

**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,

vs.

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

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

**BRIEF OF AMICUS CURIAE
INTERNATIONAL MUNICIPAL LAWYERS
ASSOCIATION IN SUPPORT OF PETITIONERS**

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**STATEMENT OF IDENTITY AND
INTEREST OF THE AMICUS CURIAE¹**

The International Municipal Lawyers Association (“IMLA”) is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA’s mission is to advance the responsible development of municipal law through education and advocacy, by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

Amicus curiae IMLA’s members represent all levels of local government, including law enforcement agencies such as county sheriff’s departments, and city police departments. IMLA and its members have an interest in ensuring clarity of the law concerning imposition of liability on public entities, which allows

¹ Counsel for petitioners and respondents were notified ten days prior to the due date of this brief of the intention to file and have consented to the filing of this amicus brief. This brief was not authored in whole or in part by counsel for any party. No person or entity other than amicus curiae made a monetary contribution towards preparation of this brief.

accurate fiscal planning, avoids prolonged litigation and permits informed training that might avoid entanglement in litigation altogether.

STATEMENT OF THE CASE

Amicus curiae IMLA joins in and refers to the Statement in the petition for writ of certiorari (“Pet.”) at pages 2-11.

SUMMARY OF ARGUMENT

One of the most vital functions this Court performs is to bring clarity to the law and resolve conflicts among the lower appellate courts. The petition presents two issues on which the circuit courts are divided: 1) Whether 42 U.S.C. § 1988 requires that survival of claims under 42 U.S.C. § 1983 be determined by reference to state statutes concerning survival of general personal injury claims, or state statutes addressing survival of the most analogous state tort claim; and 2) Whether police officers have individual disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) that were clearly established as of 1975. The impact on the underlying litigation from resolving the conflict among the lower courts in and of itself would justify the Court’s intervention. Favorable resolution of the issues on behalf of petitioners

might effectively end the underlying litigation,² and at the very least be “fundamental to the further conduct of the case.” *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945). However, review is also warranted because the importance of the issues transcends the interests of the parties, and directly impacts the day-to-day operation of local government.

It is necessary to resolve the question whether, under § 1988, courts must look to a state’s general personal injury survivorship rule or survivorship rules that may be more closely tailored to the underlying claims at issue in order to determine whether a § 1983 claim survives. The existence of the circuit split means that public entities located in those jurisdictions which have not addressed the issue face uncertainty in fiscal planning for potential liability, as well as the prospect of protracted litigation to determine which survivorship statutes might govern in a particular case. Bringing certainty to law will allow local public entities to understand the nature and extent of potential liability and curtail litigation costs.

Resolution of the nature and extent of an individual police officer’s disclosure obligations under *Brady*,

² Three of the individual defendants (Terpay, Farmer, and Staimpel) died before suit was filed (Pet. App. 149a-150a), and the fourth died in July 2019 (*Jackson v. City of Cleveland*, No. 1:15-cv-00989, Dkt. 148). Hence, resolution of the survivorship issue in their favor would terminate the litigation as to the individual defendants. The City has only been sued for *Brady* violations (Pet. App. 53a-72a) and favorable resolution of the *Brady* issue could end the litigation as to the City.

and potential liability arising from an alleged failure to meet any such obligation will similarly allow local public entities to assess and plan for potential liability. More importantly, it will aid local entities in training law enforcement personnel in performing key investigative tasks that impact not simply civil liability, but the routine prosecution of criminal cases, given that potential *Brady* issues can arise in virtually every criminal case.



WHY REVIEW IS WARRANTED

I. REVIEW IS NECESSARY TO RESOLVE AN ISSUE THAT IMPACTS FISCAL PLANNING FOR LIABILITY AND LITIGATION COSTS FOR LOCAL PUBLIC ENTITIES—THE STANDARDS FOR DETERMINING SURVIVAL OF CLAIMS BROUGHT UNDER 42 U.S.C. § 1983.

A. Uncertainty In Determining Survival Of Claims Brought Under 42 U.S.C. § 1983 Makes It Difficult To Assess And Plan For Potential Liability, And Spawns Protracted Litigation That Increases Costs To Local Public Entities.

As demonstrated in the petition, there is a clear and deep conflict among the circuit courts concerning application of 42 U.S.C. § 1988 to determine survival of claims brought under 42 U.S.C. § 1983. (Pet. 13-16.) Consistent with this Court's decision in *Robertson v. Wegmann*, 436 U.S. 584 (1978), the lower courts,

applying the standards set forth in § 1988, look to state law to determine the survival of claims brought under § 1983. The courts are sharply divided, however, on whether to apply state statutes concerning survival of general personal injury claims, or to instead apply survivorship statutes concerning tort claims that are most analogous to the underlying constitutional tort.

As the underlying case illustrates, resolution of this issue can have profound consequences on potential liability of public employees, and correspondingly, public employers. As a result, uncertainty with respect to the applicable standard used to determine survival of claims under § 1983 makes it difficult in many cases for public entities to assess potential liability with any degree of certainty. Fiscal planning for litigation is difficult in the best of circumstances, with local entities having to set reserves for indemnifying an employee against potential liability and for defense costs at the early stages of a case, but uncertainty as to something so fundamental as to whether a claim may be maintained in the first place, makes the task infinitely harder. Moreover, uncertainty in fiscal planning for litigation has a deleterious impact on the budgeting process as a whole, that necessarily affects municipal decision-making across the broad spectrum of public services—funds that must be reserved for potential liability are necessarily unavailable for providing fire protection, road maintenance, building inspection and the like.

In addition, as the sheer volume of cases concerning survival of § 1983 claims illustrates,³ uncertainty in the law as to that question necessarily spawns protracted litigation. In those jurisdictions where there is no controlling circuit precedent on the question, the parties will necessarily have an incentive to fully litigate the issue, and even in those jurisdictions where precedent on the issue may be clear, the stakes are high enough to prompt exhaustion of all avenues of review, whether it be seeking en banc consideration, or, ultimately, review by this Court.⁴ The net result of this uncertainty is to drive up litigation costs as a whole, and consume already strained judicial resources.

Section 1983 litigation is a fact of life for every local public entity in the country. Rules concerning imposition of liability under § 1983 impact the day-to-day operations of local government because governmental decision-making is directly impacted by the nature and extent of potential liability. It is essential that the Court provide clear standards for determining survival of § 1983 claims because unless and until the Court provides such guidance, local public entities will face uncertainty that adversely affects the ability to plan for potential liability and increases litigation costs, all to the detriment of the citizens they serve.

³ As a general sampling, the petition identifies 21 circuit court decisions and 14 district court decisions directly addressing the survivorship issue. (Pet. 17-18.)

⁴ As the petition notes, wrongful conviction cases in particular, expose public entities to massive potential liability. (Pet. 19.)

**B. The Posture Of This Case Makes It Ideal
For Resolution Of The Conflict Concern-
ing Survival Of § 1983 Claims.**

As noted in the petition, Ohio law specifically addresses survival of malicious prosecution claims. (Pet. 16.) The Ohio legislature has determined that such claims, because of their nature, abate at the death of either party. (*Id.*) Plaintiffs have, in turn, filed claims for malicious prosecution under § 1983. Although this Court has never articulated the standards for a malicious prosecution claim under § 1983,⁵ the lower federal courts and in particular the Sixth Circuit, have recognized that the basic elements are virtually identical to the common-law tort claim.⁶

As a result, this case presents a particularly strong setting in which to resolve the question of whether survival of § 1983 claims is determined by reference to a state's general personal injury survivorship rule, or by a survivorship rule that addresses the most closely analogous state tort claim. Here, the federal claim and analogous state law claim are virtually identical. The Ohio survivorship statute specifically abates

⁵ See *Albright v. Oliver*, 510 U.S. 266, 273-75 (1994) (plurality) (rejecting substantive due process claim for malicious prosecution, but leaving issue open as to other constitutional grounds for such a claim).

⁶ Compare Pet. App. 39a (stating elements of Fourth Amendment claim for malicious prosecution) with *Sygula v. Regency Hosp. of Cleveland E.*, 64 N.E.3d 458, 469 (Ohio Ct. App. 2016) (stating elements of malicious prosecution under Ohio law). Moreover, the allegations of plaintiffs' state and federal malicious prosecution claims are highly similar. (*Jackson v. City of Cleveland*, No. 1:15-cv-00989, Dkt. 86, ¶¶ 124-135 (federal) and ¶¶ 156-161 (state).)

malicious prosecution actions, and reflects legislative judgment based on the practical realities of litigating such cases, including the difficulties of assuring a fair adjudication or meaningful relief once a party has died.

The Court has “long recognized the role of the States as laboratories for devising solutions to difficult legal problems.” *Oregon v. Ice*, 555 U.S. 160, 171 (2009); see *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (“[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”). Correspondingly, practical experience reflected in state legislative action is not to be lightly disregarded. This case presents the perfect platform for the Court to address the deference to be accorded to the states in the context of making fundamental decisions concerning the prosecution of particular claims upon the death of a party.

II. REVIEW IS NECESSARY TO CLARIFY THE NATURE AND EXTENT OF AN INDIVIDUAL OFFICER’S DISCLOSURE OBLIGATION AND POTENTIAL CIVIL LIABILITY UNDER *BRADY V. MARYLAND*.

Over 56 years ago in *Brady v. Maryland*, 373 U.S. 83 (1963), this Court held that the due process clause of the Fourteenth Amendment required prosecutors to disclose evidence favorable to the accused in order to preserve the accused’s right to a fair trial. Since then, the Court has clarified the application of *Brady* in

criminal cases, noting that omissions by members of the prosecution team, including police officers, may require reversal of a conviction. *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). Although the Court has assumed the existence of a civil claim for a *Brady* violation under 42 U.S.C. § 1983 in the context of addressing issues concerning immunity or municipal liability,⁷ it has never addressed the precise nature of such a claim.⁸ More particularly, the Court has never addressed the obligation of individual police officers—as opposed to prosecutors—to assure compliance with *Brady*, much less the nature or extent of any civil liability that might arise from a failure to fulfill any such obligation. Amicus curiae submits that it is essential that this Court grant review to set down clear guidelines for future cases.

⁷ See, e.g., *Connick v. Thompson*, 563 U.S. 51 (2011) (municipal liability); *McMillian v. Monroe Cnty., Ala.*, 520 U.S. 781 (1997) (municipal liability); *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009) (absolute prosecutorial immunity); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute prosecutorial immunity).

⁸ Indeed, even in the context of criminal cases the Court has not clearly indicated whether *Brady* rights stem from the substantive or procedural protections of the due process clause of the Fourteenth Amendment, although the latter seems likely. See *Albright*, 510 U.S. at 273 n.6.

A. The Ubiquity Of Potential *Brady* Claims Warrants Intervention By The Court To Clarify The Nature And Extent Of Police Officer Liability For *Brady* Violations.

As the petition notes, the circuit courts are divided on the question of whether it is “clearly established” that police officers were subject to *Brady* standards as of 1975, as found by the Sixth Circuit here. (Pet. 27-28.) This, in and of itself, mandates qualified immunity for the individual petitioners and warrants this Court’s intervention to secure compliance with its jurisprudence on qualified immunity. (Pet. 29-31.) However, IMLA submits that the lack of clarity concerning application of *Brady* standards to police officers, and the conflicting standards for imposing civil liability in such cases, makes it necessary for the Court to provide guidance for future cases.

As noted, this Court has never addressed the merits of a civil claim for damages for a *Brady* violation. In the criminal law context, the Court has identified three elements of a *Brady* violation: (1) “[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [(2)] that evidence must have been suppressed by the State, either willfully or inadvertently; and [(3)] prejudice must have ensued.” *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Suppressed evidence is considered material, and hence prejudice ensues, “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

different,” either with respect to guilt or punishment. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Although a criminal defendant may obtain relief from conviction even for an inadvertent *Brady* violation, application of the *Brady* standard becomes more problematic in civil cases, where imposition of liability typically requires some proof of fault or culpability. Since *Brady* rights stem from the due process clause, mere inadvertence, or even negligence cannot be enough. *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986) (negligently caused slip and fall insufficient to support due process claim). The Court has made it clear that in the context of civil claims arising from a violation of substantive due process rights, the defendant’s conduct must “shock the conscience,” a standard that varies depending on the period of reflection a defendant may have before taking the action in question. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998); *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472-73 (2015).

Those Circuits that recognize some sort of *Brady* adjacent civil claim against police officers acknowledge that unlike the criminal context, there must be something more than inadvertence, but disagree on the standard of liability. The Eighth Circuit requires a showing of bad faith by a police officer. *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir. 2004); *Helmig v. Fowler*, 828 F.3d 755, 760 (8th Cir. 2016). The Ninth and Seventh Circuits only require proof of deliberate indifference or reckless disregard. *Tennison v. City*

and Cnty. of San Francisco, 570 F.3d 1078, 1088 (9th Cir. 2009); *Steidl v. Fermon*, 494 F.3d 623, 631-32 (7th Cir. 2007). Requiring a high degree of culpability is consistent with the Court’s observation that there are many “gray areas” in *Brady*, and that evaluation of some sorts of evidence—impeachment for example—is difficult, even for lawyers and all the more problematic with respect to police officers who lack the formal legal training of prosecutors that might allow them to discern the nature and impact of potential evidence. *Connick*, 563 U.S. at 70-71; *United States v. Ruiz*, 536 U.S. 622, 630 (2002).

The critical point, in any event, is that a clear standard of liability be articulated, and a point fixed at which it can be said that the law is “clearly established” for purposes of qualified immunity. As noted, section I.A, *supra*, uncertainty as to legal standards makes it difficult for public entities to meaningfully assess and plan for potential liability, thus impacting budgeting and the provision of public services as a whole. Open questions on liability inevitably spawn protracted, costly litigation that serves neither public, private, nor judicial interests. These problems are compounded by the ubiquity of potential *Brady* claims, given that virtually *every* criminal case has the potential to spawn such claims. Criminal investigation and the gathering and submission of evidence are basic functions of law enforcement agencies, and part of the day-to-day tasks that officers undertake in the field.

Moreover, as the petition notes, the absence of clear standards makes effective training to avoid massive potential liability almost impossible. (Pet. 33.)

It is essential that the Court address the nature and scope of a police officer's obligation under *Brady* and the standards for imposing civil liability arising from any such obligation.

B. The Case Squarely Presents Issues Concerning A Police Officer's Duties Under *Brady*, And Liability Arising From Violation Of Any Such Duties.

This case clearly presents significant issues concerning a police officer's duties under *Brady*, as well as civil liability arising from alleged failure to comply with such duties. The individual officers were sued for *Brady* violations (Pet. App. 25a-29a) and the only claim against the City is premised on *Brady* violations (*id.*, 53a-72a). The issues were briefed by the parties and directly addressed by the Sixth Circuit. (*Id.*, 25a-29a, 53a-72a.) The issues are therefore squarely presented for resolution by this Court.



CONCLUSION

For the foregoing reasons, Amicus Curiae IMLA respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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