Case No. __________

In the

Supreme Court of the United States

ERIN SHEPHERD and TERRY REED,

Petitioners,

v.

ANGELA STUDDARD,

Respondent.

SECOND APPLICATION FOR STAY OF DISTRICT COURT PROCEEDINGS PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT AND CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT:

Shelby County, Tennessee Sheriff's Deputies Erin Shepherd and Terry Reed have petitioned the Supreme Court for interlocutory review (Case No. 19-609) to determine whether qualified immunity protects them from having to endure a jury trial. Meanwhile, as their Petition is pending before the Supreme Court, the District Court has set the matter for trial. Reed and Shepherd moved the District Court to stay the trial—now scheduled for March 9, 2020—because qualified immunity is immunity not just from damages, but also immunity from suit, and is effectively lost if a case goes to trial erroneously. The District Court denied the requested stay. Pursuant to 28 U.S.C. § 2101,[1] and in light of the Sixth Circuit's recent ruling in *Reich v. City of Elizabethtown, Kentucky*, No. 18-6296, 2019 WL 6907382 (6th Cir. Dec. 19, 2019), Reed and Shepherd requested a stay from the Sixth Circuit, which the Sixth Circuit denied on January 2, 2020.[2] Thus, Reed and Shepherd now apply to this Court for a stay, pending the resolution of their Petition.

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[1] 28 U.S.C. § 2101(f) provides in relevant part that "[i]n any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court."

[2] Before filing with the U.S. Court of Appeals for the Sixth Circuit, Reed and Shepherd attempted to apply to this Court for a stay. This Court's Clerk rejected their (First) Application, informing their undersigned counsel that they must first request a stay from the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's mandate is included as Appendix A. The District Court's Order Denying Defendants' Motion for Stay is included as Appendix B. The Sixth Circuit's Order Denying Defendant's Motion for Stay is included as Appendix C.

JURISDICTIONAL STATEMENT

The District Court had and has jurisdiction pursuant to 28 U.S.C. § 1331. The Court of Appeals entered its judgment on August 12, 2019. This Court has jurisdiction to hear the underlying Petition for Writ of Certiorari under 28 U.S.C. § 1254(1). The Justice has jurisdiction to hear this Application for Stay pursuant to 28 U.S.C. § 2101.

STATEMENT OF THE CASE

A. Procedural History

Plaintiff Angela Studdard brought suit as Edmond Studdard's next of kin, administrator *ad litem*, and personal representative against Shelby County Government, Erin Shepherd, and Terry Reed (and other defendants, since dismissed from the case) in state court, alleging violations of Mr. Studdard's Fourth Amendment rights under 42 U.S.C. § 1983 stemming from their use of deadly force on July 7, 2016. (*See* RE 1). The Defendants removed the case to the District Court, after which Plaintiff filed an Amended Complaint. (RE 33). Defendants filed an Answer, in which Reed and Shepherd asserted qualified immunity. (RE 38, PageID# 145). After the conclusion of discovery, Shelby County filed a Motion for Summary Judgment (RE 90), as did Reed and Shepherd, who again asserted they were entitled to qualified immunity. (RE 89).

The District Court found that Reed and Shepherd were not entitled to qualified immunity, and denied their summary judgment motion.[3] (RE 153). Reed and Shepherd filed an interlocutory appeal to the Sixth Circuit. (RE 154). While their interlocutory appeal was pending, the District Court stayed all proceedings. (RE 178). After briefing and oral argument, the Sixth Circuit affirmed the ruling of the District Court on August 12, 2019, although based on different case precedent than that relied on by the District Court. (RE 179). The Sixth Circuit issued its mandate on September 3, 2019. (RE 180).[4]

Pursuant to Supreme Court rules, Reed and Shepherd had 90 days to file a Petition for Writ of Certiorari with the Supreme Court. During that period, no new activity occurred in the District Court, and Reed and Shepherd timely filed their Petition on November 8, 2019 (docketed as Case No. 19-609). Notice of the filing was filed with the District Court on November 14, 2019. (RE 181). Twenty days later, the District Court entered an Order Setting Status Conference for Trial Dates (RE 182), scheduling a status conference "for the purpose of setting the trial [and related] dates." (*Id.* at PageID# 2835).

Reed and Shepherd moved the District Court to continue the previously-ordered stay pending a ruling from the Supreme Court on their Petition for Writ of Certiorari. (RE 184). They asserted, once again, that qualified immunity is more than

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[3] The District Court granted summary judgment in favor of Shelby County on all of Plaintiff's claims against it. (RE 153).

[4] Neither the mandate nor the Court's substantive order affirming the District Court ruling dictated that Reed and Shepherd would be required to proceed to trial before having time to seek relief from the Supreme Court. And, pursuant to 6 Cir. I.O.P. 41, the "issuance of a mandate does not affect a party's right to seek a writ of certiorari." Thus, Reed and Shepherd did not seek a stay of the Sixth Circuit's mandate at that time.

just an immunity from damages—it is an immunity from suit, and may be effectively lost if the case proceeds to trial without qualified immunity being decided. The day before the status conference, the District Court denied Reed and Shepherd's motion to continue the stay. It ruled that, if a stay were to issue, it would have to come from a higher court:

> The language of [28 U.S.C.] § 2101(f) excludes the district courts from issuing a stay of a mandate by the Court of Appeals while an application to the Supreme Court for certiorari is pending. The Sixth Circuit's Judgment "ordered that the judgment of the district court is affirmed." ([RE] No. 179 at PageID 2831.) In the Order, Sixth Circuit explained that "Studdard's claim deserves resolution by a jury." ([RE] No. 179 at PageID 2829.) Because the Sixth Circuit has issued a mandate ordering a jury trial, the Court is required to comply and cannot grant a further stay. If Defendant desires a further stay preventing the execution of the mandate for the case to proceed in this matter, it is the Sixth Circuit or the Supreme Court which must issue the order, not this court.

(RE 186, at PageID 2939, Appendix B).

The District Court held the status conference and set the trial to begin on March 9, 2020. (RE 187, 188). Thus, Reed and Shepherd find themselves arguing to this Court that they are protected from having to go to trial based on their qualified immunity, while simultaneously being ordered to go to trial in the District Court. Reed and Shepherd filed a Motion with the Sixth Circuit seeking a stay on December 31, 2019, which the Court denied on January 2, 2020 (Appendix C). Reed and Shepherd therefore respectfully ask this Court to stay all District Court proceedings pending disposition of their Petition for Writ of Certiorari.

B. Facts Relevant to the Petition for Certiorari

On July 7, 2016, Deputies Erin Shepherd and Terry Reed came face-to-face with a man covered in blood, holding a knife up to his neck and refusing to drop it, and yelling at them to shoot him. That man, Edmond Studdard, had cut his own wrists minutes earlier. The deputies pleaded with him to drop the knife; he refused. Three of the four deputies who could see Studdard perceived him as being no more than ten or fifteen feet from them, and the fourth deputy could not estimate how far he perceived Studdard as being from those officers. At that perceived distance and perceiving Studdard as walking toward them, Shepherd and Reed shot a total of five times, striking Studdard twice and ceasing fire as soon as he fell. They immediately rushed to him to secure the knife and to render medical aid. Mr. Studdard did not die on the scene, likely due to the deputies' quick actions in rendering aid. Tragically, he died two months later at the hospital. Nonetheless, the facts in the record make clear that Shepherd and Reed acted reasonably, even if based on a mistaken perception.

The District Court found that Reed and Shepherd were not entitled to qualified immunity. (RE 153). On interlocutory appeal, the Sixth Circuit affirmed the ruling of the District Court, but did not rely on any of the cases the District Court cited. Instead, the Sixth Circuit relied on a single opinion—*Sova v. City of Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998)—to hold both that Reed and Shepherd's actions were objectively unreasonable and that their purported violation was clearly established. Reed and Shepherd timely submitted their Petition for Writ of Certiorari to the Supreme Court.

In their Petition, Reed and Shepherd ask the Supreme Court to consider three issues related to qualified immunity. First, they ask the Court to clarify what level of factual specificity is necessary in given case law to put officers on notice that what they are doing is clearly established as unconstitutional. As it pertains to this case, in assessing the reasonableness of Reed and Shepherd's shooting of a suspect unencumbered and on open ground, the Court of Appeals relied solely on one earlier Sixth Circuit case—*Sova*—in which officers shot a suspect through a door frame inside a building. Reed and Shepherd submit this was legal error.

Second, Reed and Shepherd ask the Court to clarify that one witness's lack of knowledge as to whether Studdard was walking, in and of itself, does not create a triable issue of fact. In this case, all but one of the deputies on the scene who could see Studdard testified that Studdard was walking toward them with a knife. Deputy Kyle Lane testified that he did not see Studdard walking, but "didn't see him ***not*** walking either. I was too busy focused on that knife that he had in his hand. ***I saw he was moving.***" (Lane Dep., RE 89-5, at PageID 565) (emphasis added); *accord*, Lane Dep., RE 89-5, at PageID 586) ("I can't – I don't remember if he was walking, or if he was swaying. I just – he was moving. That's all I can say."). Reed and Shepherd submit that Lane's lack of knowledge as to this fact, alone, is not sufficient to create a triable issue of fact. *See generally Scott v. Harris*, 550 U.S. 372 (2007).

Finally, Reed and Shepherd ask the Court to assess whether a law enforcement officer remains entitled to qualified immunity notwithstanding an honest mistake of fact by the officer. Qualified immunity gives officers "ample room for mistaken

judgments . . . ." *Malley v. Briggs*, 475 U.S. 335, 343 (1986). This is true whether the mistake is a mistake "of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citation omitted). Here, Reed and Shepherd perceived Studdard as coming at them with a knife at a distance of no more than 10 feet. Deputy Pair, who did not fire, perceived the distance as 15 feet. No witness on the scene testified that Studdard appeared to be farther away from Reed and Shepherd than that during the 30-second encounter. With the aid of 20/20 hindsight and a measuring tape, the Plaintiff's evidence suggests that Studdard may have actually been 34 feet away—9 feet farther than the 25-foot rule on which the deputies were trained.[5] In other words, Reed and Shepherd (and Pair) (at least for purposes of summary judgment) made a mistake of fact as to the distance. Though the Supreme Court has not squarely addressed the issue, Reed and Shepherd submit it is precisely the kind of mistake of fact qualified immunity is designed to protect. *See Henry v. Purnell*, 652 F.3d 524, 552-53 (4th Cir. 2011) (Shedd, J., dissenting) (courts should not equate an officer's honest mistake "with intentional misconduct of the worst sort and [ ] permit a jury to do the same.").

[5] The Plaintiff sued Shelby County Government under (among other claims) a failure to train theory. As noted above, the District Court granted Shelby County summary judgment on all claims, including the failure to train claim. (RE 153, at PageID 2572-77).

REASONS FOR GRANTING THE APPLICATION FOR STAY

Qualified immunity is immunity from suit, not just liability. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). It is "effectively lost if a case is erroneously permitted to go to trial." *Id.* And forcing an officer to go to trial when he or she would later be found entitled to qualified immunity constitutes a harm. *See Behrens v. Pelletier*, 516 U.S. 299, 315-16 (1996) (Breyer, J., dissenting).

To obtain a stay pending a petition for writ of certiorari, an applicant must show (1) a reasonable probability that the Supreme Court will consider the case on the merits; (2) a fair prospect that a majority of the Court will vote to reverse the decision below; and (3) a likelihood that irreparable harm will result from the denial of a stay. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Those factors are all satisfied here, particularly in light of the Sixth Circuit's recent ruling in *Reich v. City of Elizabethtown, Kentucky*, No. 18-6296, 2019 WL 6907382 (6th Cir. Dec. 19, 2019).

As to the first factor, this is a qualified immunity case, and the Supreme Court has reviewed at least one such case in several recent terms. *See City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500 (2019); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018*); D.C. v. Wesby*, 138 S. Ct. 577 (2018); *White v. Pauly*, 137 S. Ct. 548 (2017); *City & County of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765 (2015); *Mullenix v. Luna*, 136 S. Ct. 305 (2015). And the Court is especially mindful of qualified immunity cases involving the use of deadly force. *See Kisela; White; Sheehan; Mullenix.* Use of deadly force is perhaps one of the most nationally-debated issues surrounding law enforcement, and the law continues to develop as to the circumstances under which

officers have qualified immunity or, conversely, may be held personally liable for the use of deadly force.

Moreover, the Sixth Circuit's recent opinion in *Reich v. City of Elizabethtown, Kentucky*, No. 18-6296, 2019 WL 6907382 (6th Cir. Dec. 19, 2019) suggests that the ruling in *Studdard* is, at the very least, subject to disagreement among federal judges. Less than three weeks ago, the *Reich* Court, in a 2-1 opinion, found that officers were entitled to qualified immunity after shooting a suspect armed with a three-inch knife who may have been as far as ***thirty-six feet*** away, who may have been taking a step toward the officers or may have actually been turning and retreating ***away*** from them, and who said "you're going to have to kill me mother****er."[6] Nonetheless, the *Reich* Court found that "[s]hooting [the suspect] from a distance of twenty-five to thirty-six feet would ***not have violated*** any clearly established right." *Id.* at *8 (emphasis added).[7]

In dissent, Judge Moore specifically addressed *Reich*'s implication to *Studdard* (and *Sova*, the case the *Studdard* Court relied on to deny Reed and Shepherd qualified immunity), reasoning: "If anything, Reich's testimony that Defendants essentially shot Blough in the back, as he turned to run away, makes the officers' actions even ***more*** unreasonable than the actions at issue in *Sova* and *Studdard*." *Id.* at *16 (Moore, J., dissenting) (emphasis in original). Under Judge Moore's reasoning, if the officers in *Reich* were entitled to qualified immunity, Reed and Shepherd are,

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[6] Studdard was two feet closer to Reed and Shepherd than the suspect in *Reich* under even the most generous view of the facts in Plaintiff's favor. And unlike in *Reich*, there is absolutely no evidence to suggest that Studdard was facing away from or retreating away from Reed and Shepherd when shot.
[7] The Sixth Circuit recommended the *Reich* opinion for full-text publication.

too. Reed and Shepherd are caught in the middle of a judicial debate about the appropriate level of force against a knife-wielding suspect. And as the Supreme Court has recognized, if "judges [ ] disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999). The recent *Reich* ruling and its dissent indicate, at the very least, that Reed and Shepherd's actions were not unconstitutional beyond debate.

Second, there is at least a fair prospect that the majority of the Supreme Court would vote to reverse the decision below. Though decided after the shooting in this case, the Court's ruling in *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) suggests at least a fair chance that the Court might even summarily reverse the Sixth Circuit's ruling here. The facts in *Kisela* were arguably a closer call as to whether qualified immunity was appropriate than the facts presented here. Officers in *Kisela* shot a woman who was in her yard holding a kitchen knife and standing near her roommate. *Id.* at 1150-51. As the dissent recognized, "at the time of the shooting: Hughes stood stationary about six feet away from Chadwick, appeared 'composed and content,' and held a kitchen knife down at her side with the blade facing away from Chadwick." *Id.* at 1155 (Sotomayor, J., dissenting). The *Kisela* Court found qualified immunity and summarily reversed the ruling of the Ninth Circuit Court of Appeals on the basis that the officers faced a situation that had not been specifically addressed by the Supreme Court or the Ninth Circuit. The situation Reed and Shepherd found themselves in

here was arguably more volatile than the situation in *Kisela*. And, as with the first factor, the recent ruling in *Reich* casts new doubt on the ruling in *Studdard*.

Further, in her Brief in Opposition to Reed and Shepherd's Petition, Respondent failed to articulate responses to the legal issues Reed and Shepherd raised. Pursuant to this Court's Rule 15.2, arguments not addressed in the opposition-to-certiorari brief may be deemed waived. *See D.C. v. Wesby*, 138 S. Ct. 577, 584 n.1 (2018). Thus, the Court may find that Respondent waived the right to respond to the three legal issues Petitioners submitted. Specifically, Respondent failed to articulate a response to the question of what level of factual specificity is required to clearly establish a right for qualified immunity purposes—in this case, whether a case about an armed suspect in a building governs a factual scenario where a suspect is on open ground. Respondent also failed to articulate in any detail a response to Petitioner's argument that an officer's factual mistake as to the distance between herself and a knife-wielding suspect could give rise to qualified immunity. And finally, while Respondent quarrels about facts she claims are found in the record, she does not respond to Petitioner's request that the Court consider the legal question of whether a witness's lack of knowledge can create a triable issue of fact. Because Respondent's Brief in Opposition fails to articulate responses to these legal arguments, there is a fair prospect that the Petitioners may prevail.

Third and finally, there is a likelihood Shepherd and Reed will be irreparably harmed if a stay is not granted. As Justice Breyer recognized in dissent in *Behrens v.*

Pelletier, 516 U.S. 299 (1996), forcing an officer to go to trial when he or she would later be found entitled to qualified immunity constitutes such harm:

> The [*Mitchell*] Court concluded that the District Court order, by sending the case to trial, could cause the litigant what (in terms of the immunity doctrine's basic trial-avoiding purpose) would amount to an important harm. Post-trial appellate review would come too late to avoid that harm.

Id. at 315-16 (Breyer, J., dissenting) (internal citations to *Mitchell* omitted).

If Reed and Shepherd are entitled to qualified immunity, that immunity protects them from not only damages, but from going through a trial. Proceeding through a trial while their assertion of qualified immunity may be reviewed by the Supreme Court essentially defeats the purpose of qualified immunity. Moreover, beyond the burdensome nature of litigation that impacts all litigants, the stakes in this case are even higher. Reed and Shepherd fired their weapons in self-defense, and the events that day ultimately led to Edmond Studdard's death. The result is not what Reed and Shepherd wanted, and it is not something they should have to relive under the present status of the proceedings. If they are entitled to qualified immunity, they should be protected from having to endure a trial, currently set just over two months from now.

CONCLUSION

The District Court has set the matter for trial on March 9, 2020. The District Court ruled that it is without authority to stay the proceedings and that such a stay can only come from a higher court. Based on the foregoing, Reed and Shepherd

request that the proceedings in the District Court be stayed for a reasonable time pending disposition of their Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 7th day of January, 2020, the foregoing is being sent via Federal Express Next Day for service on all persons registered in connection with this case including:

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Filed: September 03, 2019

Mr. Thomas M. Gould
U.S. District Court
for the Western District of Tennessee
167 N. Main Street
Room 242 Clifford Davis and Odell Horton Federal Building
Memphis, TN 38103

Re: Case No. 19-5084, *Angela Studdard v. Shelby County, TN, et al*
Originating Case No. 2:17-cv-02517

Dear Mr. Gould:

Enclosed is a copy of the mandate filed in this case.

Sincerely yours,

s/Patricia J. Elder
Senior Case Manager

cc: Mr. John Marshall Jones
Mr. Daniel Alan Seward
Mr. Emmett Lee Whitwell

Enclosure

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 19-5084

Filed: September 03, 2019

ANGELA STUDDARD, individually and as lawful wife, next of kin, administrator ad litem and personal representative for Edmond Studdard, deceased, and Estate of Edmond Studdard

Plaintiff - Appellee

v.

SHELBY COUNTY, TN, et al.

Defendant

and

ERIN J. SHEPHERD, individually and as employee or agent of Shelby County, TN; TERRY I. REED, individually and as employee or agent of Shelby County, TN

Defendants - Appellants

MANDATE

Pursuant to the court's disposition that was filed 08/12/2019 the mandate for this case hereby issues today.

COSTS: None

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ANGELA STUDDARD, individually and as next of kin, administrator ad litem and personal representative of EDMOND STUDDARD, deceased, and estate of EDMOND STUDDARD, Plaintiff, v. SHELBY COUNTY, TENNESSEE; ERIN J. SHEPHARD, in her individual capacity; and TERRY I. REED, in his individual capacity, Defendants.	)	No. 17-cv-2517-JPM-tmp

ORDER DENYING DEFENDANTS' MOTION FOR STAY

Before the Court is Defendants' Motion to Continue Stay Pending Ruling from the United States Supreme Court ("Motion to Continue Stay") filed on December 11, 2019. (ECF No. 184.) The Plaintiff submitted a Response in Opposition to the Motion on December 11, 2019. (ECF No. 185.) For the reasons stated below, the Motion to Continue Stay is **DENIED**.

I. Background

This matter was stayed pending interlocutory appeal to the Sixth Circuit on February 22, 2019. (ECF No. 178.) The pretrial hearing in this matter was set for February 27, 2019. (ECF No. 177.) The Sixth Circuit has issued its order and corresponding mandate in this case. (ECF Nos. 179, 180.) The Sixth Circuit held that "Studdard's claim deserves resolution by a

jury." (ECF No. 179 at PageID 2829.) Accordingly, the Court set a telephonic status conference for Friday, December 13, 2019 at 3:30 p.m. for the purpose of setting the trial dates. (ECF Nos. 182-83.)

The Defendants filed a petition for a writ of certiorari on November 8, 2019. (ECF No. 181.) The Clerk of the United States Supreme Court docketed the petition on November 12, 2019. (Id.) The notice was docketed in this case file on November 14, 2019. (Id.)

II. Legal Standard

28 U.S.C. § 2101(f) sets out the applicable federal law regarding the staying of cases pending a writ of certiorari to the United States Supreme Court. Section 2101(f) provides as follows:

> In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

28 U.S.C. § 2101(f).

The Sixth Circuit has not specifically addressed the issue of a district court's power to stay the execution of Sixth Circuit mandates pending United State Supreme Court review of filed writs of certiorari. Hi-Lex Controls, Inc. v. Blue Cross & Blue Shield, No. 11-12557, 2014 U.S. Dist. LEXIS 111023, at *7 (E.D. Mich. Aug. 12, 2014). However, the district courts within the Sixth Circuit "have consistently relied upon § 2101(f) for the rule that district courts lack

jurisdiction to stay the execution of an appellate court judgment." Id., see also Cole v. City of Memphis, No. 2:13-cv-02117-JPM-dkv, 2017 U.S. Dist. LEXIS 27789, at *6 (W.D. Tenn. Feb. 28, 2017).

As this Court ruled in Cole,

> It is one thing for a district court to grant a stay of its own judgment under Rule 62(d) pending the resolution of an appeal to the Court of Appeals. . . . It is quite another thing for [a district] court to grant a motion to stay under the present circumstances. The district court judgment has been superseded by the judgment of the Court of Appeals, even though the latter affirms the district court judgment in all respects. The defendants will be asking the Supreme Court to overturn the judgment of the Court of Appeals, not that of the district court.

Id. (citing William A. Graham Co. v. Haughey, 794 F. Supp. 2d 566, 568-69 (E.D. Pa. 2011)).

The Court is compelled to "proceed in accordance with the mandate and the law of the case as established by the appellate court." Hanover Ins. Co. v. Am. Eng'g. Co., 105 F.3d 306, 312 (6th Cir. 1997). It is inappropriate for a district court to evaluate "the likelihood that the ruling of a higher court will be accepted for review by the Supreme Court; rather, that function is properly performed by the court of appeals or the Supreme Court, as contemplated by § 2101(f)." United States v. Lentz, 352 F. Supp. 2d 718, 726 (E.D. Va. 2005) (internal quotation marks omitted). "Any stay of proceedings must be sought in the Court issuing the mandate rather than the Court receiving it." United States v. Shaw, 115 F. Supp. 532, 532-33 (D.D.C. 1953)

III. Analysis

Defendants argue that the Supreme Court may grant their petition in light of recent cases selected. (ECF No. 184 at PageID 2840-41). The Defendants also argue that qualified immunity, as a legal doctrine, includes not just immunity from liability but also immunity from

suit. (Id.) Defendants argue that, if the Supreme Court ruled on their case and overturned the Sixth Circuit decision, then the Defendants would be unjustly subjected to a jury trial. (Id.)

The Plaintiff provides nine statements in opposition. (ECF No 185 at PageID 2935-36.) Plaintiff's argue that the Motion to Continue Stay was filed without a petition for rehearing or rehearing en banc, was filed more than a month after the petition itself was filed, and the case has been pending for long enough and needs resolution. (Id.) In the alternative, the Plaintiff requests a $10,000,000 bond as a condition to granting a stay of the mandate. (Id., Fed. R. App. P. 41(d)(3).)

Neither argument is persuasive or even necessary. The language of § 2101(f) excludes the district courts from issuing a stay of a mandate by the Court of Appeals while an application to the Supreme Court for certiorari is pending. The Sixth Circuit's Judgment "ordered that the judgment of the district court is affirmed." (ECF No. 179 at PageID 2831.) In the Order, Sixth Circuit explained that "Studdard's claim deserves resolution by a jury." (ECF No. 179 at PageID 2829.) Because the Sixth Circuit has issued a mandate ordering a jury trial, the Court is required to comply and cannot grant a further stay. If Defendant desires a further stay preventing the execution of the mandate for the case to proceed in this matter, it is the Sixth Circuit or the Supreme Court which must issue the order, not this court.

SO ORDERED this 12th day of December, 2019.

/s/ Jon P. McCalla
JON P. McCALLA
UNITED STATES DISTRICT JUDGE

APPENDIX C

Case No. 19-5084

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

ANGELA STUDDARD, individually and as lawful wife, next of kin, administrator ad litem and personal representative for Edmond Studdard, deceased, and Estate of Edmond Studdard

Plaintiff - Appellee

v.

SHELBY COUNTY, TN, et al.

Defendant

and

ERIN J. SHEPHERD, individually and as employee or agent of Shelby County, TN; TERRY I. REED, individually and as employee or agent of Shelby County, TN

Defendants - Appellants

BEFORE: SUTTON, Circuit Judge; GRIFFIN, Circuit Judge; READLER, Circuit Judge;

Upon consideration of the Appellants' motion to stay district court proceedings,

It is ordered that the motion be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

Issued: January 02, 2020