.

Respondents asserted numerous claims, including "malicious prosecution," "fabrication of evidence," and "*Brady* violations." Pet. App. 9a, 155a, 235a. Although Vernon had told an officer that "he knew who had committed" the murder, respondents allege that Vernon later could not "identify Jackson and Bridgeman in [a] line-up" and eventually told officers that "he had not witnessed the crime." Pet. App. 6a-8a. Respondents allege that officers pressured Vernon into averring that "he had failed to" identify respondents because he was "scared of * * * retaliat[ion]"; that an officer pressured Vernon to "testify that he had seen [respondents] commit the crime"; and that an officer "coached Vernon regarding his testimony." Pet. App. 7a-8a. Respondents further allege that officers violated *Brady* by failing to disclose those facts. Pet. App. 26a-29a. Respondents assert that City of Cleveland policy permitted *Brady* violations. Pet. App. 4a-5a, 54a-55a & n.20.

B. The District Court's Decisions

The district court dismissed or granted summary judgment against respondents on all claims.

1. In October 2015, the estates of four deceased officers moved to dismiss the claims against them because administration of their estates was long since "closed, or were never opened," leaving "no executors or administrators with the capacity to be sued." Pet. App. 148a, 152a, 213a-214a. The district court granted the motions, dismissing the claims without prejudice. *Ibid.*

After reopening the estates' administration in state court, respondents sought leave to amend their complaints to reassert claims against the deceased officers' estates. Pet. App. 154a, 215a. The district court denied the motions as "futile." Pet. App. 163a, 223a. Consistent with § 1988, the district court looked to Ohio law to determine whether respondents' § 1983 claims "survive[d] the death of the decedent officers." Pet. App. 157a-158a, 218a-219a. It determined they did not. Pet. App. 158a, 219a. Ohio law, the court explained, distinguishes between claims for physical harm, which survive death, and "personal rights" claims (like "malicious prosecution"), which do not. Pet. App. 157a-158a, 218a-219a. Because respondents asserted invasions of "personal rights" and not personal "injuries," their claims did not survive. *Ibid.* (citing *Tinney* v. *Richland Cty.*, No. 1:14-cv-703, 2014 WL 6896256, at *2 (N.D. Ohio Dec. 8, 2014), aff'd 678 F. App'x 362 (6th Cir. 2017)). The district court denied reconsideration. Pet. App. 169a-178a, 230a-231a.

2. The court granted officer Stoiker summary judgment, rejecting the *Brady*, fabrication-of-evidence, and malicious-prosecution claims against him. Pet. App. 184a-190a, 238a-243a. Respondents failed to show that Stoiker, who had a secondary role in the investigation, had

withheld exculpatory evidence. Pet. App. 182a, 186a-188a, 190a, 240a-242a. The district court also ruled that Stoiker was "entitled to qualified immunity against the *Brady* claim" regardless. Pet. App. 188a, 241a. The court explained that, in 1975—when the alleged violation occurred—a "reasonable official would not be aware that" a police officer's "failure to disclose [evidence of] a constitutional violation would itself be a second constitutional violation." *Ibid.* The district court identified no contrary "binding precedent." *Ibid.*

3. The district court granted the City of Cleveland summary judgment as well. Pet. App. 198a, 252a. On the *Brady* claim, the district court identified no City policy that "forbade police officers from disclosing exculpatory evidence." Pet. App. 204a-206a, 258a-260a. The "plain language" of then-existing policies "clearly require[d] police officers to turn over everything to prosecutors." Pet. App. 208a, 262a. The district court rejected respondents' failure-to-train allegations, citing evidence that officers received "on-the-job training." Pet. App. 208a-211a, 262a-265a. The court found no "widespread custom" of constitutional violations. Pet. App. 211a-212a, 265a-266a.

C. Sixth Circuit Proceedings

The Sixth Circuit reversed in relevant part. Pet. App. 1a-73a.[1]

1. The court of appeals held that the § 1983 claims against the individual officers survived their death. See

[1] While petitioners' rehearing petition was pending, one panel member passed away. Pet. App. 2a n.*. The court of appeals withdrew its original opinion and issued an amended one. Citations are to the amended opinion.

Pet. App. 18a-22a. "Because '[n]o federal statute or rule says anything about the survivorship of § 1983 claims,'" § 1988 required the court to apply "relevant Ohio law" to determine survival. Pet. App. 19a. That law provides that "'causes of action for * * * injuries to the person or property * * * shall survive,'" but directs that actions for the invasion of personal rights, including "'libel, slander, [and] malicious prosecution," shall "abate.'" Pet. App. 19a-20a (quoting Ohio Rev. Code §§ 2305.21, 2311.21).

Unlike the district court, the Sixth Circuit declined to determine whether respondents' suit—which alleged wrongful conviction and incarceration—was most analogous to claims for malicious prosecution or other invasions of personal rights. Instead, the Sixth Circuit announced a categorical rule: It held that "all § 1983 claims" are "to be treated" as "'*a personal injury action, sounding in tort, and nothing further*.'" Pet. App. 21a-22a (quoting *Crabbs* v. *Scott*, 880 F.3d 292, 296 (6th Cir. 2018)). Under Ohio's general rule for personal injuries, the claims survived. Pet. App. 23a-24a. Whether Ohio law would abate respondents' specific torts was immaterial. "[A]ll § 1983 claims" must be treated "the same way for survival-of-claims purposes." Pet. App. 21a. The panel relied on *Wilson* v. *Garcia*, 471 U.S. 261 (1985), which held that "'all § 1983 claims'" are to be "'characterized in the same way'"—as "'personal injury actions'"—for "statute-of-limitations purposes." Pet. App. 21a.

2. The court of appeals overturned the district court's ruling that qualified immunity barred respondents' *Brady* claims. Pet. App. 42a-48a. "In 1975," the court explained, it was clearly established that "*prosecutorial* withholding of exculpatory evidence violates * * * due process." Pet. App. 44a (emphasis added) (citing *Brady* v. *Maryland*, 373 U.S. 83, 86-87 (1963)). The court

cited no binding pre-1975 precedent imposing *Brady* obligations on "law-enforcement officers—as distinct from prosecutors." *Ibid.* Instead, relying extensively on a 1964 Fourth Circuit decision, the court held that out-of-circuit precedent made "clear that the duty to disclose evidence falls on the state as a whole and not on one officer of the state particularly," and therefore that *police officers* had clearly established *Brady* "obligation[s] to disclose exculpatory evidence" in 1975. Pet. App. 46a.

The Sixth Circuit did not mention that a plurality of the Fourth Circuit sitting en banc eventually rejected that police officers have *Brady* obligations. See *Jean* v. *Collins*, 221 F.3d 656, 660 (4th Cir. 2000) (en banc) (Wilkinson, C.J., concurring) ("to speak of the duty binding police officers as a *Brady* duty is simply incorrect"). Nor did the Sixth Circuit mention that other courts have declined to extend *Brady* to police officers. See *Porter* v. *White*, 483 F.3d 1294, 1306 (11th Cir. 2007); *Villasana* v. *Wiloit*, 368 F.3d 976, 979 (8th Cir. 2004).

3. Having held that police officers had clear *Brady* obligations by 1975, the Sixth Circuit ruled that the City of Cleveland could be held liable for failing to train officers about those obligations. Pet. App. 67a-73a. Respondents could not identify any pattern of *Brady* violations to establish "deliberate indifference." Pet. App. 71a. Instead, they argued, it was "'plainly obvious'" that a failure to train would result in *Brady* violations. Pet. App. 70a-72a. Although the Sixth Circuit reinstated respondents' claims, it did not dispute that, if the law was *not* clearly established in 1975, binding precedent would have foreclosed a deliberate-indifference finding. See *Arrington-Bey* v. *City of Bedford Heights*, 858 F.3d 988, 994 (6th Cir. 2017). If a right has "'yet [to be] clearly established,'" a "'municipal policymaker cannot exhibit

fault rising to the level of deliberate indifference.'" *Ibid.* (emphasis omitted).

4. On June 27, 2019, the Sixth Circuit denied rehearing and rehearing en banc. Pet. App. 267a-268a. Shortly thereafter, the last remaining individual officer, Stoiker, passed away. D. Ct. Dkt. 148 (No. 1:15-cv-989).

REASONS FOR GRANTING THE PETITION

This case presents two questions that have divided the courts of appeals. First, the courts are in conflict over how to incorporate state law under 42 U.S.C. § 1988. Several courts apply the complete body of state survival rules to § 1983 claims, treating each one as the State would treat the most analogous state-law claim. Other courts, including the Sixth Circuit, borrow only a single state-law rule and apply it to all § 1983 claims, ignoring more specific rules States have enacted for analogous state-law claims. Second, the courts of appeals have splintered over whether clearly established law—or any law—extends duties under *Brady* v. *Maryland*, 373 U.S. 83 (1963), beyond prosecutors to police officers. Those questions warrant review.

I. THIS COURT SHOULD RESOLVE THE CONFLICT OVER WHICH STATE LAWS GOVERNING SURVIVAL AND ABATEMENT ARE INCORPORATED UNDER § 1988

In enacting § 1983, Congress recognized that "federal law simply does not 'cover every issue that may arise in * * * a federal civil rights action.'" *Robertson* v. *Wegmann*, 436 U.S. 584, 588 (1978). Accordingly, § 1988 directs courts to fill gaps with "the common law, as modified and changed by the constitution and statutes of the [forum] State." 42 U.S.C. § 1988(a). Section 1988 makes state "statutory law * * * the principal reference point in determining survival of civil rights actions."

Robertson, 436 U.S. at 589-590. Absent conflict between state and federal law, a "§ 1983 plaintiff (or his representative)" may not "continue an action in disregard of the state law to which § 1988 refers." *Id.* at 593.

In *Robertson*, this Court applied those principles to decide whether a § 1983 claim abated upon the plaintiff's death. Federal law, the Court first ruled, was silent on survival of § 1983 claims; state law thus controlled. See 436 U.S. at 588-589. Next, following § 1988's "quite clear[ ] instruct[ions]," the Court applied Louisiana law "governing the survival of state actions." *Id.* at 589-590, 594-595. Even though "most" state-law claims survived under Louisiana law, the Court observed, the "particular lawsuit" before it did not. *Ibid.* The Court then asked whether state law was "inconsistent" with federal law. *Id.* at 590-594. The Court saw nothing "unreasonable" in the State's "decision to restrict certain survivorship rights." *Id.* at 592-595.

Section 1988 thus "clearly instructs" courts "to refer to state statutes" to determine survival. *Robertson*, 436 U.S. at 593. But the courts of appeals have divided on *how* to do that. Most circuits examine the *entirety* of state law to determine whether the claim would survive if asserted as the most analogous state-law cause of action. If state law provides that most actions survive, but requires the particular claim asserted (*e.g.*, malicious prosecution) to abate, those courts will hold the § 1983 action abates. See, *e.g.*, *Parkerson* v. *Carrouth*, 782 F.2d 1449, 1451-1453 (8th Cir. 1986).

Other court of appeals, like the court below, take a different approach. Rather than "refer to" the body of state law "governing the survival of state actions," *Robertson*, 436 U.S. at 589-590, 593, those courts consult one portion. On the theory that "all § 1983 claims" must be "treated

the same way for survival-of-claims purposes," they apply the general state survival rule for "personal injury actions" to "all § 1983 claims." Pet. App. 20a-21a. Even if state law provides a different rule for the type of claim asserted, those courts will ignore that direction. That categorical approach does not merely create a circuit conflict. It conflicts with § 1988's "clear[ ]" command to incorporate—not modify or truncate—state law "governing the survival of state actions." *Robertson*, 436 U.S. at 589, 593. Review is warranted.

A. The Circuits Are Divided Over Which State Survival Rules Apply to § 1983 Claims

Following *Robertson*, a majority of appellate courts "examine the facts of each separate § 1983 claim" and apply the state-law survival rule for "the most analogous state-law cause of action." *Caine* v. *Hardy*, 943 F.2d 1406, 1410 (5th Cir. 1991) (en banc). Other courts, including the Sixth Circuit, apply a "single" survival rule to "all § 1983 actions." *Id.* at 1411. "[C]haracteriz[ing] all § 1983 actions" as generic "'personal injur[y]'" torts, they apply the general survival rule for personal injuries to *all* § 1983 claims, regardless of what state survival law otherwise provides. *Ibid.*

1. Four courts of appeals—the Fourth, Eighth, Tenth, and Eleventh Circuits—consistently follow the first approach. They apply state survival rules for the state-law torts "most analogous" to the asserted § 1983 claims. See, *e.g.*, *Brown* v. *Town of Cary*, 706 F.3d 294, 300 (4th Cir. 2013); *Dean* v. *Shirer*, 547 F.2d 227, 229 (4th Cir. 1976); *Parkerson* v. *Carrouth*, 782 F.2d 1449 (8th Cir. 1986); *Andrews* v. *Neer*, 253 F.3d 1052, 1056-1058 (8th Cir. 2001); *Pietrowski* v. *Town of Dibble*, 134 F.3d 1006, 1008 (10th Cir. 1998); *Estate of Gilliam* v. *City of*

Prattville, 639 F.3d 1041, 1046-1047 & nn.8-9 (11th Cir. 2011).

In *Parkerson*, for example, the plaintiff had brought §1983 claims alleging malicious prosecution and defamation. 782 F.2d at 1450. Although Arkansas law "broadly" permitted the survival of actions for "'wrongs done to the person or property of another,'" it made "exceptions" for malicious prosecution, libel, and slander. *Id.* at 1451-1452. Just as *Robertson* held that the state law there "abat[ed] [the] malicious prosecution claim" before the Court, *Pietrowski*, 134 F.3d at 1008, the Eighth Circuit concluded that Arkansas law, incorporated by §1988, abated the §1983 claims (which were akin to malicious-prosecution, libel, and slander claims) before it, *Parkerson*, 782 F.2d at 1451-1455.

Similarly, in *Estate of Gilliam*, the Eleventh Circuit determined whether a §1983 claim could be brought, following the plaintiff's death, using the survival rule for the most analogous state-law action. 639 F.3d at 1046-1049. Under Alabama law, the court explained, there are two different survival rules for unfiled tort claims (those not filed before the plaintiff's death): Claims arising from wrongful death survive, and can be pursued by the deceased plaintiff's representative, but other personal-injury claims do not. *Id.* at 1046-1048. The claim at issue, the Eleventh Circuit ruled, did not resemble a wrongful-death action that would survive under Alabama law, as the "unconstitutional conduct" had not "caused death." *Id.* at 1046-1048 & nn.8-9 (emphasis omitted). Consequently, the §1983 claim did not survive. *Id.* at 1046-1048 & n.11.

2. By contrast, the Sixth Circuit—in accord with decisions of at least one other court of appeals—has adopted the opposite approach. In *Crabbs* v. *Scott*, 880 F.3d

292, 294 (6th Cir. 2018), the Sixth Circuit observed that § 1983 actions "span an array of topics, including discrimination in public employment, illegal arrests and searches." But *Crabbs* held that "all § 1983 claims" nonetheless "must be characterized in the same way" for survival purposes. *Id.* at 294. Other courts would "examine the facts of each separate § 1983 claim" to identify the survival rule for "the most analogous state-law cause of action." *Caine*, 943 F.2d at 1410. But the Sixth Circuit ruled that "[a]nalyzing the particular facts of each § 1983 action" would create undue "'uncertainty and time-consuming litigation.'" *Crabbs*, 880 F.3d at 295. It held that *all* § 1983 actions "are best characterized as personal injury actions"—"as a personal injury action, sounding in tort, and nothing further"—regardless of their actual nature. *Id.* at 295-296; see *id.* at 296 ("Requiring courts to go pleading by pleading * * * would largely undo the benefit of characterizing all § 1983 claims as personal injury actions in the first place."). The Sixth Circuit relied on *Wilson* v. *Garcia*, 471 U.S. 261 (1985), and *Owens* v. *Okure*, 488 U.S. 235 (1989), which held that § 1983 claims should be characterized as "personal injury actions" for statute-of-limitations purposes. *Crabbs*, 880 F.3d at 295.

In so holding, the Sixth Circuit followed the Seventh Circuit's decision in *Bennett* v. *Tucker*, 827 F.2d 63, 67-68 (7th Cir. 1987). There, the Seventh Circuit read *Wilson* as "stress[ing] the importance of adopting uniform rules governing the timeliness of all § 1983 claims." *Bennett*, 827 F.2d at 68. The Seventh Circuit held that whether § 1983 claims survive death must likewise be determined using the general rule for "personal injury claims." *Ibid.*;

see *Anderson* v. *Romero*, 42 F.3d 1121, 1124 (7th Cir. 1994).[2]

The decision below follows the same categorical approach, holding that courts must look to the survival rule for "'*a personal injury action, sounding in tort, and nothing further*.'" Pet. App. 21a-22a (quoting *Crabbs*, 880 F.3d at 296). The panel did not dispute that, while Ohio law provides that personal-injury claims often survive death, it specifically "'except[s] actions for libel, slander, [and] malicious prosecution,'" declaring they "'shall abate.'" Pet. App. 20a (quoting Ohio Rev. Code § 2311.21). Nor did the panel deny that the Ohio Supreme Court had ruled that "malicious prosecution [claims] do not survive the death of a party." *Id.* at 19a-20a (citing *State ex rel. Crow* v. *Weygandt*, 162 N.E.2d 845, 848 (Ohio 1959)). The panel thus nowhere disputed that state-law claims most "similar" to the "§ 1983 claims * * * brought by" respondents would abate. Pet. App. 19a, 22a. Instead, the court declined to consider "the specific type of injury underlying the § 1983 claim," declaring that "all claims brought under § 1983 are to be treated as * * * personal injury tort[s]," without regard to the § 1983 claims' actual nature. Pet. App. 20a, 22a. Under Ohio's generic personal-injury rule, the Sixth Circuit held, respondents' actions survived. Pet. App. 22a.

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[2] The Seventh Circuit appears internally divided. Other decisions read § 1988 as requiring courts "to 'look to the most closely analogous state law to determine survivability.'" *Bentz* v. *City of Kendallville*, 577 F.3d 776, 778 (7th Cir. 2009); see *Beard* v. *Robinson*, 563 F.2d 331, 334 (7th Cir. 1977).

B. The Division Over § 1988's Application Is Recurring and Important

1. The issue is recurring and important. Time and again, courts of appeals confront questions about "the types of claims that survive." *Robertson*, 436 U.S. at 589; see, *e.g.*, *Crabbs*, 880 F.3d at 296; *Tinney* v. *Richland Cty.*, 678 F. App'x 362, 368 (6th Cir. 2017); *Brown*, 706 F.3d at 299-300; *Giles* v. *Campbell*, 698 F.3d 153, 155-157 (3d Cir. 2012); *Estate of Gilliam*, 639 F.3d at 1046-1047; *Bentz* v. *City of Kendallville*, 577 F.3d 776, 778-783 (7th Cir. 2009); *Malone* v. *Nielson*, 474 F.3d 934, 937 & n.3 (7th Cir. 2007); *Oliveros* v. *Mitchell*, 449 F.3d 1091, 1093-1094 (10th Cir. 2006); *Andrews*, 253 F.3d at 1056-1058; *Moreland* v. *Las Vegas Metro. Police Dep't*, 159 F.3d 365, 369 (9th Cir. 1998); *Pietrowski*, 134 F.3d at 1008; *Hopkins* v. *Okla. Pub. Employees Ret. Sys.*, 150 F.3d 1155, 1159 (10th Cir. 1998); *Anderson*, 42 F.3d at 1124; *Caine*, 943 F.2d at 1410; *Parkerson*, 782 F.2d at 1449; *Smith* v. *City of Fontana*, 818 F.2d 1411, 1416 (9th Cir. 1987); *Jaco* v. *Bloechle*, 739 F.2d 239, 242 (6th Cir. 1984); *McFadden* v. *Sanchez*, 710 F.2d 907, 911 (2d Cir. 1983); *White* v. *Walsh*, 649 F.2d 560, 562 n.4 (8th Cir. 1981); *Beard* v. *Robinson*, 563 F.2d 331, 334 (7th Cir. 1977); *Dean*, 547 F.2d at 229.

District courts, too, confront the issue frequently, with outcomes often turning on which survival rule governs. See, *e.g.*, *Herrera* v. *Sena*, No. 18-cv-763, 2019 WL 1922458, at *2-6 (D.N.M. Apr. 30, 2019); *Estate of Sanders* v. *Jones*, 362 F. Supp. 3d 463, 466 (W.D. Tenn. 2019); *Gothberg* v. *Town of Plainville*, 148 F. Supp. 3d 168, 195-197 (D. Conn. 2015); *Ray* v. *Cutlip*, No. 2:13-cv-75, 2014 WL 858736, at *1 (N.D.W. Va. Mar. 5, 2014); *Slavens* v. *Millard Cty.*, No. 2:11-cv-568, 2013 WL 5308105, at *2 (D. Utah Sept. 20, 2013); *James* v. *Geerken*, No. 5:10-cv-259,

2012 WL 602775, at *1 n.2 (N.D. Fla. Jan. 20, 2012), report and recommendation adopted, 2012 WL 602723 (N.D. Fla. Feb. 24, 2012); *Talley* v. *Paul*, No. 6:08-cv-068, 2008 WL 4613516, at *1 (S.D. Ga. Oct. 15, 2008); *Pomeroy* v. *Ashburnham Westminster Reg'l Sch. Dist.*, 410 F. Supp. 2d 7, 14 (D. Mass. 2006); *Bell ex rel. Bell* v. *Bd. of Educ. of Cty. of Fayette*, 290 F. Supp. 2d 701, 707 (S.D.W. Va. 2003); *Rivera* v. *Medina*, 963 F. Supp. 78, 84 (D.P.R. 1997); *Crotty* v. *City of Chicago Heights*, No. 86-cv-3412, 1990 WL 6816, at *1 (N.D. Ill. Jan. 10, 1990); *Strandell* v. *Jackson Cty.*, 648 F. Supp. 126, 133 (S.D. Ill. 1986); *Larson* v. *Wind*, 542 F. Supp. 25, 26 (N.D. Ill. 1982); *Burt* v. *Abel*, 466 F. Supp. 1234, 1237 (D.S.C. 1979).

Because state laws "vary widely" concerning "the types of claims that survive," *Robertson*, 436 U.S. at 589, the issue will continue to recur. The "vast majority of States" require at least one type of claim to abate upon death. *Id.* at 591 n.6. For example, at least 12 States (including Ohio) permit personal-injury actions to survive, but require malicious-prosecution actions (among others) to abate.[3] Other States exempt claims alleging, for example, "invasion of the right of privacy," Ariz. Rev. Stat. Ann. §14-3110, or false imprisonment, N.C. Gen. Stat. §28A-18-1.

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[3] See Del. Code Ann. Title 10 §3701; Haw. Rev. Stat. §§663-4 to 663-7; Ind. Code §34-9-3-1; Kan. Stat. Ann. §§60-1801, 60-1802; Ky. Rev. Stat. Ann. §411.140; Neb. Rev. Stat. §§25-1401, 25-1402; N.M. Stat. Ann. §37-2-4; Ohio Rev. Code Ann. §2311.21; Okla. Stat. Ann. Title 12 §§1051, 1052; Wyo. Stat. Ann. §§1-4-101, 1-4-102; *Bowman* v. *Hart*, 33 S.W.2d 58, 59 (Tenn. 1930) (interpreting what is now Tenn. Code Ann. §20-5-102); *Ferguson* v. *Charleston Lincoln Mercury, Inc.*, 564 S.E.2d 94, 97 (S.C. 2002) (interpreting S.C. Code Ann. §15-5-90).

As new technologies (like DNA testing) and increased scrutiny allow older and older cases to be reconsidered, survival issues will recur with greater frequency. See *Exonerations by Year: DNA and Non-DNA*, The National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx (last visited Sept. 24, 2019). Exonerations have generated a "wave of civil suits" under §1983. Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 Wis. L. Rev. 35, 37, 43, 51, 77-78. The older the events, the more likely survival questions, prompted by a party's death, become.

The monetary impact is considerable. Officers' estates (and States and municipalities) can face ruinous liability. A Nebraska county recently suffered a $28 million judgment after six persons were exonerated with DNA evidence, leading to the county's bankruptcy. See Mary Ann Barton, County News, *Nebraska county faces bankruptcy after $28.1 million judgment* (Mar. 20, 2017), https://www.naco.org/articles/nebraska-county-faces-bankruptcy-after-281-million-judgement.

2. The issue, moreover, extends beyond which *claims* survive death. States have varying rules about *who* can maintain a §1983 claim after a plaintiff's death. See, *e.g.*, *Robertson*, 436 U.S. at 589; *Wheeler* v. *City of Santa Clara*, 894 F.3d 1046, 1052 (9th Cir. 2018); *Estate of Guled* v. *City of Minneapolis*, 869 F.3d 680, 683-684 (8th Cir. 2017); *Rodgers* v. *Lancaster Police & Fire Dep't*, 819 F.3d 205, 212-213 (5th Cir. 2016); *Hayes* v. *Cty. of San Diego*, 736 F.3d 1223, 1228-1229 (9th Cir. 2013); *Carringer* v. *Rodgers*, 331 F.3d 844, 850 (11th Cir. 2003); *Barrett* v. *United States*, 689 F.2d 324, 331 (2d Cir.

1982).[4] As with questions regarding *which* claims survive, state law determines "the parties as to whom survivorship is allowed." *Robertson*, 436 U.S. at 589.

Many survival laws provide different rules for different claims. In *Robertson*, for example, state law permitted a personal representative to maintain property claims, but permitted survival of personal claims "only in favor of a spouse, children, parents, or siblings." 436 U.S. at 591; see *Shaw* v. *Garrison*, 391 F. Supp. 1353, 1361 (E.D. La. 1975). California law provides that no claim is "lost by reason of a plaintiff's death," *Wheeler*, 894 F.3d at 1052, but *who* can maintain claims depends on whether it is a "wrongful death" action "based on personal injuries resulting from the death of another," *Hayes*, 736 F.3d at 1228-1229. And, in Minnesota, appointed trustees must bring wrongful-death claims; personal representatives must bring other claims; and still other claims, including personal-injury actions, abate entirely. See Minn. Stat. Ann. §§573.01, 573.02; *Estate of Guled*, 869 F.3d at 683-684. Whether all §1983 claims are treated as personal-injury actions, without regard to States' other rules, thus can have profound effects.[5]

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[4] See also, *e.g.*, *Sharbaugh* v. *Beaudry*, 267 F. Supp. 3d 1326, 1334 (N.D. Fla. 2017); *Mingo* v. *City of Mobile*, No. 12-cv-00056, 2013 WL 11089795, at *4 (S.D. Ala. Sept. 4, 2013); *Gotbaum* v. *City of Phoenix*, 617 F. Supp. 2d 878, 883 (D. Ariz. 2008); *Green ex rel. Estate of Green* v. *City of Welch*, 467 F. Supp. 2d 656, 660 (S.D.W. Va. 2006); *Bell ex rel. Bell* v. *Bd. of Educ. of Cty. of Fayette*, 290 F. Supp. 2d 701, 707 (S.D.W. Va. 2003); *Weeks* v. *Benton*, 649 F. Supp. 1297, 1303 (S.D. Ala. 1986); *O'Connor* v. *Several Unknown Corr. Officers*, 523 F. Supp. 1345, 1348 (E.D. Va. 1981).

[5] The issue's significance may extend beyond survival. Federal civil-rights laws do not provide "the elements of damages and the prerequisites for their recovery"—making state law the proper

3. A division of authority lies at the heart of § 1988's goal—preserving judgments that States have refined over generations. "[M]embers of the 42d Congress were familiar with common-law principles * * * previously recognized in ordinary tort litigation." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981). They chose "to fill the interstices of federal law" with them. *Moor* v. *Alameda Cty.*, 411 U.S. 693, 701 (1973). That makes sense: Before § 1983 was enacted, most claims against officers were brought under state tort law. Congress chose to respect the "authority" of States "to create" rules "providing for the survival of a cause of action" for "conduct within their borders, when the state action does not run counter to federal laws." *Just* v. *Chambers*, 312 U.S. 383, 391 (1941). The Sixth Circuit's approach jettisons judgments Congress sought to preserve in favor of a one-size-fits-all approach Congress never adopted. Review is warranted.

C. The Sixth Circuit's Decision Is Incorrect

The approach adopted below is incorrect. It defies § 1988. It departs from this Court's method in *Robertson* v. *Wegmann*, 436 U.S. 584 (1978). It contravenes general legal principles. And it produces nonsensical results.

1. Section 1988's text is "quite clear[]." *Robertson*, 436 U.S. at 593. Where federal law is silent, "the common law, as modified and changed by the constitution and statutes of the [forum] State * * * *shall be extended to*

"starting point" under § 1988. *Carey* v. *Piphus*, 435 U.S. 247, 257-258 & n.13 (1978). Where States provide different remedies for different claims, *e.g.*, Cal. Civ. Proc. §§ 377.34, 377.61; *Fla. Dep't of Corr.* v. *Abril*, 969 So. 2d 201, 206 (Fla. 2007), whether a § 1983 claim is treated as its state tort cousin—or as a generic personal-injury action—may affect the applicable rule.

and govern" the "disposition" of § 1983 claims. § 1988(a) (emphasis added). That language directs federal courts to apply the State's "statutes" (plural) "modif[ying] and chang[ing]" the common law. Section 1988 does not permit courts to pick and choose, singling out one state-law survival provision and ignoring others. Section 1988 authorizes a departure from state law if it is "inconsistent" with federal law. *Ibid.* That "express exception * * * implies that there are no *other* circumstances" under which a court may refuse to apply state law. *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 844 (2018).

Nothing in § 1988 suggests courts should ignore state-law distinctions to achieve uniform results. The opposite is true. Section 1988 directs courts to apply the "common law" in the first instance. § 1988(a). Common-law survival rules were not uniform. The common law often "'extinguished'" claims for personal wrongs, *Robertson*, 436 U.S. at 589, while allowing some property and contract claims to survive, see *Patton* v. *Brady*, 184 U.S. 608, 614 (1902); *Gerling* v. *Baltimore & O.R. Co.*, 151 U.S. 673, 698, 707 (1894). Congress would not have directed the common law to govern if it had desired all § 1983 cases to be treated the same. Nor would Congress have directed that state statutes—which have long provided different rules for different claims, see, *e.g.*, *Smith* v. *Estes*, 46 Me. 158, 159-160 (1858); *Read* v. *Hatch*, 36 Mass. 47, 47-48 (1837)—"shall * * * govern," § 1988(a).

2. The approach adopted below defies this Court's decision in *Robertson*. In *Robertson*, the plaintiff (Clay Shaw) had passed away after bringing a § 1983 claim for malicious prosecution. 436 U.S. at 586. Although "most" § 1983 actions survived under Louisiana law, his "particular lawsuit" did not. *Id.* 594-595. Louisiana law permitted only certain family members to continue malicious-

prosecution suits. *Id.* at 591-593. Because none of those family members brought the claim, the Court held that it abated. *Id.* at 593. The action could not be maintained "in disregard of the state law to which § 1988 refers." *Ibid.* It is impossible to reconcile that decision with a rule, like the Sixth Circuit's, that requires "all § 1983 claims" to be treated as generic personal-injury claims without more. Pet. App. 21a-22a.

Robertson rejects the view that abatement of a "particular lawsuit" justifies imposition of a uniform federal "absolute survivorship" rule. 436 U.S. at 590-595. The Court understood that, "in many States"—even the "vast majority"—some claims (*e.g.*, "malicious prosecution") "would abate automatically." *Id.* at 591 & n.6. It acknowledged that, in Louisiana, survival rules for "damage to property" were more generous than for injury to persons. *Id.* at 591. The Court and the dissent were thus aware that incorporating state law would cause the survival of § 1983 claims to depend on the "intricacies of state survival law" for the "nearest tort cousin." *Id.* at 602 (Blackmun, J., dissenting). The Court rejected a uniform rule nonetheless. The Sixth Circuit's categorical approach attempts to avoid the issues of state survival law that *Robertson* embraced.

3. The Sixth Circuit's categorical approach also departs from general principles. Elsewhere, federal courts regularly use state law "to fill the interstices of federal law." *Moor*, 411 U.S. at 701 & n.11. Under the Federal Tort Claims Act, for example, this Court applies "the *whole law* of the State where the act or omission occurred." *Richards* v. *United States*, 369 U.S. 1, 11 (1962) (emphasis added). Borrowing only part of state law would contravene Congress's decision "to build upon" it. *Id.* at 7. If "Congress had meant to alter or supplant the

legal relationships developed by the States, it could specifically have done so." *Ibid.* Nothing in § 1988 suggests a different principle here.

4. The decision below produces incongruous results, requiring federal courts to apply "personal injury" state survival rules to § 1983 claims that bear no resemblance to personal-injury actions. As the Sixth Circuit recognized, § 1983 encompasses a range of claims, from improper firings to excessive force to unreasonable seizures. See *Crabbs*, 880 F.3d at 294. For example, federal takings claims can now be asserted more easily under § 1983. See *Knick* v. *Township of Scott*, 139 S. Ct. 2162, 2167 (2019). Takings claims are quintessential *property* torts, historically redressed through trespass actions. *Id.* at 2176. The survival of property torts was often governed by distinct rules. See *Patton*, 184 U.S. at 614; *Read*, 36 Mass. at 47. But the Sixth Circuit's categorical approach requires the rule for *personal* injuries to govern even those quintessential *property* torts. Pet. App. 21a-22a. That makes no sense.

Under the Sixth Circuit's approach, moreover, whatever rule the State adopts as its "general" survival rule for personal injuries controls. *Owens*, 488 U.S. at 236; see *Crabbs*, 880 F.3d at 295-296. Consequently, if a State provides a general rule of abatement subject to exceptions for wrongful death, see, *e.g.*, Ala. Code §§ 6-5-410, 6-5-462; Minn. Stat. Ann. §§ 573.01, 573.02; N.M. Stat. Ann. §§ 37-2-1, 41-2-1, the Sixth Circuit's approach would abate all claims regardless. Those who suffered the

greatest deprivations would be subjected to harsh results the State specifically sought to avoid.[6]

5. Although the Sixth and Seventh Circuits invoked *Wilson* v. *Garcia*, 471 U.S. 261 (1985), *Wilson* does not address survival. Nor does *Wilson* purport to overrule this Court's decision in *Robertson*. Instead, *Wilson* adopted a "simple, broad characterization of all § 1983 claims" for *statute-of-limitations* purposes based on rationales specific to that context. 471 U.S. at 272. The Court invoked "practical considerations"; the need for "uniformity" and "certainty," the Court noted, are at their apogee in the statute-of-limitations context, as parties need to know when to bring their claims and how to assess risk exposure. *Id.* at 271-272, 275 & n.34.

Wilson's rationale does not apply "'equally'" in the survival context. *Crabbs*, 880 F.3d at 295. It does not apply at all. In the statute-of-limitations context, parties must be able to "readily ascertain" the time limits for filing suit in every case to avoid costly mistakes. *Owens*, 488 U.S. at 248. But parties do not ordinarily plan lawsuits around their own or their opponents' deaths. And while *Wilson* selected the "personal injury" limitations period because it was unlikely to conflict with federal law, it is far from clear that applying state personal-injury rules for survival will avoid "inconsisten[cy]" with federal

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[6] Some courts have ruled that abating claims where the challenged conduct caused the plaintiff's death potentially can be "inconsistent" with federal law within the meaning of § 1988. See *Chaudhry* v. *City of Los Angeles*, 751 F.3d 1096, 1104 (9th Cir. 2014). But that underscores the impropriety of the Sixth Circuit's approach: Federal courts ought not to adopt a rule that, by ignoring the carefully crafted body of state survivorship rules, produces conflicts with federal policies.

law "in any respect." 471 U.S. at 279. Quite the opposite: Applying the state rule for personal injuries to all § 1983 claims actually increases the likelihood of conflict. See pp. 24-25 & n.6, *supra*. The Sixth Circuit nowhere considered those differences between the survival and limitations contexts.

II. The Court Should Resolve Whether Clearly Established Law—Or Any Law—Extends *Brady* To Police Officers

This case presents a second issue warranting review—whether clearly established law (either in 1975 or now) imposes *Brady* obligations on police officers. As this Court has held since *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), police officers are entitled to qualified immunity unless their alleged misconduct violates "clearly established law." Immunity should be granted unless "it would have been clear to a reasonable officer that the alleged conduct 'was unlawful in the situation he confronted.'" *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1867 (2017).

The courts of appeals have divided over whether the obligations that *Brady* v. *Maryland*, 373 U.S. 83 (1963), places on prosecutors extend to individual police officers. In *Brady* itself, this Court held that the withholding of exculpatory evidence "by the prosecution" was unlawful, "irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. *Brady* does not mention police officers. Several courts of appeals have declined to extend *Brady*'s no-fault obligations beyond prosecutors. Others have ruled that, at the very least, any requirements are not clearly established (or were not until relatively recently). The Sixth Circuit set itself in conflict with both sets of decisions, holding that police officers' responsibilities under *Brady* were "'beyond debate'" as early as 1975. Pet. App. 43a-46a. It then relied on that holding to

permit claims to proceed against the City of Cleveland for being deliberately indifferent by failing to train police officers about their putative *Brady* obligations. *Id.* at 46a, 73a. Review is warranted.

A. The Circuits Are Divided on Whether *Brady* Extends to Police Officers and Whether That Is Clearly Established

Courts of appeals are divided on whether the disclosure obligation *Brady* placed on prosecutors extends to police officers. Three courts of appeals have declined to extend *Brady*'s no-fault obligations to police officers at all. "[P]olice officers and prosecutors," those courts recognize, "have *different obligations* with respect to the disclosure of exculpatory evidence." *Owens* v. *Baltimore City State's Attorneys Office*, 767 F.3d 379, 396 n.6 (4th Cir. 2014) (citing *Jean* v. *Collins*, 221 F.3d 656, 660 (4th Cir. 2000) (en banc) (Wilkinson, J., concurring)) (emphasis added); see *Porter* v. *White*, 483 F.3d 1294, 1306 (11th Cir. 2007); *Villasana* v. *Wilhoit*, 368 F.3d 976, 979-980 (8th Cir. 2004). Although those courts recognize separate due-process obligations, they do not transpose *Brady*'s requirements from prosecutors to police officers as the Sixth Circuit did below. *Owens*, 767 F.3d at 396 n.6 (distinguishing *Moldowan* v. *City of Warren*, 578 F.3d 351 (6th Cir. 2009)).[7]

Two other courts of appeals have rejected arguments that any *Brady* obligations for police officers were "clearly established" decades ago. See *Haley* v. *City of Boston*, 657 F.3d 39, 48-49 (1st Cir. 2011); *Gibson* v. *Superintend-*

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[7] The decision below analyzed the *Brady* claims separately from other due-process claims. Pet. App. 29a-32a, 48a-51a. This petition is limited to the *Brady* claims.

ent of N.J. Dep't of Law & Pub. Safety – Div. of State Police, 411 F.3d 427, 443-444 (3d Cir. 2005). *Brady*, those courts have explained, presumes that "prosecutor[s]" have a "'special status'" and unique obligations. *Gibson*, 411 F.3d at 442-443. This Court, moreover, did not "settle" whether information known to "the police could be imputed to the prosecutor" until 1995, *id.* at 443, in *Kyles* v. *Whitley*, 514 U.S. 419 (1995). "A fortiori," those courts have held, it could not have been "clearly established" *before* 1995 "that police officers owed any affirmative no-fault obligation to criminal defendants." *Haley*, 657 F.3d at 49.

Other circuits, including the Sixth Circuit, have held that *Brady* extends beyond prosecutors to police officers. *Moldowan*, 578 F.3d at 377. Some have further held that police officers' *Brady* obligations were "clearly established" by the 1970s. See, *e.g.*, *id.* at 382; *Newsome* v. *McCabe*, 256 F.3d 747, 752-753 (7th Cir. 2001); *Carrillo* v. *Cty. of Los Angeles*, 798 F.3d 1210, 1221 (9th Cir. 2015). The Ninth Circuit, for example, has held that a prior in-circuit decision "clearly established in 1978 that police officers have a duty to disclose *Brady* material." *Carrillo*, 798 F.3d at 1221. Despite the absence of controlling Sixth Circuit precedent, the panel below held that *Brady* itself, along with out-of-circuit decisions, clearly established that *Brady* extends to police officers. Pet. App. 44a-46a. In so holding, the Sixth Circuit reached the furthest back in time of any circuit—holding that those obligations were clearly established in 1975. *Ibid.*

The courts of appeals are thus profoundly divided. Some hold that *Brady* does not extend to the police. Some hold that any such extension is not clearly established law. Still others hold that the law was clearly established more than 40 years ago. Review is warranted.

B. The Sixth Circuit's Decision Has Profound Consequences for States, Local Governments, and Officials

The doctrine of qualified immunity serves a critical function: It prevents the threat of liability from impeding the proper operation of government and imposing undue timidity on officers. See *Scheuer* v. *Rhodes*, 416 U.S. 232, 241-242 (1974). A government official thus is entitled to qualified immunity unless it would be clear to "every 'reasonable official,'" *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 741 (2011), that what he was doing "'was unlawful in the situation he confronted,'" *Ziglar*, 137 S. Ct. at 1867. That doctrine thus protects "all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). If officers of reasonable competence can "disagree" about the conduct's lawfulness, immunity is warranted. *Ibid.* And where "judges * * * disagree," certainly reasonable officers can as well. *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999). Because of the qualified immunity's importance, this Court has rigorously enforced its requirements, and "often corrects lower courts when they wrongly subject individual officers to liability." *City & Cty. of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015).

1. The decision below identified no decision of this Court extending *Brady* to police officers. As the decision below recognized, Pet. App. 44a, *Brady* itself addressed "suppression" of exculpatory evidence "by the *prosecution*"—not police officers, *Brady*, 373 U.S. at 86-87 (emphasis added). Nor did the Sixth Circuit identify "'controlling circuit precedent'" from before 1975 that extended *Brady* to police officers. *Sheehan*, 135 S. Ct. at 1776 (assuming, without deciding, that such precedent could suffice). Instead, the Sixth Circuit deemed it "'ob-

vious[ ]'" from *Brady*'s holding and other decisions that "the duty to disclose evidence falls on the state as a whole." Pet. App. 44a-46a.

But this Court has repeatedly warned against invoke-ing "general * * * proposition[s]" to hold that a specific question is "beyond debate." *Sheehan*, 135 S. Ct. at 1774-1776. Qualified immunity turns on a more particular—and thus more relevant—inquiry: whether every competent police officer would understand, in the circumstances he confronts, that *his* conduct is unlawful. *Ziglar*, 137 S. Ct. at 1867. That disclosure obligations fall "on the State as a whole" does not tell individual police officers their specific obligations. And this "Court has always defined the *Brady* duty as one that rests with the prosecution." *Jean*, 221 F.3d at 660 (Wilkinson, J., concurring) (collecting cases). *Brady* "is the responsibility of the prosecutor," *Giglio* v. *United States*, 405 U.S. 150, 154 (1972), the Court has explained, because prosecutors enjoy a "special" position, *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999). Certainly, in 1975, "reasonable officers could have questioned" whether the onus is on prosecutors—trained attorneys—to identify and disclose exculpatory evidence. *Reichle* v. *Howards*, 566 U.S. 658, 666 (2012). One would reasonably think that maintaining a single locus of responsibility would have advantages, such as preventing diffusion of accountability. See *Kyles*, 514 U.S. at 537. Indeed, this Court did not even "settle" whether facts known to "the police could be imputed to the prosecutor" until *Kyles*—20 years after the events in this case. *Gibson*, 411 F.3d at 443.

The continuing disagreement among courts of appeals on the underlying constitutional question—*i.e.*, whether *Brady* applies to police officers even today, see p. 27, *supra*—underscores the Sixth Circuit's error. Immunity

should be denied only if reasonable officers would not "disagree" about the conduct's lawfulness. *Malley*, 475 U.S. at 341. The Sixth Circuit itself ruled that "the *Brady* obligation applies only to prosecutors" as recently as 2004. *Lindsay* v. *Bogle*, 92 F. App'x 165, 170 (6th Cir. 2004). "When the courts are divided on an issue," reasonable officers surely could disagree as well. *Ziglar*, 137 S. Ct. at 1868.[8]

2. The Sixth Circuit's decision creates serious disruption. Police departments need to know what their obligations are, and whether they can rely on prosecutors to fulfill *Brady*'s requirements.[9] By imposing potentially massive liability on individual officers based on duties

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[8] The decisions cited below hardly constitute a "'robust consensus * * * of persuasive authority.'" *al-Kidd*, 563 U.S. at 742. Two cited decisions—*Jackson* v. *Wainwright*, 390 F.2d 288, 298 (5th Cir. 1968), and *Clarke* v. *Burke*, 440 F.2d 853, 855 (7th Cir. 1971)—concerned *prosecutors'* obligations. The Fourth Circuit, which decided *Barbee* v. *Warden, Md. Penitentiary*, 331 F.2d 842 (4th Cir. 1964), later declined to extend *Brady*'s specific obligations to police officers, *Jean*, 221 F.3d at 660 (Wilkinson, J., concurring). *Curran* v. *Delaware*, 259 F.2d 707 (3d Cir. 1958), was decided before *Brady*, and was issued by a court that later rejected the argument that *clearly established law* extends *Brady* to police officers. See pp. 27-28, *supra*. And *Smith* v. *Florida*, 410 F.2d 1349, 1351 (5th Cir. 1969), concerned whether a habeas hearing was required. It did not mention *Brady*.

[9] The Sixth Circuit held that the City of Cleveland's written disclosure policy might authorize *Brady* violations by police officers, explaining that police officers might not "turn over to prosecutors * * * 'statements made by witnesses.'" Pet. App. 58a-60a. That would be immaterial if municipalities were permitted to rely on prosecutors to collect statements. Indeed, in a critical passage the Sixth Circuit omitted, the policy stated that "witness statements" *are* "subject to disclosure" through an "*in camera*" process. Pet. App. 274a. The policy thus provided for statements to be available to prosecutors, who would make any required disclosures.

about which "judges * * * disagree," *Wilson*, 526 U.S. at 618, the decision below threatens to distract or deter officers from their duties, see *Harlow*, 457 U.S. at 814. The consequences of such a decision for "'society as a whole'" weigh strongly in favor of further review. *Sheehan*, 135 S. Ct. at 1774 n.3 (collecting cases).

C. The Sixth Circuit's Errors Have Serious Consequences for Municipal Liability

The impact of Sixth Circuit's decision on municipalities and local governments is severe. Municipalities "cannot be held liable" for §1983 claims under "a *respondeat superior* theory." *Monell* v. *Dep't of Social Servs. of City of New York*, 436 U.S. 658, 690-691 (1978). Plaintiffs must "prove that 'action pursuant to official municipal policy' * * * caused their injury." *Connick* v. *Thompson*, 563 U.S. 51, 60-61 (2011). Although failure to train can amount to a "policy," it is the "most tenuous" basis for liability. *Id.* at 61. There must be "proof that a municipal actor *disregarded a known or obvious consequence of his action*," *Bd. of Cty. Comm'rs of Bryan Cty.* v. *Brown*, 520 U.S. 397, 410 (1997) (emphasis added)—*i.e.*, that the municipality was "deliberately indifferent" to individuals' rights, *Connick*, 563 U.S. at 61.

Given that "stringent standard," *Bryan Cty.*, 520 U.S. at 410, respondents' claims against the City of Cleveland for failing to train "officers as to their obligation[s] * * * under *Brady*" necessarily presume that clearly established law imposed *Brady* obligations on police officers in 1975, Pet. App. 67a. Sixth Circuit precedent precludes municipal liability for violations of rights that have "yet" to be "clearly established." *Arrington-Bey* v. *City of Bedford Heights*, 858 F.3d 988, 994 (6th Cir. 2017); accord *Szabla* v. *City of Brooklyn Park*, 486 F.3d 385, 393 (8th Cir. 2007) (en banc); *Young* v. *Cty. of Fulton*, 160 F.3d

899, 903 (2d Cir. 1998). Under that precedent, if no clearly established law placed *Brady* obligations on police officers in 1975, it could not have been "obvious" to the City of Cleveland that "failure to train" its officers on those obligations would lead to conduct that "obvious[ly] * * * violate[s] constitutional rights." *Arrington-Bey*, 858 F.3d at 995. Nor would it have been apparent that written policies making prosecutors responsible for disclosures were unlawful. See pp. 31-32 & n.9, *supra*.

The lack of any pattern of *Brady* violations reinforces that conclusion. Deliberate indifference ordinarily requires a "pattern" of "constitutional violations." *Connick*, 563 U.S. at 62. Here, respondents established no pattern. Pet. App. 71a. They instead argued that the need to train police officers' *Brady* obligations would be "'plainly obvious'" in 1975. Pet. App. 70a-72a. That "hypothesized" theory of liability is so tenuous that this Court has rejected it in connection with an alleged failure to train *prosecutors* in *Brady* obligations. *Connick*, 563 U.S. at 63-64. It fares worse when applied to police officers, when the courts are divided as to whether *Brady* applies to them in the first place and whether any requirements were clear in 1975.

Municipalities like the City of Cleveland must make decisions about where to allocate resources and what to include in training. They cannot conceivably be required, on pain of potentially ruinous liability, to train police officers about every potential legal obligation *before* those obligations are announced with clarity. Cf. *Harlow*, 457 U.S. at 814. Such a requirement would divert scarce resources from training officers on already numerous legal requirements and the fundaments of law enforcement. For that reason, too, review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2019