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 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

REPLY FOR PETITIONERS

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Respondents nowhere dispute that the first question presented—how courts should identify the state-law survival rules governing §1983 claims—is important and recurring. They do not deny that States have diverse rules governing "the types of claims that survive and the parties as to whom survivorship is allowed." *Robertson* v. *Wegmann*, 436 U.S. 584, 589 (1978); see Pet. 17-20. Nor

do they dispute that federal courts routinely must decide *which* survival rule applies and *how* to identify that rule. Pet. 17-21 & n.4 (citing scores of cases). Respondents' effort to deny the clear circuit conflict is unavailing. Four circuits consistently identify the relevant state survival rule for each §1983 claim by examining the nature of the underlying wrongs. By contrast, the Sixth and Seventh Circuits treat "all §1983 claims" the "same way" regardless of the injuries alleged. Pet. App. 20a.

Respondents resort to insubstantial waiver arguments that defy both the record and the decision below. The Sixth Circuit recognized that petitioners argued against treating the §1983 claims here as personal injuries for survival-of-claims purposes, Pet. App. 19a; addressed the argument at length, Pet. App. 19a-22a; and rejected it, *ibid.* Under 42 U.S.C. §1988, the court held, the general state survival rule for personal injuries governs "'all §1983 claims,'" Pet. App. 21a, even if state law provides a "separate survival rule" for the particular type of claims at issue, Pet. App. 22a.

Respondents' efforts to avoid review of whether *Brady* v. *Maryland*, 373 U.S. 83 (1963), clearly imposed disclosure obligations on individual police officers in 1975 (or even today) likewise fall short.

I. Whether §1988 Requires The Same State-Law Survival Rule To Govern All §1983 Claims Warrants Review

A. Respondents' Procedural Objections Lack Merit

1. This Court ordinarily will not grant review unless the issue was "'pressed *or* passed upon'" below. *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002) (emphasis added). Contrary to respondents' assertion, Opp. 9,

the survival issue was *both* pressed *and* passed upon below.

Respondents concede that the Sixth Circuit "passed upon" the issue. The decision below, respondents admit, declined to "analogiz[e] federal claims to the 'most closely analogous' state cause of action." Opp. 16; see Opp. 13-14. Instead, the court held that "all §1983 claims are subject to the forum State's survival rules for personal injury actions, regardless of the specific * * * injury underlying the §1983 claim." Pet. App. 20a. That alone is fatal under the "pressed *or* passed upon" standard.

Petitioners, moreover, pressed the issue below. They specifically argued that federal courts must look to the "'gravamen'" of §1983 claims in determining the applicable survival rule. Estates C.A. Br. 16-17; see Dist. Ct. Dkt. 75-1 at 4, 7-8 (No. 1:15-cv-989). Petitioners urged that, because the §1983 claims here "aris[e] from * * * wrongful prosecution and imprisonment," they should be treated like state "malicious prosecution" and "wrongful imprisonment" torts, which "do not survive death" under Ohio law. Estates C.A. Br. 10; see *id.* at 15, 17-19; Estates C.A. Rule 28(j) Letter.

Respondents never asserted waiver below. The Sixth Circuit found none. It recognized that petitioners "argue[d]" that, because "state-law claims for malicious prosecution do not survive the death of a party," neither do respondents' "§1983 claims for malicious prosecution." Pet. App. 19a. The Sixth Circuit simply disagreed with petitioners' position that "§1983 claims for malicious prosecution" should be treated like their state-tort analogues for survival purposes. Pet. App. 22a. Instead, the court ruled, "all §1983 claims must be treated" as "'*personal injur[ies] * * * and nothing further*,'" "regardless of the specific" wrong alleged. Pet. App. 20a-21a.

2. Respondents fare no better in accusing petitioners of "switch[ing]" theories about which Ohio Revised Code provision—§2311.21 or §2305.21—prevents claims like malicious prosecution from surviving. Opp. 9-10. The argument is pointless. Under the Sixth Circuit's approach, it makes no difference *which* provision best describes respondents' §1983 claims. The general survival rule for personal-injury actions governs regardless. Pet. App. 21a. Besides, petitioners invoked *both* provisions—and the Sixth Circuit addressed *both*—below. The Ohio Supreme Court, petitioners explained, construed both provisions together to hold that claims for "malicious prosecution"—like respondents'—do not survive. Estates C.A. Br. 14-19 & n.3 (citing *State ex rel. Crow* v. *Weygandt*, 162 N.E.2d 845, 847-849 (Ohio 1959)). Petitioners thus urged that, under Ohio Supreme Court precedent, malicious-prosecution claims are not "'personal injur[ies]'" and do not survive under §2305.21. Estates C.A. Br. 15-19 (citing *Weygandt*, 162 N.E.2d at 847-849); see Pet. App. 19a. The Ohio Supreme Court found confirmation for that result, they explained, in §2311.21, which declares an "action for malicious prosecution shall abate." Estates C.A. Br. 17-18 & n.3.

The Sixth Circuit thus observed: "Defendants also argue" that *Weygandt*—which held "that state-law claims for malicious prosecution do not survive" death—requires the §1983 claims here to abate. Pet. App. 19a. The Sixth Circuit block quoted §2311.21, Pet. App. 20a; admitted the provision is "still in effect," *ibid.*; and noted that *Weygandt* remains "good law," Pet. App. 21a. The court simply deemed Ohio's "separate survival rule for malicious prosecution claims" irrelevant because "all §1983 claims" must be treated as "'*personal injury action[s] * * * and nothing further.*'" Pet. App. 21a-22a.

3. Respondents' contention that this case concerns the "interpretation of Ohio law," Opp. 10-11, is self-evidently wrong for the same reasons. The question presented concerns the application of § 1988—"'a question of *federal* law.'" Pet. App. 21a. The Sixth Circuit thus invoked *this Court's* decisions to hold that the State's general rule for personal injuries governs "'all § 1983 claims.'" Pet. App. 21a. In the Sixth Circuit's estimation, "*Wilson* [v. *Garcia*, 471 U.S. 261 (1985),] and *Owens* [v. *Okure*, 488 U.S. 235 (1989),] tell [courts] what [they] need to know to resolve" survival issues. *Crabbs* v. *Scott*, 880 F.3d 292, 295 (6th Cir. 2018).

The decision below therefore refused to follow the Ohio Supreme Court's holding that claims like "malicious prosecution" abate upon death—even though it was still "good law." Pet. App. 20a-21a. The Sixth Circuit did not disagree with the state supreme court's interpretation of state law. Rather, the Sixth Circuit ruled that Ohio's "separate survival rule for malicious prosecution" cannot be applied to "§ 1983 claims" because "all § 1983 claims" must be treated as "personal injury actions," "regardless of the specific * * * injury" alleged. Pet. App. 20a, 22a.

B. The Courts of Appeals Are Divided

The courts of appeals are in conflict. The Sixth Circuit applies the forum State's general survival rule for personal injuries to *all* § 1983 claims, ignoring the specific wrongs alleged. That is "[o]ne way" of applying § 1988. *Caine* v. *Hardy*, 943 F.2d 1406, 1410-1411 (5th Cir. 1991) (en banc). "Another way" requires applying the specific state survival rule for the "most analogous" state tort. *Ibid.* At least four other circuits follow that latter approach, examining the specific wrongs alleged to determine the applicable rule. Pet. 13-14.

Respondents' half-hearted effort to reconcile the cases confirms the conflict. In *Parkerson* v. *Carrouth*, 782 F.2d 1449, 1451-1453 (8th Cir. 1986), the Eighth Circuit declined to apply Arkansas's general survival rule for "wrongs done to the person" to §1983 claims. It instead held the claims abated because state law excluded "claims for malicious prosecution" (among others). *Ibid.* Respondents agree the court did exactly that. Opp. 17. They argue, however, that Arkansas law requires personal "'wrongs'" to involve "tangible or physical injury." *Ibid.* That is a non-sequitur. The Eighth Circuit held that the plaintiff's §1983 claims abated because they were for malicious prosecution. 782 F.2d at 1451-1452. The court rejected the plaintiff's argument that her claims differed from most malicious-prosecution claims, explaining that her claims likewise raised issues of "probable cause" and "malice." *Id.* at 1452. That approach cannot be reconciled with the Sixth Circuit's approach of ignoring the nature of the alleged wrongs in favor of treating "all §1983 claims" as personal injuries. Pet. App. 20a.

Respondents' effort to distinguish *Pietrowski* v. *Town of Dibble*, 134 F.3d 1006 (10th Cir. 1998), fares worse still. Respondents concede that *Pietrowski* determined a §1983 claim abated by "analogiz[ing]" it "to a state-law malicious-prosecution claim," Opp. 19—the precise approach the Sixth Circuit rejects. Respondents urge that another Tenth Circuit decision, addressing Title VII, parts ways with *Pietrowski*. *Ibid.* But §1988(a), by its terms, does not apply to Title VII. And the Tenth Circuit has attributed the cases' differing outcomes to the fact that Oklahoma law supplies different survival rules for

different claims. See *Hopkins* v. *Okla. Pub. Emps. Ret. Sys.*, 150 F.3d 1155, 1159 & n.3 (10th Cir. 1998).[1] That cannot be reconciled with the Sixth Circuit's method of treating "all §1983 claims" alike. Pet. App. 21a.

Likewise, in *Estate of Gilliam* v. *City of Prattville*, 639 F.3d 1041, 1046 (11th Cir. 2011), the Eleventh Circuit determined the "applicable Alabama survivorship law" for unfiled §1983 claims by looking to the underlying injury, asking whether the challenged conduct caused the plaintiff's death. See also *Andrews* v. *Neer*, 253 F.3d 1052, 1056-1058 (8th Cir. 2001) (similar). Respondents observe that the court ultimately applied the general survival rule for personal injuries. Opp. 18. But the Eleventh Circuit's inquiry—examining the specific injury alleged—would have been irrelevant under the Sixth Circuit's rule. Pet. 14, 24-25. That rule would have prevented the Eleventh Circuit from "stress[ing]" that the applicable survival rule would have been different if the injury were different, *i.e.*, if the challenged conduct had caused death. 639 F.3d at 1046-1047 nn.8-9.

Finally, respondents seek to distinguish *Brown* v. *Town of Cary*, 706 F.3d 294 (4th Cir. 2013), by arguing it "merely interpreted" North Carolina law. Opp. 19. But respondents ignore how the Fourth Circuit determined whether North Carolina's "default" survival rule, or a state-law "exception," governed: It "*[a]nalogiz[ed]*" the §1983 claims "to a *corresponding action* under North Carolina law." 706 F.3d at 300 (emphasis added). Respondents also ignore *Dean* v. *Shirer*, 547 F.2d 227, 229-

[1] *Pietrowski* hardly stands alone in examining the specific wrongs alleged. See *Oliveros* v. *Mitchell*, 449 F.3d 1091, 1093-1095 (10th Cir. 2006); *Hopkins*, 150 F.3d at 1159.

230 (4th Cir. 1976), which asked whether a § 1983 claim was "more nearly akin to slander" (which did not survive under state law) or "allied more closely to false imprisonment or assault" (which did). The Sixth Circuit's approach of treating "all § 1983 claims * * * the same" could not be more different. Pet. App. 21a.

Respondents seem to object that some courts have not used the Fifth Circuit's phrase "most analogous state cause of action." Opp. 17-19. It makes no difference whether they use that phrase, use phrasing like "most nearly akin," or apply the approach without labeling it. The fact remains that the Sixth Circuit and the Seventh Circuit take one approach to survival—treating all § 1983 claims uniformly regardless of the underlying conduct—while four other circuits follow the opposite approach.[2]

C. The Sixth Circuit's Decision Departs from the Statutory Text

Respondents never attempt to reconcile the Sixth Circuit's approach with § 1988's text. They do not even quote § 1988. That is telling: Section 1988 provides a "quite clear[]" directive that state law governs survival (absent conflict with federal law). *Robertson*, 436 U.S. at 593. Section 1983 actions cannot be maintained "in disregard of the state law to which § 1988 refers." *Ibid.* Construing § 1988 to require courts to ignore specific state survival rules defies that directive. Pet. 21-23. The Sixth Circuit's approach also conflicts with general

[2] Respondents nowhere dispute that the Seventh Circuit appears "internally divided," Pet. 16 n.2, having sometimes held that "'the most closely analogous state law * * * determine[s] survivability,'" *Bentz* v. *City of Kendallville*, 577 F.3d 776, 778 (7th Cir. 2009).

principles and produces incongruous results. Pet. 23-25 & n.6. Respondents address those points with silence.

Respondents' only answer—that *Wilson* and other decisions require uniform statute-of-limitations rules in light of § 1988's "purpose" and "'practical considerations,'" Opp. 12-13—is no answer. Respondents all but ignore *Robertson*. *Robertson* observed that survival rules vary widely for different "'types of claims,'" embraced that variation, and applied the state-law rule that best fit the § 1983 claims. Pet. 18, 22-23. Respondents do not explain how *Robertson*'s application of survival rules that would allow "most"—but not all—§ 1983 claims to survive is consistent with an approach that requires *all* claims to be treated the same. Opp. 15. And respondents ignore critical differences between the statutes-of-limitations and survival contexts. See Pet. 25-26. Regardless, any tension between *Robertson* and *Wilson* underscores the need for this Court's review.

II. THE *BRADY* ISSUE WARRANTS REVIEW

Whether clearly established law—or any law—imposes *Brady* obligations on police officers (either in 1975 or now) likewise warrants review.

A. The Circuits Disagree Whether Clearly Established Law Extends *Brady* to Police Officers

This Court has never held that *Brady* extends to police officers. Unlike the Sixth Circuit below, other circuits have often rejected any such extension, or found it not clearly established. Pet. 27-28. Respondents therefore try to change the topic. Opp. 24-26. They insist that lower courts uniformly hold that "deliberate[]" and "intentional[]" misconduct that produces wrongful convictions—like fabricating evidence and suborning perjury—violates due process. Opp. 21, 24-25, 28. But

the petition does not seek review for intentional-misconduct claims (*e.g.*, fabrication of evidence). Pet. 27 n.7. Rather, the question presented is whether clearly established law—or any law—extends *Brady*'s "'*affirmative no-fault obligation[s]*'" from prosecutors to police officers, and did so in 1975. Pet. 26-28 (emphasis added).

1. On that question, the courts are divided. The Fourth, Eighth, and Eleventh Circuits have declined to extend *Brady*'s no-fault obligations to police officers. Pet. 27. Although those courts may recognize general due-process claims for "deliberate[]" misconduct, Opp. 24-25 n.14, those are not "pure *Brady* claim[s]," *Porter* v. *White*, 483 F.3d 1294, 1306 (11th Cir. 2007). "*Brady*[] makes the good or bad faith" of officials "irrelevant." *Arizona* v. *Youngblood*, 488 U.S. 51, 57 (1988).

Respondents concede (at 27) that the Third Circuit rejected the notion that "clearly established" law extended *Brady*'s no-fault obligations to police officers long ago. So has the First Circuit. *Haley* v. *City of Boston*, 657 F.3d 39, 49 (1st Cir. 2011).[3] Those decisions are not "fact-bound." Opp. 26. They read this Court's decision in *Kyles* v. *Whitley*, 514 U.S. 419 (1995), as "antithetic to any suggestion" that police officers had clearly established no-fault *Brady* obligations before 1995. *Haley*, 657 F.3d at 48-49; see *Gibson* v. *Superintendent of N.J. Dep't of Law & Pub. Safety – Div. of State Police*, 411 F.3d 427, 443-444 (3d Cir. 2005). That reasoning—which respondents nowhere address—cannot be reconciled with the decision below. Pet. 27-28.

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[3] Trying to distinguish *Haley*, respondents point to its "'*[d]eliberate* concealment'" analysis. Opp. 21 n.11 (emphasis added). They ignore the court's separate holding that no clearly established law imposed *Brady*'s "no-fault obligation[s]" on police officers. 657 F.3d at 48-49.

2. This Court's resolution of the question presented is of vital importance. The *Brady* claims before the Sixth Circuit required no more than that police officers "'inadvertently'" fail to disclose exculpatory evidence (*i.e.*, no-fault claims). Pet. App. 26a. The Sixth Circuit held that clearly established law extended such duties to police officers as early as 1975. Pet. App. 46a. The court thus endorsed *Brady* claims against Officer Stoiker because he might have been "present" for events or had "possible awareness" of undisclosed exculpatory evidence. Pet. App. 27a-28a. It is hard to imagine anything more "fundamental to the further conduct of the case" than whether proof of intentional misconduct is required. *United States* v. *Gen. Motors Corp.*, 323 U.S. 373, 377 (1945). Petitioners' immunity against no-fault *Brady* claims would be "'effectively lost'" if they go to trial. *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009). The question presented also controls the City of Cleveland's liability. Because the only remaining claims against the City are for officer *Brady* violations, Pet. App. 53a-72a, there is no municipal liability unless *Brady* extends to police officers, Pet. 31 n.9.[4]

Respondents would prefer to focus on intentional-misconduct claims (*e.g.*, fabrication of evidence). But those distinct claims were addressed by the Sixth Circuit separately. Compare Pet. App. 29a-32a, 48a-51a, with Pet. App. 25a-29a, 44a-48a. They are not at issue here. The question is whether every reasonable police officer would have understood that it was his personal obligation

[4] Moreover, if the law was not clear, the City cannot be liable for any failure to train. Pet. 31-32. Respondents cite no law holding that a municipality's failure to train on duties not yet clear constitutes deliberate indifference.

to ensure *Brady* disclosures were made. *Kyles*—like this Court's prior decisions—emphasizes that "the prosecutor bears the responsibility" for implementing *Brady*. *Jean* v. *Collins*, 221 F.3d 656, 660-661 (4th Cir. 2000) (Wilkinson, C.J., concurring). *Kyles* held only that police knowledge "could be imputed to the prosecutor." *Gibson*, 411 F.3d at 443. Respondents do not explain how police officers in 1975 would know that *Brady*'s no-fault obligations extended to them when even the Sixth Circuit still thought otherwise in 2004. Pet. 31.[5]

B. Respondents' Waiver Argument Is Meritless

Respondents again argue waiver. Opp. 20. But petitioners argued below that *Brady*'s requirements did not clearly extend to police officers in 1975. See Lamendola C.A. Br. 43-45. And respondents do not deny the Sixth Circuit passed upon—and rejected—that argument. See Pet. App. 46a-48a. Respondents assert that petitioners "never raised" that, "even today," no clearly established law extends *Brady* to police officers. Opp. 20. But the Sixth Circuit declared that petitioners had "argue[d] that * * * it is not clearly established *even now* that officers are under a *Brady* obligation to disclose their own or fellow officers' fabrication of evidence." Pet. App. 47a (emphasis added); see Lamendola C.A. Br. 43-44. The Sixth Circuit simply held otherwise. Pet. App. 46a-48a.

Nor have "petitioners conceded" that *Kyles* "clearly established" that "officers have an obligation to disclose exculpatory evidence." Opp. 20. The cited filing, see Opp. 8, argued the opposite: "Even" in *Kyles*, petitioners

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[5] Many of respondents' cases (at 21-22 & nn.12-13, 29-30) are of "no use" because they postdate the challenged conduct. *Brosseau* v. *Haugen*, 543 U.S. 194, 200 n.4 (2004).

stressed, "the Supreme Court held that the responsibility to disclose exculpatory evidence remained with the prosecutor, *not* the police." Dist. Ct. Dkt. 99 at 15 (No. 1:15-cv-989) (emphasis added).

CONCLUSION

The petition should be granted.

Respectfully submitted.

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