No. 19-409

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 ESTATE 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 Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents Rickey Jackson,[1] Kwame Ajamu, and Wiley Bridgeman collectively spent over 100 years imprisoned for a crime they did not commit. After the sole inculpatory witness revealed that police coerced and fabricated his false testimony, respondents were exonerated. Respondents filed suit pursuant to 42 U.S.C. § 1983 alleging violations of their constitutional rights, including that their due process rights had been violated by the suppression of exculpatory evidence by police officers.

The questions presented are:

1. Did the Sixth Circuit correctly hold that *Wilson* v. *Garcia*, 471 U.S. 261 (1985), requires applying the state-law survival rule for personal-injury claims to § 1983 actions, when petitioners conceded the issue and never argued that the survival rule for the most closely analogous state cause of action should apply?

2. In a case replete with significant factual disputes, including evidence of deliberate suppression of exculpatory evidence, should the Court determine whether it was clearly established by 1975 that suppression of exculpatory evidence by police violates due process?

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[1] Mr. Jackson's first name was misspelled in the courts below.

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INTRODUCTION

The Court should deny the writ for four reasons. First, on both questions presented, petitioners raise new arguments for the very first time—arguments that the Court may not consider because they have been waived or forfeited.

Second, there is no circuit split on either question presented that warrants the Court's review, and the Sixth Circuit applied well-established law. Petitioners' forfeited argument that selecting a state-law survival rule requires looking to the "most closely analogous" state claim seeks a reversal of law that has been in place for over thirty years. And it has been clearly established for over eighty years that police officers violate due process when they deliberately suppress exculpatory evidence.

Third, the second question presented is relevant only to a very small (and diminishing) number of cases involving wrongful convictions over forty years old. This Court's resources are not well deployed in adjudicating long-settled issues impacting a marginal number of future cases.

Fourth, neither of the questions presented are outcome-determinative for this case and there are extensive factual disputes, making this case an exceptionally poor vehicle for review of either question presented.

STATEMENT

I. THE DETECTIVES' DELIBERATE SUPPRESSION OF EXCULPATORY AND IMPEACHMENT EVIDENCE.

On May 19, 1975, 12-year-old Edward Vernon heard gunshots as he rode the bus home from school in Cleveland, Ohio. Pet. App. 6a. Vernon exited the bus and ran to the location where he believed the shots originated. *Ibid.* He saw the gunshot victim on the ground, but he did not see the crime occur. *Ibid.* Nor did Vernon see respondents. Vernon left the scene and met up with a friend who told him that respondents committed the crime. *Ibid.* Vernon went back to the scene and told an officer that he knew who did it, even though he did not. *Ibid.* The officer took down Vernon's contact information. *Ibid*.

The next day, Detectives Eugene Terpay and James Farmer went to Vernon's house and took him to the police station alone. Pet. App. 6a. Vernon told them he had heard respondents were the perpetrators. *Ibid*. Terpay fed Vernon details about the crime that Vernon did not know. R. 99-1, at 13, 44, 59.[2]

On May 25, 1975, Detective John Staimpel and his partner Frank Stoiker, who were working the

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[2] Page numbers refer to the page number of the docket entry. "R." refers to district court docket entries in No. 1:15-cv-989; "App. Ct. R." refers to appellate court docket entries in No. 17-3840.

case with Terpay and Farmer, picked up Vernon at his house to bring him to a lineup.[3] Pet. App. 6a–7a. Vernon's mother asked to accompany him to the police station, but the detectives said, "[N]o, he'll be all right. We'll bring him back after the lineup." Pet. App. 7a. Ricky Jackson and Wiley Bridgeman were in the lineup. *Ibid*. Vernon was asked if there was anybody in the lineup he recognized as having committed the shooting, and he replied truthfully that there was not. *Ibid*.

Staimpel and Stoiker then took Vernon into a room, where Staimpel accused Vernon of lying, threatened to send his parents to jail for perjury, banged on the table, and called him the "n-word."[4] Pet. App. 7a; R. 99-1, at 20–22, 58. After Vernon began to cry, Staimpel said, "[W]e'll fix it," and the detectives left the room. Pet. App. 7a. When they returned, they gave Vernon a piece of paper, explaining that it said he had failed to identify Jackson and Bridgeman in the lineup because he was scared, and they told him to sign it. *Ibid.* The written statement Staimpel and Stoiker made Vernon sign contained a fabricated version of events. Pet. App. 7a; see R. 99-1, at 58. Stoiker also signed a police report containing this false,

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[3] Petitioners claim Stoiker had a "secondary role in the investigation." Pet. 7. This is an incorrect, if not disputed, claim about the evidence, which illustrates that Stoiker, Staimpel, Terpay, and Farmer all shared primary responsibility in the investigation, including Stoiker's involvement in the lineup and in fabricating evidence from Vernon. Pet. App. 6a–7a.

[4] Vernon is black; the detectives were white.

inculpatory version of events. Pet. App. 7a–8a, 30a–32a.

The day after the lineup, Terpay and Farmer brought Vernon to the police station again. Pet. App. 8a. Vernon told them that he had not witnessed the crime. *Ibid.* Terpay threatened to send Vernon's parents to jail for perjury, and Vernon was convinced to testify falsely that he had seen respondents commit the crime. *Ibid.*

The detectives withheld from the prosecutor their coercion of Vernon, the fabrication of his testimony, and Vernon's exculpatory oral statement to the detectives that he did not witness the crime. Pet. App. at 27a–29a. Vernon testified falsely against respondents at their trials, and Vernon's coerced, fabricated written statement was used against Jackson at his trial. *Id.* at 8a, 32a, 49a n.19.

For nearly forty years, Vernon struggled with the knowledge that his false testimony put respondents in prison. Pet. App. at 8a. In 2013, he finally told the truth to his pastor, while in the hospital sick with kidney failure. *Id.* at 9a. In 2014, Vernon testified at a post-conviction hearing that his false testimony had been coerced by detectives. After the hearing, the prosecutor for Cuyahoga County agreed to the dismissal of all charges against respondents and admitted that there was "no evidence tying any of the three convicted defendants to the crimes" and that "[t]hey have

been victims of a terrible injustice." *Ibid.* Jackson and Bridgeman were released from prison.[5]

II. PROCEEDINGS BELOW.

Respondents filed their § 1983 actions in 2015. Detectives Terpay, Farmer, and Staimpel died many years ago, and an administrator was appointed for their estates. Stoiker died in July 2019, after the Sixth Circuit's decision below. Stoiker's daughter, Karen Lamendola, was appointed administrator of Stoiker's estate and has been substituted as the party defendant for Stoiker. See R. 68-1, 148, 150, 151.

In the district court and the court of appeals, petitioners argued that respondents' § 1983 claims did not survive the deaths of Terpay, Farmer, and Staimpel. They argued that Ohio Revised Code § 2305.21, which provides for survival of "injuries to the person," applies, but that "injuries to the person" require physical injury. R. 71 (Defs.' Mem. in Opposition to Mot. for Leave to File Second Amd. Compl.), at 9–14 (arguing that Ohio Revised Code § 2305.21 applies); Estates' C.A. Br. 24–25 (same).[6]

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[5] Ajamu had been released on parole in 2003.

[6] Contrary to petitioners' assertion otherwise, Ohio law does not provide for abatement of "personal rights." Pet. 9. Under Ohio law, personal injuries—whether physical or psychic—survive, and only specific common-law claims abate. Ohio Rev. Code §§ 2305.21, 2311.21; *Crabbs* v. *Scott*, 880 F.3d 292, 296 (6th Cir. 2018) (discussing state law).

Contrary to petitioners' suggestion otherwise (Pet. 9), the district court did not rule that a different section of state law, Ohio Revised Code § 2311.21, supplies the applicable survival rule or that the survival of § 1983 claims must be determined using the rule for the "most closely analogous" state cause of action. Petitioners never made such arguments below. Instead, the district court ruled that "injuries to the person" under Ohio Revised Code § 2305.21 requires a showing of physical injury. Pet. App. 157a–158a. The district court concluded that respondents' constitutional claims were not claims for physical injury and did not survive the deaths of the tortfeasors. Pet. App. 157a.

The court of appeals construed Ohio law differently and selected a state-law survival rule in accordance with this Court's precedent. It held that respondents' § 1983 claims survived the deaths of the detectives because (1) Ohio Revised Code § 2305.21—the rule that all parties agreed applies—provides that personal-injury claims survive the death of any party, and (2) *Wilson* v. *Garcia*, 471 U.S. 261 (1985), holds that § 1983 actions advance personal-injury claims. Pet. App. 19a–22a. The Sixth Circuit applied its prior decision in *Crabbs* v. *Scott*, 880 F.3d 292, 294–296 (6th Cir. 2018), which held that § 1983 claims are personal-injury actions under *Wilson* and *Owens* v. *Okure*, 488 U.S. 235 (1989), and thus qualify as causes of action for "injuries to the person" under Ohio Revised Code § 2305.21.

Crabbs applied the long-standing principles set forth by this Court in *Wilson* and *Owens*, which provide that all "§ 1983 actions are best characterized as personal injury actions." 880 F.3d at 295 (citing *Wilson*, 471 U.S. at 269–275, 280); *see ibid.* (citing *Owens*, 488 U.S. at 249–250 for the proposition that "all § 1983 claims [are] governed by the residual statute of limitations for personal injuries, even those stemming from intentional conduct").

In holding that respondents' § 1983 claims survive the deaths of the officers, the court of appeals applied well-established law. Pet. App. 22a. The court reversed the district court's denial of leave to amend the complaints to name the administrator of the estates of Terpay, Farmer, and Staimpel as a defendant. *Ibid.*

The court of appeals also reversed (in large part) the district court's grant of summary judgment. Pet. App. 10a. With respect to respondents' constitutional claims, the court of appeals held that there is sufficient evidence for a reasonable jury to find for respondents on their Fourteenth Amendment fabrication-of-evidence and suppression-of-exculpatory-evidence claims and their Fourth Amendment unlawful-detention claim, as well as their claims against the City of Cleveland. Pet. App. at 25a–42a, 53a–73a.

In seeking certiorari, petitioners argue for the first time that police officers have no constitutional obligation—even today—not to suppress or

withhold exculpatory evidence. Pet. 26–28. They have forfeited this argument by failing to raise it below. In fact, petitioners' arguments have shifted at every stage of this case. In the district court, petitioners conceded that police officers have an obligation to disclose exculpatory evidence. R. 99 (Lamendola's Mot. for Summary Judgment), at 21 (citing *Kyles* v. *Whitley*, 514 U.S. 419 (1995)). In the court of appeals, petitioners argued that it was not clearly established in 1975 that police officers "could be held liable" for concealing their "own alleged wrongdoing or the wrongdoing of other police officers." Lamendola C.A. Br. 53–54.

The Sixth Circuit held that it was clearly established prior to respondents' trials in 1975 that "the duty to disclose evidence falls on the state as a whole and not on one officer of the state particularly, and it was therefore clearly established by the time of those trials that Stoiker had a Fourteenth Amendment obligation to disclose exculpatory evidence." Pet. App. 46a. The Sixth Circuit also held that it was "clearly established that impeachment evidence, such as the fact that a witness was coerced into making a fabricated statement, qualifies as exculpatory." *Ibid.* The court relied on *Brady* v. *Maryland*, 373 U.S. 83 (1963), *Giglio* v. *United States*, 405 U.S. 150 (1972), and a robust consensus of persuasive authority. Pet. App. 44a–46a.

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT CONSIDER A NEW ARGUMENT RAISED FOR THE FIRST TIME IN THE PETITION.

A. Petitioners' Concession That The Applicable Survival Rule Is Ohio Revised Code § 2305.21 Forecloses This Court's Consideration Of The First Question Presented.

Arguments not raised below are waived and not considered by this Court. *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) ("Ordinarily, 'we do not decide in the first instance issues not decided below.'") (citation omitted); *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 108–109 (2001) (*per curiam*) (dismissing a writ as improvidently granted because question at issue was not raised or considered below). Petitioners never argued that Ohio Revised Code § 2311.21 provides the applicable rule, or that the survival rule for the "most closely analogous" state-law cause of action to respondents' federal constitutional claims should apply. Instead, petitioners argued that the applicable state-law survival rule is Ohio Revised Code § 2305.21, which governs claims for personal injuries in Ohio. Estates' C.A. Br. 24; R. 71, at 9–11. Petitioners made the deliberate choice to argue for § 2305.21 because they believed that under Ohio law, the phrase "injuries to the person" requires physical injury, thereby reasoning that respondents'

constitutional claims would be excluded. See Estates' C.A. Br. 24–28.

The Sixth Circuit followed this Court's guidance in *Wilson* and *Owens* in holding that "all § 1983 claims are subject to the forum state's survival rules for personal injury actions, regardless of the specific type of injury underlying the § 1983 claim." Pet. App. 20a. Having lost while advancing their interpretation of Ohio Revised Code § 2305.21, petitioners now switch horses and make an entirely new argument that the applicable rule is not § 2305.21 but § 2311.21, and that the Sixth Circuit erred in selecting the general personal-injury rule instead of the rule for the "most closely analogous" state law cause of action.[7] The Court cannot and should not entertain this kind of gamesmanship.

B. Central To The Sixth Circuit's Survival Ruling Is Its Interpretation Of State Law, An Issue That Does Not Warrant Review.

This Court has consistently refused to grant certiorari to review a federal appellate court's

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[7] Petitioners assert that "[t]he panel thus nowhere disputed that state-law claims most 'similar' to the '§ 1983 claims * * * brought by' respondents would abate." Pet. 16. This suggests that the Sixth Circuit was presented with this argument and simply did not consider it. This suggestion is misleading. Petitioners *never argued* that respondents' § 1983 claims were "most analogous" to common-law malicious-prosecution claims or that Ohio Revised Code § 2311.21 should apply because respondents' § 1983 claims were "most analogous" to common-law malicious-prosecution claims.

interpretation of state law. The Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 16 (2004). This is because "federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than [the Supreme Court] to determine how local courts would dispose of comparable issues." *Butner* v. *United States*, 440 U.S. 48, 48 (1979); see also *McMillian* v. *Monroe County*, 520 U.S. 781, 786 (1997); *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701, 738 (1989).

In *Crabbs*, the Sixth Circuit unanimously held that the phrase "injuries to the person" in Ohio Revised Code § 2305.21 includes claims of psychological or personal as well as physical harm and that the Ohio Supreme Court has never imposed a physical injury requirement under the Ohio survivorship statute. 880 F.3d at 296. The court below simply applied its interpretation of state law from *Crabbs* in holding that respondents' § 1983 claims survive the deaths of the detectives. The Sixth Circuit's interpretation of Ohio law is not a subject that warrants this Court's review. See *Michigan* v. *Long*, 463 U.S. 1032, 1038 (1983) ("The process of examining state law is unsatisfactory because it requires us to interpret state law with which we are generally unfamiliar").

C. The Sixth Circuit's Survival Ruling Correctly Applied This Court's Long-Standing Precedents.

In *Wilson*, this Court held that 42 U.S.C. § 1988 directs the selection of "the one most appropriate statute of limitations for all § 1983 claims" in each state. 471 U.S. at 275. The Court explained:

> practical considerations help to explain why a simple, broad characterization of all § 1983 claims best fits the statute's remedial purpose. The experience of the courts that have predicated their choice of the correct statute of limitations on an analysis of the particular facts of each claim demonstrates that their approach inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983. Almost every § 1983 claim can be favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations.

Id. at 272–273. The purpose of § 1988 was to create an "effective remedy" not "obstructed by uncertainty" with "useless litigation on collateral matters." *Id.* at 275.

Furthermore, the Court held that "all § 1983 actions" are best characterized as "involving claims for personal injuries * * * ." *Wilson*, 471 U.S. at 279. It specifically rejected the idea that Congress would have "characterized § 1983 as providing a

cause of action analogous to state remedies for wrongs committed by public officials" because "[i]t was the very ineffectiveness of state remedies that led Congress to enact the Civil Rights Acts in the first place." *Ibid.* *Wilson* ended the "conflict, confusion, and uncertainty" that existed when courts selected a statute-of-limitations rule by analogizing the plaintiff's federal claim to a state cause of action. *Id.* at 266. The "simple, broad characterization of all § 1983 claims best fits the statute's remedial purpose," *id.* at 272, and serves the "federal interest in uniformity" and "the interest in having firmly defined, easily applied rules," *id.* at 270 (internal quotation marks and citation omitted). This Court has likewise applied this principle to § 1981 actions. *Goodman* v. *Lukens Steel Co.*, 481 U.S. 656 (1987).

In *Owens*, this Court reaffirmed these principles by holding that the residual or general personal-injury statute of limitations applies when a state has one or more statute of limitations for certain enumerated intentional torts. 488 U.S. at 249–250. The unanimous Court explained that "so many claims brought under § 1983 have no precise state-law analog," and "[t]he practice of seeking state-law analogies for particular § 1983 claims bred confusion and inconsistency in the lower courts and generated time-consuming litigation." *Id.* at 240.

The Sixth Circuit has faithfully applied these long-established principles to the selection of a state-law survival rule. *Crabbs* explained:

> *Wilson* and *Owens* tell us what we need to know to resolve this case. Neither decision cabined its rationale to state statutes of limitation. And if survivorship statutes are not siblings of time-bar statutes, they are at least cousins. Together they seek to balance repose and finality with the substantive policies served by enforcement of the cause of action. * * * the appropriate level at which to generalize a § 1983 claim under state law is as a personal injury action, sounding in tort, and nothing further.

Crabbs, 880 F.3d at 295–296; see also Pet. App. 21a. Thus, the court of appeals borrowed the state survival rule governing personal-injury claims for § 1983 actions. Pet. App. 21a. The court recognized that Ohio law provides for abatement of claims for libel, slander, and malicious prosecution (under Ohio Revised Code § 2311.21), but it held that § 2311.21 concerns only state-law claims, not respondents' § 1983 claims.[8] *Id.* at 21a–22a.

The Sixth Circuit's application of the principles set forth by this Court in *Wilson* and *Owens* to the selection of a state survival rule was correct and uncontroversial; it does not warrant review.[9]

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[8] Petitioners filed a petition for rehearing with suggestion for rehearing *en banc* on this issue. It was denied. App. Ct. R. 67. No judge requested a vote on the suggestion for rehearing *en banc*. App. Ct. R. 73-1.

[9] Petitioners' alarmist assertion that the Sixth Circuit created a "uniform federal 'absolute survivorship' rule," Pet. 23, is incorrect. The Sixth Circuit applied state law and determined

Contrary to petitioners' suggestion otherwise (Pet. 21–23), nothing in *Wilson* or *Owens* or the Sixth Circuit's application of those cases is inconsistent with *Robertson* v. *Wegmann*, 436 U.S. 584 (1978). *Robertson* instructed that when federal law is "deficient," as 42 U.S.C. § 1988 is in providing a survivorship rule, courts turn to state law, as long as it is "not inconsistent with the Constitution and laws of the United States." 436 U.S. at 588 (quoting *Moore* v. *County of Alameda*, 411 U.S. 693, 703 n.1 (1973), quoting 42 U.S.C. § 1988). The Court examined the Louisiana survivorship statute and determined that its application was not inconsistent with federal law because most actions survive the plaintiff's death. *Id.* at 591–594.

Petitioners argue strenuously that all § 1983 actions cannot be characterized as claims for personal injuries. Pet. 24–26. That ship has long sailed. *Wilson*, 471 U.S. at 276–279; *Owens*, 488 U.S. at 237–250; see *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 725 (1999) (Scalia, J., concurring). Petitioners seek nothing short of a return to the conflict, confusion, and uncertainty that existed before *Wilson* and *Owens*, when there was time-consuming litigation over how to characterize a federal claim and which state rule governed the most closely analogous cause of action. See Pet. 22–24. However, this Court could not have been more clear: "In *Wilson*, we expressly

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that the application of state law does not conflict with federal law. Pet. App. 18a–22a.

rejected the practice of drawing narrow analogies between § 1983 claims and state causes of action." *Owens*, 488 U.S. at 248 (citing *Wilson*, 471 U.S. at 272); *Del Monte Dunes at Monterey*, 526 U.S. at 726 ("the search for (often nonexistent) common-law analogues to remedies for those particular violations is a major headache").

In sum, this Court's precedents require the result reached by the Sixth Circuit. A decision resurrecting the long-buried practice of analogizing federal claims to the "most closely analogous" state cause of action in order to select a state rule of decision would have conflicted with *Wilson* and *Owens*.

D. There Is No Circuit Split Over Which State Survival Rules Apply To § 1983 Claims.

The petition should also be denied because there is no circuit split on what state-law rules to apply to § 1983 claims.

The Sixth and the Seventh Circuits have expressly applied the principles set forth in *Wilson* to the selection of a state survivorship rule for § 1983 claims. *Crabbs*, 880 F.3d at 295; *Bennett* v. *Tucker*, 827 F.2d 63, 68 (7th Cir. 1987) ("[I]t is equally important to have a uniform rule of survivorship for § 1983 claims, and that it would be anomalous to use a different analogy in this context. Accordingly, we conclude that, in order to determine whether a § 1983 claim survives, we

must look to the state law governing whether a personal injury claim survives."); see also *Anderson* v. *Romero*, 42 F.3d 1121, 1124 (7th Cir. 1994).

Petitioners attempt to manufacture a circuit split by mischaracterizing decisions in the Fourth, Fifth, Eighth, and Eleventh Circuits. *None* of those courts have held that § 1988 requires the selection of the survival rule for the most analogous state cause of action to a plaintiff's § 1983 claim instead of the survival rule for personal-injury claims.

In *Parkerson* v. *Carrouth*, 782 F.2d 1449 (8th Cir. 1986), the Eighth Circuit interpreted an Arkansas statute providing for survival of actions when based on "wrongs done to the person or property of another." *Id*. at 1451 (internal quotation marks and citation omitted). The court determined that Arkansas courts had held that this statute required tangible or physical injury. *Id*. at 1452. Thus, the Eighth Circuit held that the plaintiffs' claims did not survive. The court did not hold that the survival rule for § 1983 actions is determined by choosing the most closely analogous state cause of action over the rule for personal-injury claims.

In *Caine* v. *Hardy*, 943 F.2d 1406, 1410 (5th Cir. 1991), the Fifth Circuit examined a Mississippi statute that provided for survival for "any personal action." The court examined how Mississippi courts have interpreted "personal action," and whether the plaintiff's § 1983 claims would qualify as a "personal action" under state law. *Id.* at 1410–1411. The court mused that "[o]ne way to apply this

definition to § 1983 actions is to examine the facts of each separate § 1983 claim and characterize it according to the most analogous state-law cause of action." *Id.* at 1410. But, the Fifth Circuit did not adopt this rule. Instead, like the Sixth Circuit, it applied *Wilson* to the survival context:

> Another way to apply the definition of personal action is to make a single federal characterization of all § 1983 actions for survival purposes. * * * If we transplant *Wilson*'s holding to the survival context, it is easy to conclude that all § 1983 actions are actions "for the recovery of damages for the commission of an injury to the person" within the scope of § 91-7-237. Thus, Dr. Caine's lawsuit would also survive under this analysis.

Id. at 1411 (citing *Wilson*, 471 U.S. at 276). Hence, the Fifth Circuit did not hold that courts should select the state survival rule for the most closely analogous state cause of action.

In *Estate of Gilliam ex rel. Waldroup* v. *City of Prattville*, 639 F.3d 1041, 1043 (11th Cir. 2011), the Eleventh Circuit held that application of the Alabama survivorship statute, under which unfiled personal-injury claims do not survive the death of the injured party, was not inconsistent with federal law. The court did not hold that courts should select the state survival rule for the most closely analogous cause of action over the general personal-injury rule. *Id.* at 1047–1048.

In *Brown* v. *Town of Cary*, 706 F.3d 294 (4th Cir. 2013), the Fourth Circuit examined the survival statute in North Carolina, which provided that all claims survive except for "causes of action where the relief sought could not be enjoyed, or granting it would be nugatory after death." *Id*. at 299–300. The court determined that the plaintiff's claim would survive under this statute because he asserted a past deprivation of his constitutional rights. *Id*. at 300. The court merely interpreted the North Carolina law and considered whether the claim survived under that law and did not hold that the state-law survival rule for the most closely analogous state cause of action should apply.

Even if the Tenth Circuit decision in *Pietrowski* v. *Town of Dibble*, 134 F.3d 1006 (10th Cir. 1998), is arguably an outlier that analogized a § 1983 malicious-prosecution claim to a state-law malicious-prosecution claim, the Tenth Circuit has also applied the correct rule in other cases. *E.g.*, *Slade for Estate of Slade* v. *U.S. Postal Serv.*, 952 F.2d 357, 360 (10th Cir. 1991) (applying the state statute of survival for personal-injury actions to a Title VII case). Furthermore, *Pietrowski* involved a *pro se* plaintiff, and the Tenth Circuit was not presented with an argument that Oklahoma's general personal-injury survival rule applied to the plaintiff's § 1983 claims. See *Pietrowski*, 134 F.3d at 1008–1009. In light of *Slade*, it is not at all clear that the Tenth Circuit would reject *Wilson*'s

reasoning as applied to state survival rules if it were squarely presented with the question.[10]

II. THIS COURT HAS LONG HELD THAT SUPPRESSION OF EXCULPATORY EVIDENCE BY POLICE OFFICERS VIOLATES THE DUE PROCESS CLAUSE, AND EVERY CIRCUIT HAS FOLLOWED THIS PRECEDENT.

A. This Court Should Not Consider An Argument Not Raised Below.

Petitioners assert that it is not clearly established—even today—that police officers violate the due process rights of a criminal defendant when they suppress exculpatory or impeachment evidence. See Pet. 26–31. They never raised this argument below. In fact, in the district court, petitioners conceded that officers have an obligation to disclose exculpatory evidence, but they argued that such a duty was not clearly established until *Kyles* was decided in 1995. As with the survival issue, petitioners have changed their arguments from below to attempt to obtain review. But this Court does not consider new arguments raised for the first time. *Zivotofsky*, 566 U.S. at 201 ("Ours is 'a court of final review and not first view'")

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[10] Another reason this case should not be reviewed is that the district court is now considering, in the first instance, petitioners' argument that even if the § 1983 actions survived the deaths of the detectives, they are nonetheless untimely. Pet. App. 23a–24a. A decision on that issue could render an opinion from this Court on survival merely advisory.

(quoting *Adarand Constructors, Inc.*, 534 U.S. at 110).

B. It Has Been Clearly Established For Over 80 Years That Police Officers Violate The Due Process Clause When They Deliberately Suppress Exculpatory Evidence.

Petitioners' extraordinary assertion that police officers may suppress exculpatory evidence without violating a criminal defendant's due process rights is meritless. "*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.'" *Youngblood* v. *West Virginia*, 547 U.S. 867, 869–870 (2006) (*per curiam*) (quoting *Kyles*, 514 U.S. at 438)); see also *Wearry* v. *Cain*, 136 S. Ct. 1002, 1007 n.8 (2016). That it violates due process for government agents—including police officers—to deliberately suppress evidence favorable to the accused has been clearly established for decades. *Pyle* v. *Kansas*, 317 U.S. 213 (1942); *Mooney* v. *Holohan*, 294 U.S. 103 (1935) (*per curiam*); *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Giglio* v. *United States*, 405 U.S. 150 (1972); *cf. Killian* v. *United States*, 368 U.S. 231 (1961) (addressing law enforcement's duty to preserve potentially exculpatory evidence).[11]

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[11] See *Haley* v. *City of Boston*, 657 F.3d 39, 49 (1st Cir. 2011) ("[d]eliberate concealment of material evidence by the police," was clearly established "[a]lmost forty years before Haley was

In *Pyle*—decided three decades before respondents' trials—the Court held that a criminal defendant's due process rights were violated when local and state police officers deliberately suppressed favorable evidence, threatened witnesses into giving false testimony, and withheld this information from the prosecutor. 317 U.S. at 214–216. This is exactly the misconduct of the detectives alleged by respondents in this case. Pet. App. 6a–8a, 26a–29a. After *Pyle*, no reasonable officer could have believed that engaging in this kind of misconduct was constitutional. And in *Kyles*, which petitioners pointed to in the district court, this Court emphasized it was not recognizing a new principle of law when it explained, as in *Pyle*, that police officers violate due process by withholding exculpatory evidence from the prosecutor. 514 U.S. at 438. Instead, providing that police officers do not violate due process by suppressing evidence would "amount to a serious change of course from the *Brady* line of cases."[12] *Ibid.*

Brady—decided 12 years before respondents' trials in 1975—was based on this well-established

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tried" in 1972); *Drumgold* v. *Callahan*, 707 F.3d 28, 38 (1st Cir. 2013) ("The duty that these cases established has always applied equally to prosecutors and law enforcement officers."); *Halsey* v. *Pfeiffer*, 750 F.3d 273, 296 (3d Cir. 2014).

[12] The Court's decision in *United States v. Bagley*, 473 U.S. 667 (1985), reinforces that *Kyles* did not represent a change in the law. The Court held that there may be a *Brady* violation even when the prosecutor said he did not know about the officers' undisclosed payments to a witness. *Id.* at 671 n.4.

line of cases holding that deliberate suppression of evidence, deception of the court, and fabrication of evidence violates due process. 373 U.S. at 86–87 (explaining that its holding was based on *Mooney*, *Pyle*, and *Napue*). For example, in 1935, this Court explained that:

> depriving a defendant of liberty through deliberate deception of court and jury by the presentation of testimony known to be perjured * * * is * * * inconsistent with the rudimentary demands of justice * * * the Fourteenth Amendment * * * governs any action of a state, "whether through its legislature, through its courts, or through its *executive* or administrative *officers*."

Mooney, 294 U.S. at 112–113 (emphasis added). Subsequent cases from this Court clearly applied the *Brady* rule to police failures to disclose evidence unknown to the prosecutor.[13]

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[13] See *Moore* v. *Illinois*, 408 U.S. 786, 787, 798 (1972) (holding that the allegedly suppressed evidence, some of which may have been known only to the police, was not sufficiently material to constitute a *Brady* violation); *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 866, 872–874 (1982) (discussing whether there was a due process violation for deporting a witness who does not possess material, exculpatory evidence, where a detective violated *Brady* by concealing a material witness); *Bagley*, 473 U.S. at 671, & n.4 (remanding to the circuit court to determine whether documents possessed by the law enforcement agents, but not known to the prosecutor, were material such that non-disclosure violated *Brady*); *Arizona* v. *Youngblood*, 488 U.S.

C. Applying This Court's Precedents, Every Circuit Has Ruled That Police Officers Violate The Due Process Clause When They Deliberately Suppress Exculpatory Evidence.

Applying this Court's long-standing precedents, every court of appeals has held that police officers have a constitutional obligation under the Due Process Clause to disclose exculpatory or impeachment evidence. *Brady* v. *Dill*, 187 F.3d 104, 114 (1st Cir. 1999); *Walker* v. *City of New York*, 974 F.2d 293, 299 (2d Cir. 1992); *Gibson* v. *Superintendent of N.J. Dep't of Law and Pub. Safety-Div. of State Police*, 411 F.3d 427, 443 (3d Cir. 2005); *Owens* v. *Baltimore City State's Attorneys Office*, 767 F.3d 379, 396–397 (4th Cir. 2014); *Geter* v. *Fortenberry*, 882 F.2d 167, 171 (5th Cir. 1989); *Moldowan* v. *City of Warren*, 578 F.3d 351, 378–382 (6th Cir. 2009), cert. denied, *City of Warren*, 130 S. Ct. 3504 (2010); *Jones* v. *City of Chicago*, 856 F.2d 856, 992–994 (7th Cir. 1988); *White* v. *McKinley*, 519 F.3d 806, 814 (8th Cir. 2008); *Carrillo* v. *County of Los Angeles*, 798 F.3d 1210, 1219–1222 (9th Cir. 2015); *Pierce* v. *Gilchrist*, 359 F.3d 1279, 1293 (10th Cir. 2004); *McMillian* v. *Johnson*, 88 F.3d 1554, 1569 (11th Cir. 1996).[14]

51, 55 (1988) (police violate an accused's due process rights when they destroy evidence of unknown exculpatory value in bad faith).

[14] Petitioners' characterization of the cases cited on page 27 of their Petition is misleading. See Pet. 27. In *Jean* v. *Collins*, 221 F.3d 656 (4th Cir. 2000) (*en banc*), all 12 judges concluded

Circuit decisions regarding whether police were obligated to disclose material, exculpatory evidence go back to at least 1964, the year after *Brady*, and 11 years before respondents' trials in 1975. *Barbee* v. *Warden, Md. Penitentiary*, 331 F.2d 42, 846 (4th Cir. 1964); *Smith* v. *Florida*, 410 F.2d 1349, 1350–1351 (5th Cir. 1969); *Clarke* v. *Burke*, 440 F.2d 853, 855 (7th Cir. 1971); see also *Hilliard* v. *Williams*, 516 F.2d 1344, 1349–1350 (6th Cir. 1975), vacated in part, 424 U.S. 961 (1976); *Curran* v. *Delaware*, 259 F.2d 707 (3d Cir. 1958).

The fact that different circuits have held that the law was clearly established at different times does not reflect a circuit split on the question whether police violate due process when they deliberately suppress evidence favorable to the accused. These cases did not establish the earliest date that the law was established, but rather whether it was clearly established by the time of the events at issue in each particular case, based on this Court's and the circuit's own cases. See*, e.g.*, *Walker*, 974 F.2d at 299 (clearly established by 1971); *Haley* v. *City of Boston*, 657 F.3d 39, 49 (1st Cir. 2011) (clearly established by 1972); *Carrillo*, 978 F.3d at 1221 (clearly established by 1978); *Newsome* v. *McCabe*, 256 F.3d 747, 752–753 (7th Cir. 2001) (clearly established by 1979); *Geter* v.

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that police who deliberately withhold exculpatory evidence, and thus prevent the prosecutors from complying with *Brady*, violate the due process clause. The Eighth and Eleventh Circuits reached the same conclusions in *Villasana* v. *Wilhoit*, 368 F.3d 976, 979–981 (8th Cir. 2004), and *Porter* v. *White*, 483 F.3d 1294, 1306 (11th Cir. 2007).

Fortenberry, 849 F.2d 1550, 1559 (5th Cir. 1988) (clearly established by 1982); *McMillian*, 88 F.3d at 1569 (clearly established by 1987); *Owens*, 767 F.3d at 401 (clearly established by 1988); *Moldowan*, 578 F.3d at 381–382 (clearly established by 1990). These differences do not constitute a conflict—the Circuits have issued ruling based upon the factbound nature of the cases before them.

D. This Case Presents An Exceptionally Poor Vehicle For Addressing Whether Bad Faith Is Required Because The Record Contains Factual Disputes On Whether The Detectives Acted Deliberately And In Bad Faith By Suppressing Exculpatory Evidence.

The petition should also be denied because there are extensive facts showing that Stoiker acted deliberately and in bad faith by withholding the exculpatory evidence at issue. This is not a case where Stoiker—or any of the other detectives—could be said to have accidentally overlooked exculpatory evidence or negligently withheld evidence from the prosecutor. The record shows that when Vernon failed to identify Jackson and Bridgeman in the lineup and said he did not witness the crime, Staimpel and Stoiker took Vernon into another room, where Staimpel banged on the table, called him a racial epithet, a "liar," and threatened to send his parents to jail for perjury. Pet. App. 25a–29a. After Vernon started crying, Staimpel and Stoiker said they would "fix it," whereupon they left the room and returned

with a fully typed statement containing a fabricated version of events for Vernon to sign. *Ibid.* Stoiker then signed a police report repeating this version of events that he knew was false. *Id.* at 7a. When Terpay and Farmer talked to Vernon again the next day, Vernon told them that he did not witness the crime. *Id.* at 8a. Terpay threatened Vernon again and Vernon agreed to falsely testify against respondents.[15] *Ibid.* All of this was intentionally hidden from the prosecutor and respondents.

Given these factual disputes—which must be resolved at trial—the question whether bad faith is required is, at most, academic because it will not make any difference in this case. And because there is such extensive evidence of egregious misconduct by Stoiker and the other detectives, this case is a poor vehicle for addressing this issue.

Simply put, no reasonable officer in Stoiker's position could have thought that it was constitutional to suppress Vernon's statement that

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[15] Petitioners argue that the suppression in this case could have been avoided by placing all responsibility on the prosecutor. Pet. 30–31 & n.9. Not so. A reasonable jury could find that Stoiker and the other detectives deliberately withheld exculpatory evidence from the prosecutor. This is not a case involving potential negligence or mistake. Prosecutors cannot "fulfill *Brady*'s requirements" (Pet. 31) if officers deliberately do not tell them about exculpatory evidence known only to the officers. Moreover, petitioners mischaracterize General Police Order 19-73, which excluded witness statements from material that officers were required to provide to prosecutors. See Pet. App. 60a.

he did not recognize anyone in the lineup as having participated in the crime. No reasonable officer in Stoiker's position could have thought that it was constitutional to conceal the threats that Staimpel made to Vernon to coerce him into signing the false written statement against respondents. This is not the vehicle through which this Court should review the question whether police must exhibit bad faith in withholding exculpatory evidence.

Petitioners cite to some cases suggesting a difference among the Circuits on the level of culpability required for an officer to be held liable on a claim that he suppressed exculpatory evidence. See, *e.g.*, *Moldowan*, 578 F.3d at 383–388; *Porter*, 483 F.3d at 1306. But this is not a basis for review for several reasons.

First, it has been clearly established for decades that when officers *deliberately* or *intentionally* suppress or withhold exculpatory evidence, they violate a criminal defendant's right to due process. *E.g.*, *Mooney*, 294 U.S. at 112–113; *Pyle*, 317 U.S. at 215–216; *Napue*, 360 U.S. at 269. As discussed above, there is no disagreement among the Circuits on this point. Because the record in this case is replete with evidence of deliberate suppression—the detectives coerced a 12-year-old boy into signing a fabricated statement and giving false testimony against respondents even though he told them that he did not witness the crime and did not recognize anyone in the lineup as a participant in the crime—review by this Court of the level of culpability required would not resolve this case.

Second, it is settled law that the Due Process Clause is violated when the government—whether through the actions of the prosecutor or the police—suppresses exculpatory evidence. See, *e.g.*, *Brady*, 373 U.S. at 87; *Kyles*, 514 U.S. at 438; *Strickler* v. *Greene*, 527 U.S. 263, 288 (1999). "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *United States* v. *Agurs*, 427 U.S. 97, 110 (1976).

Third, reinforcing these holdings are the Court's twin decisions in *Arizona* v. *Youngblood*, 488 U.S. 51 (1988), and *California* v. *Trombetta*, 467 U.S. 479 (1984), which concern the closely related issue of the duty to preserve evidence. These decisions make clear that the important inquiry is whether the withheld evidence is merely potentially useful, or whether the exculpatory nature of the evidence is apparent. In *Youngblood*, the Court held that failure of the police to preserve potentially useful evidence is not a denial of due process absent a showing of bad faith on the part of police. 488 U.S. at 54–59. However, police officers have a duty to preserve evidence when the exculpatory value of the evidence is apparent before its destruction. *Trombetta*, 467 U.S. at 487–489. See *Illinois* v. *Fisher*, 540 U.S. 544, 549 (2004).

Considering all of this together, the Sixth Circuit has followed this guidance:

> [T]he critical issue in determining whether government conduct deprived a criminal

> defendant of a fair trial is the nature of the evidence that was withheld; it emphatically is not the mental state of the government official who suppressed the evidence.

Moldowan, 578 F.3d at 384; *see id.* at 384–386 (discussing *Youngblood* and *Trombetta*). Likewise, the Eighth and Eleventh Circuits look to the nature of the evidence withheld in determining whether bad faith is required. *Villasana* v. *Wilhoit*, 368 F.3d 976, 979–981 (8th Cir. 2004); *White*, 519 F.3d at 814 ("an investigating officer's failure to preserve evidence *potentially useful* to the accused or their failure to disclose such evidence does not constitute a denial of due process in the absence of bad faith") (emphasis added). Thus, there is no meaningful split of authority on this issue. The Circuits simply recognize different standards depending on the nature of the evidence withheld.

E. The Sixth Circuit's Decision Does Not Have Any Impact On Municipal Liability.

Petitioners argue that the Sixth Circuit's decision will have "ruinous" impact on municipalities such as the City of Cleveland because they will have to train on "every potential legal obligation *before* those obligations are announced with clarity." Pet. 33. For three reasons, this argument is wrong.

First, Cleveland already trains its police officers in their obligation to disclose exculpatory evidence.

See R. 102, at 86. They just did not do so in 1975. Pet. App. 67a–70a; see also R. 102, at 101–102 (Cleveland's Rule 30(b)(6) witness explaining that General Police Order 19-73 was in effect in 1975 but is not in effect today).

Second, the Sixth Circuit held years ago, in *Gregory* v. *City of Louisville*, 444 F.3d 725, 753–754 (6th Cir. 2006), that a plaintiff survived summary judgment on his *Monell* claim against a municipality by showing that "officer training failed to address the handling of exculpatory materials" and that "[t]he obligation to turn over exculpatory materials is a significant constitutional component of police duties with obvious consequences for criminal defendants." The Sixth Circuit faithfully applied the standard for deliberate indifference set forth in *City of Canton* v. *Harris*, 489 U.S. 378 (1989). *Gregory*, a 13-year-old case, has not led to "ruinous" liability for municipalities in the Sixth Circuit.

Third, nothing about the Sixth Circuit's decision requires municipalities to provide training to officers on legal obligations before they are clearly established (even assuming this is the correct standard). The court below obviously held that the law was clearly established long before 1975.[16]

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[16] It is incorrect that the Sixth Circuit "precludes municipal liability for violations of rights that have 'yet' to be 'clearly established.'" Pet. 32 (citing *Arrington-Bey* v. *City of Bedford Heights*, 858 F.3d 988, 994 (6th Cir. 2017)). *Arrington-Bey* does not apply when there is an express unconstitutional

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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municipal policy, such as General Police Order 19-73. See Pet. App. 55a–67a; *Arrington-Bey*, 858 F.3d at 994–995 (discussing *Owen* v. *City of Independence*, 445 U.S. 622 (1980), and *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986), under which municipalities are not entitled to qualified immunity). Thus, no ruling from this Court on the second question presented will have any impact on respondents' *Monell* claim against the City of Cleveland for its unconstitutional express policy.

Moreover, petitioners' reference to *Connick* v. *Thompson*, 131 S. Ct. 1350 (2011), proves respondents' point. Pet. 33. Single-incident liability is available where the need for more or different training is so obvious that a plaintiff's injury is a "highly predictable consequence" of deficient training. *Connick*, 131 S. Ct. at 1361. The reason the Court found no single-incident liability for failure to train prosecutors about their *Brady* obligations in *Connick* was because prosecutors are legally trained and already familiar with *Brady*. *Id.* at 1361–1365. The Court expressly distinguished attorneys from police officers due to their legal training. *Id.* at 1361, 1363–1364.

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