No. _____

In the Supreme Court of the United States

ANDREW KNAPP; KENNETH SHINGLETON; BRYCE WILLOUGHBY; THOMAS DHOOGHE, PETITIONERS

v.

JANICE BROWN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the Sixth Circuit err in denying qualified immunity to four police officers involved in a warrantless arrest and detention in the absence of clearly established law placing each officer on notice of the obligation to provide an arrestee with a prompt probable cause determination, and err in creating a rule that will have serious adverse effects for police agencies?

PARTIES TO THE PROCEEDING

In addition to the parties listed on the case caption, the following parties were previously parties to this civil action: Genesee County, who had custody over Janice Brown for the duration of her detention, Jason Gould, the administrator of the county jail in which Brown was detained, and Mackenzie Rose, a corrections officer at the jail in which Brown was detained. Gould, Rose, and the County were each granted summary judgment at the district-court level, and Brown has not appealed that grant of summary judgment.

RELATED CASES

- *Brown* v. *Knapp*, No. 20-cv-12441, U.S. District Court for the Eastern District of Michigan. Judgment entered Sept. 28, 2022.

- *Brown* v. *Knapp*, No. 22-1973, U.S. Court of Appeals for the Sixth Circuit. Judgment entered July 28, 2023.

- *Brown* v. *Knapp*, No. 22-1973, U.S. Court of Appeals for the Sixth Circuit. Order denying rehearing en banc entered Sept. 25, 2023.

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OPINION BELOW

The opinion of the Sixth Circuit (Kethledge, Stranch, and Mathis), App. 01a–28a, is reported at 75 F.4th 638. The order in which the District Court for the Eastern District of Michigan denied Petitioners' motion for summary judgment, App. 30a–49a, is not reported but is available at 2022 WL 4541621.

JURISDICTION

The Sixth Circuit issued its opinion on July 28, 2023. It denied rehearing en banc on September 25, 2023, and it issued the mandate on October 3, 2023. App. 01a–28a, 50a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend IV. See App. 51a.

42 U.S.C. § 1983. See App. 51a.

Mich. Comp. Laws § 764.13. See App. 51a–52a.

Mich. Comp. Laws § 764.1a(1), (2)(d), and (4). See App. 52a.

INTRODUCTION

It is not uncommon for multiple police officers to be involved in an arrest. And when an arrest occurs without a warrant, every one of those officers needs to understand their obligations arising out of their participation in the arrest. This includes knowing which officers have the obligation to protect an arrestee's right to a prompt judicial determination of probable cause (as addressed in *Gerstein* v. *Pugh* and *County of Riverside* v. *McLaughlin*). A rule that holds the investigating or primary officer responsible would adequately balance law enforcement considerations with the importance of an arrestee's Fourth Amendment rights. But the new rule the Sixth Circuit established below improperly assigns that responsibility to every officer arguably involved in an arrest.

Here, Janice Brown's arrest involved a complicated overlap of attenuated actions by four law enforcement officers in varying positions, a transfer of custody between two different law enforcement agencies, and the actions (and inactions) of an assistant prosecuting attorney. The prosecutor observed in-court witness intimidation by Brown, informed the officer in charge (OIC) of the underlying criminal case, and advised that probable cause existed to arrest Brown (an assessment that the Sixth Circuit agreed with). The OIC then requested assistance from his supervising officer to arrest Brown, and two additional police officers arrived to arrest Brown and transfer her to the county jail. Four days after her arrest, the jail staff eventually contacted another officer assigned to the underlying criminal case, and that officer instructed the jail to release Brown.

Although the Sixth Circuit determined that there was probable cause to arrest Brown, it held that her right to a prompt, judicial determination of probable cause was violated. But instead of granting qualified immunity to the officers due to the absence of clearly established law that would apply to this complicated factual scenario, or merely holding the OIC responsible, the Sixth Circuit held that each of the four law enforcement officers was responsible for ensuring that Brown received a prompt, judicial determination of probable cause. The Sixth Circuit correspondingly denied those officers qualified immunity, notwithstanding that there was probable cause for the arrest.

The Sixth Circuit erred in two meaningful ways. First, it failed to grant qualified immunity to police officers when the law pertaining to their involvement was not clearly established. Second, its new rule considerably expanded the class of police officers subject to *Riverside* obligations, an expansion that will frustrate law enforcement's ability to promptly apprehend individuals suspected of criminal activity. Police officers who are not in charge of an arrest may be reluctant to assist a superior. And police officers may be reluctant to assist another agency in an arrest if those officers may be subject to liability when they have no authority to either effect a timely probable cause determination or direct the release of the suspect from the other agency's custody.

For these reasons, this Court should either grant this petition or summarily reverse the Sixth Circuit and grant qualified immunity to the Michigan State Police (MSP) Defendants.

STATEMENT OF THE CASE

A. Factual background

In 2017, Thomas Dhooghe and Kenneth Shingleton, detectives with the MSP, were assigned to investigate a 2011 murder. App. 3a. During their investigation they learned that Sheneen Jones and Dale Reed Jr. were present when the murder victim was killed in her home. *Id*. Dhooghe and Shingleton interviewed Jones, who stated she had fought with the victim, left the victim's home, and walked outside where she heard gunshots and then saw Reed rush outside and instruct her to get into the car. *Id*. Jones further informed Dhooghe and Shingleton that after the shooting, "she received a threat that she would be killed by Reed's family." *Id*.

Reed was subsequently arrested and charged with murder in 2018. *Id*. Janice Brown, Reed's mother, traveled to Michigan from her home in Arkansas to attend the preliminary examination on the murder charges against her son. *Id*. On September 11, 2018, during the preliminary examination, Jones failed to appear as a witness, and Reed's attorney told Brown that "someone needs to talk to her." App. 3a–4a. Shingleton and Dhooghe overheard this statement; they drove to Jones' home to serve her with a subpoena for a subsequent hearing date. App. 4a.

When Shingleton and Dhooghe arrived at Jones' home, Brown was present and speaking with Jones. *Id*. While at Jones' home, Brown informed Dhooghe and Shingleton that she was Reed's mother and stated that she was simply visiting her granddaughter. *Id*. Brown left after speaking with Dhooghe and

Shingleton, and Jones then stated that she did not want to testify and that she was afraid that "they" would kill her if she did. *Id.*

Later, on September 14, 2018, when Jones was subpoenaed to testify, Karen Hanson, the assistant prosecuting attorney assigned to the case against Reed, observed Brown intimidating Jones. App 4a–5a. Specifically, Hanson saw Brown following Jones (who was crying) and heard Brown yell that Jones "better not go in there" and testify. *Id.* Hanson stated that this "was the most aggressive attempt to get someone not to testify that she had ever seen[,]" and she subsequently called the OIC (though she did not remember which of the MSP Defendants she spoke with), described what occurred, and advised that there was probable cause to arrest Brown for witness intimidation. App 5a.

Dhooghe, the OIC, testified that Hanson instructed him to arrest Brown and that he in turn requested assistance from his supervisor, Sergeant Bryce Willoughby, as Dhooghe was in business attire for court and did not have handcuffs. App 6a. To maintain jurisdiction over the appeal, the Sixth Circuit also assumed that Shingleton, who, with Dhooghe, was assigned to the underlying investigation, was physically present at court and was a part of the conversation with Hanson. App 5a, 9a–11a. Shortly after being called, Willoughby arrived at court with Sergeant Andrew Knapp, placed Brown in handcuffs, and transported her to jail where Knapp completed the booking paperwork and custody was transferred to Genesee County. App. 6a.

After Brown was arrested, she remained in jail for nearly four days without receiving a probable cause determination. App 6a–7a. Ultimately, near the end of her detention, on September 18, 2018, Genesee County was able to contact Shingleton, who then instructed the jail to release Brown "pending further investigation." App 7a.

Brown subsequently sued the MSP Defendants, Genesee County, the jail administrator, and a jail deputy. *Id*. The County, the administrator, and the jail deputy were granted summary judgment; however, the district court denied the MSP Defendants' request for qualified immunity. *Id*. At issue here is the Sixth Circuit's decision to deny qualified immunity to the MSP Defendants on Brown's *Riverside* claim arising from her lack of a probable cause determination. App 28.

B. District court proceedings

On September 4, 2020, Brown filed a complaint and named the MSP Defendants, along with Genesee County, Sheriff's Deputy Mackenzie Rose, and Captain Jason Gould as defendants. As to the MSP Defendants, Brown raised the following claims: (1) the MSP Defendants failed to timely present her to a magistrate judge for a probable cause determination; (2) Dhooghe and Shingleton caused her to be arrested without probable cause; and (3) Dhooghe and Shingleton are liable for malicious prosecution.

After the close of discovery, the MSP Defendants moved for summary judgment on the basis of qualified immunity. On August 11, 2022, the district court held a hearing on the MSP Defendants' motion (as well as

on the other parties' dispositive motions). The district court subsequently issued an opinion and order denying the MSP Defendants' motion. App. 30a–49a.

In its opinion, the district court held that "Brown's alleged facts show the MSP defendants' conduct violated her constitutional right [to a prompt probable cause determination]." App. 39a. The court further concluded that "[d]espite the MSP defendants' subjective beliefs that they were not Brown's arresting officers, on this record, some combination of the MSP defendants, or perhaps all of them, are officers who arrested Brown without a warrant and, as such, were obligated to secure a probable cause hearing[.]" App. 39a (citing *Drogosch* v. *Metcalf*, 557 F.3d 372, 379 (6th Cir. 2009), and *Cherrington* v. *Skeeter*, 344 F.3d 631, 644 (6th Cir. 2003)).

Ultimately, the district court held that under *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991), and its progeny, specifically *Drogosch* and *Cherrington*, "the arresting officers' obligation to make some effort to secure a probable cause hearing within forty-eight hours of detention was clearly established." App. 43a. And despite recognizing "the complicated factual scenario surrounding Brown's arrest[,]" the district court ultimately held that the MSP Defendants' obligation "to take action to obtain a probable cause determination for Brown within forty-eight hours was clearly established." *Id.*

C. Sixth Circuit proceedings

On appeal, the MSP Defendants argued that the district court's qualified immunity decision was

erroneous because (1) they did not personally deprive Brown of her right to a prompt probable cause determination or her right to be free from arrest, and (2) a reasonable officer in each of their positions would not have known that their conduct was unlawful. Though the Sixth Circuit agreed that there was probable cause to support Brown's arrest, it denied qualified immunity with respect to Brown's prolonged-detention claim, finding that the law was clearly established such that a reasonable officer would have known their conduct was unlawful. App. 27a–28a.

Relevant to this petition, the Sixth Circuit "look[ed] to state law to determine who is responsible for ensuring that a judicial determination of probable cause takes place within 48 hours[ ] of an arrest." App. 17a (quoting *Drogosch*, 557 F.3d at 378–79). The court relied upon a Michigan statute as well as Michigan case law. As for the statute, the court referenced Mich. Comp. Laws § 764.13, which instructs that a police officer "who has arrested a person for an offense without a warrant shall without unnecessary delay" take the person to a magistrate and present "a complaint stating the charge against the person arrested." See App. 17a–18a. And for the case law, it quoted *People* v. *Gonzales*, which defines an "arrest" to mean "the taking, seizing, or detaining of the person of another, either by touching or putting hands on him, or by any act which indicates an intention to take him into custody and subjects the person arrested to the actual control

and will of the person making the arrest."[1] 97 N.W.2d 16, 19 (Mich. 1959).

After referencing the relevant state law, the Sixth Circuit concluded that Knapp and Willoughby "were arresting officers with a *Riverside* obligation because they arrested Brown by handcuffing her, physically taking her into custody, and transporting her to jail." App. 18a. As for Dhooghe, the court determined that he too was "an arresting officer for purposes of the *Riverside* analysis" because he "took actions that 'indicate[d] an intention' to take Brown into custody and subjected Brown to his will by directing other officers to take her into custody." App. 19a. As for Shingleton, the court held that, assuming he was present at the courthouse on the date of Brown's arrest, he was "part of the decision to arrest Brown and direct Knapp and Willoughby to physically take her into custody." *Id*. The court thus concluded that because each MSP Defendant was an arresting officer "for purposes of the *Riverside* analysis," each MSP Defendant "violated Brown's right to receive a prompt determination of probable cause." App. 19a, 22a.

Although the Sixth Circuit had previously established that, in Michigan, the arresting officer has the responsibility of ensuring a prompt probable cause determination, it nonetheless established a new rule under *Riverside*: any Michigan police officer who is "part of the decision to arrest" a person without a warrant

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[1] Michigan courts' definition of arrest further provides that "[t]he act relied upon as constituting an arrest must have been performed with the intent to effect an arrest and must have been so understood by the party arrested." *Gonzales*, 97 N.W.2d at 19.

will now have the obligation of ensuring that person receives a prompt, probable cause determination.

Even though it created this new rule, the Sixth Circuit still denied qualified immunity under the clearly established prong, relying on two of its published opinions. It concluded that "*Cherrington* established in 2003 that officers are assumed to be aware of an individual's right to a probable cause determination within 48 hours." App. 27a (quoting *Cherrington*, 344 F.3d at 644). It also determined that "*Drogosch* confirmed . . . that, in Michigan, arresting officers have an obligation to try to secure a probable cause hearing for the person they arrest, including by filing appropriate paperwork." App. 28a (quoting *Drogosch*, 557 F.3d at 379–80).

Given these opinions, the court held that it was "clearly established at the time of Brown's arrest that her arresting officers had a duty to take her before a magistrate for a probable cause hearing." App. 28a. The court made this determination notwithstanding two of its more recent, unpublished opinions that awarded qualified immunity to arresting officers in Michigan where the arrestees were not taken before a magistrate judge within 48 hours of their warrantless arrest. See App. 25a–28a; see also *Rayfield* v. *City of Grand Rapids*, 768 F. App'x 495, 509 (6th Cir. 2019) (affirming a grant of summary judgment to police officers when "two municipalities, both of which have authority to process a detainee, jointly manage the custody of a pre-hearing detainee"); *Roberson* v. *Wynkoop*, No. 21-1240, 2021 WL 5190902 (6th Cir. Nov. 9, 2021) (reversing the denial of qualified immunity where the MSP "do not own or operate their

own jails" and instead "rely on other agencies and actors in the criminal justice system to ensure that arrestees receive their probable cause determination").

The MSP Defendants subsequently requested rehearing en banc, which was denied. App. 50a.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit improperly denied qualified immunity to the MSP Defendants.

Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity balances "the need to hold public officials accountable when they exercise power irresponsibly [with] the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably[,]" *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009), and "it provides ample protection to all but the plainly incompetent or those who knowingly violate the law[,]" *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986).

In deciding whether a government official is entitled to qualified immunity, this Court has set forth a two-prong test. "[A] court must decide whether the facts that a plaintiff has . . . shown . . . make out a violation of a constitutional right." *Callahan*, 555 U.S. at 232. And "the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* Courts have discretion in deciding which question to address first. *Id.* at 236.

The Sixth Circuit's opinion below should be reversed because the court erred when addressing both prongs of the qualified immunity analysis.

As to the clearly established prong, the Sixth Circuit defined the purportedly clearly established law at too high a level of generality, relying on cases that do not contain facts meaningfully similar to those at issue here. It relied on its own decision in *Cherrington*, which held only that police officers should be aware of the right to a prompt probable cause determination within 48 hours (without exception for intervening weekends or holidays), see 344 F.3d at 644, and another one of its own decisions, *Drogosch*, which held only that a parole agent who arrested a probationer was responsible for ensuring a prompt probable cause determination and violated the probationer's rights by classifying him as a parolee, see 557 F.3d at 379–80.

As to the violations prong, the Sixth Circuit created a new rule that expanded the class of persons with *Riverside* obligations to all police officers that are "part of the decision" to effect a warrantless arrest. This new rule fails to strike the appropriate balance between the competing interests of protecting public safety and preventing prolonged detentions based on unfounded suspicions. A more appropriate rule in these situations would be one that assigns *Riverside* obligations only to the OIC. Though Dhooghe was the OIC of the underlying prosecution of Brown's son, no such rule was in place when Brown was arrested.

For these reasons, this Court should either grant this petition or summarily reverse the Sixth Circuit's opinion below.

A. The Sixth Circuit defined the clearly established law at too high a level of generality—despite having granted qualified immunity in recent cases with similar fact patterns.

For a right to be clearly established, it must be "clear to a reasonable officer that his conduct was unlawful in the situation he confronted[.]" *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001). The purpose of the clearly established prong is to "ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful." *Id*. For this reason, the doctrine of qualified immunity "shields an officer from suit *when she makes a decision that*, even if constitutionally deficient, *reasonably misapprehends the law* governing the circumstances she confronted." *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (emphasis added).

Moreover, courts must not define the clearly established law at a "high level of generality." *City & Cnty. of San Francisco* v. *Sheehan*, 575 U.S. 600, 613 (2015). While "general statements of the law are not *inherently* incapable of giving fair and clear warning to officers," it must nevertheless be the case that "in the light of pre-existing law the unlawfulness [of the conduct is] *apparent*." *White* v. *Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)) (emphasis added; cleaned up). In other words, a plaintiff must show that the clearly established law is "particularized" to the facts of his case. *Id*.

"Because of the importance of qualified immunity 'to society as a whole,' . . . [this] Court often corrects lower courts when they wrongly subject individual

officers to liability." *Sheehan*, 575 U.S. at 611 n.3 (quoting *Harlow*, 457 U.S. at 814). This Court thus does "not hesitate[ ] to summarily reverse courts for wrongly denying officers the protection of qualified immunity[.]" *Salazar-Limon* v. *City of Houston, Tex.*, 137 S. Ct. 1277, 1282 (2017) (SOTOMAYOR, J., dissenting). Just two years ago, this Court summarily reversed two denials of qualified immunity based on a lack of clearly established law that denied qualified immunity to police officers. See *Rivas-Villegas* v. *Cortesluna*, 595 U.S. 1 (2021) & *City of Tahlequah* v. *Bond*, 595 U.S. 9 (2021).

"[S]pecificity is especially important in the Fourth Amendment context, where . . . it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Mullenix* v. *Luna*, 577 U.S. 7, 12 (2015). "[I]n an obvious case, [general statements of law] can clearly establish the answer, even without a body of relevant case law." *Brosseau*, 543 U.S. at 199. But as was true in *Rivas-Villegas*, "this is not an obvious case." 595 U.S. at 6. To show a violation of clearly established law, Brown "must identify a case that put [the MSP Defendants] on notice that [their] specific conduct was unlawful." *Id*. Because neither Brown nor the Sixth Circuit has done so, summary reversal is appropriate here.

1. This Court's opinions in *Gerstein* and *Riverside* do not clearly establish the law as it pertains to the underlying factual scenario.

Although the Sixth Circuit did not specifically rely on *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), and *Riverside* v. *McLaughlin*, 500 U.S. 44 (1991), in defining the purported clearly established law here, it is necessary to set forth the general (i.e., non-specific) holdings from these cases. Both *Gerstein* and *County of Riverside* involved facial challenges to state and local government policies regarding prompt probable cause determinations for warrantless arrestees. But here, Brown makes no challenge to any MSP policy. Instead, she asserts that the MSP Defendants, as *individual* police officers, violated her constitutional rights. Neither *Gerstein* nor *Riverside* discusses an individual police officer's obligation to ensure that a warrantless arrestee receives a prompt judicial determination of probable cause.

In *Gerstein*, the plaintiffs challenged a Florida procedure in which "indictments [were] required . . . for prosecution of capital offenses[,]" but "[p]rosecutors [could] charge all other crimes by information, without a prior preliminary hearing and without obtaining leave of court." 420 U.S. at 105. Florida courts had further ruled that "that the filling of an information foreclosed the suspect's right to a preliminary hearing." *Id*. at 106. As a result of this procedure, the plaintiffs commenced a class action against county officials under § 1983, "claim[ed] a constitutional right to a judicial hearing on the issue of probable cause[,] and request[ed] declaratory and injunctive relief." *Id*. at 106–07. After weighing the purpose of the Fourth

Amendment with the need for law enforcement to have some leeway in ferreting out crime, the Court ruled that "the Fourth Amendment requires *a timely judicial determination* of probable cause as a prerequisite to detention[.]" *Id.* at 126 (emphasis added).

Not surprisingly, questions arose as to what constitutes a "timely judicial determination." Sixteen years later, in *Riverside*, this Court was "require[d] . . . to define what is 'prompt' under *Gerstein*." 500 U.S. at 47. *Riverside* was another class action filed under § 1983, and there the plaintiffs challenged the manner in which a county "provide[d] probable cause determinations to persons arrested without a warrant." *Id.* Under the county's procedure, probable cause determinations were made with arraignments, and arraignments were required within two days of arrest. *Id.* The "two-day" requirement, however, excluded weekends and holidays, and some individuals arrested late in the week might have been "held for as long as five days before receiving a probable cause determination." *Id.*

While it was "hesita[nt] to announce that the Constitution compels a specific time limit" within which a probable cause determination is required, this Court concluded that "it is important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds." *Id.* at 56. To that end, the Court ruled that "*a jurisdiction* that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein"* and "be immune from *systemic challenges*." *Id.* (emphasis added). Where an

"arrested individual does not receive a probable cause determination within 48 hours, . . . the burden shifts *to the government* to demonstrate the existence of a bona fide emergency or other extraordinary circumstance." *Id.* at 57 (emphasis added). The Court further made it clear that "intervening weekends" do not constitute "an extraordinary circumstance." *Id.*

Both these cases discussed the " 'practical compromise' between the rights of individuals and the realities of law enforcement." *Id.* at 53 (discussing *Gerstein*). And *Riverside* was issued "to articulate more clearly[,]" for the benefit of states, counties, and the courts, "the boundaries of what is permissible under the Fourth Amendment" after the flexibility in *Gerstein* "led to a flurry of systemic challenges to city and county practices, putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations." *Id.* at 55–56. But neither case addressed the conduct of individual officers after making a warrantless arrest.

Accordingly, neither *Gerstein* nor *Riverside* clearly established that the MSP Defendants' conduct was unlawful. This is significant (if not dispositive) given that the clearly established prong "requires that the legal principle *clearly prohibit the officer's conduct* in the particular circumstances before him." *D.C.* v. *Wesby*, 138 S. Ct. 577, 590 (2018) (emphasis added). See also *City of Escondido*, *Cal.* v. *Emmons*, 139 S. Ct. 500, 503 (2019) (reiterating the admonition "not to define clearly established law at a high level of generality").

2. Neither *Cherrington* nor *Drogosch* has sufficient specificity to clearly establish obligations on every officer involved in an arrest.

In its opinion below, the Sixth Circuit explained the effect of its decisions in *Cherrington* and *Drogosch* on the underlying facts as follows:

> *Cherrington* established in 2003 that officers are assumed to be aware of an individual's right to a probable cause determination within 48 hours. And *Drogosch* confirmed almost a decade before Brown was arrested that, in Michigan, arresting officers have an obligation to try to secure a probable cause hearing for the person they arrest, including by filing appropriate paperwork. It was therefore clearly established at the time of Brown's arrest that her arresting officers had a duty to take her before a magistrate for a probable cause hearing. The MSP Defendants made no efforts to do so, and they are not entitled to qualified immunity on Brown's *Riverside* claim.

App. 27a–28a (internal citations omitted).

Despite discussing the facts at issue in both cases, the Sixth Circuit did not explain how those facts clearly established the law with respect to Dhooghe, Willoughby, Knapp, and Shingleton. A brief review of *Cherrington* and *Drogosch* demonstrates that these cases were not capable of clearly establishing the law that was applied here.

In *Cherrington*, the Sixth Circuit reversed the grant of summary judgment to two Ohio police officers who did not bring a warrantless arrestee before a judicial officer for a probable cause determination within 48 hours of the arrest. 344 F.3d at 644. In issuing its holding, the court noted that the defendants relied, in part, on the fact that an intervening weekend and holiday made it difficult to comply with the 48-hour requirement. *Id*. at 643. But the court was not persuaded and concluded that, after *Riverside*, a reasonable officer should have both known about the 48-hour rule and "the unavailability of any 'intervening weekend or holiday' exception to th[e] 48–hour rule." *Id*. at 644. As a result, the court concluded that "*[u]nder the present record*, . . . the individual [d]efendants [we]re not entitled to qualified immunity[.]" *Id*. (emphasis added). But the court noted that "the liability of the individual [d]efendants [wa]s not a foregone conclusion upon remand" considering that the district court "had no occasion to consider whether the two individual [d]efendants actually named in the complaint . . . could be held liable for such a violation." *Id*.

This open-ended guidance in *Cherrington*—the determination that the 48-hour rule and unavailability of an "intervening weekend" exemption as set forth in *Riverside* were clearly established—does not place the lawfulness of the MSP Defendants' conduct "beyond debate." See *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 741 (2011). Stated differently, *Cherrington* does not clearly establish the law governing the MSP Defendants' conduct here.

With respect to *Drogosch*, the defendant, a parole agent with the Michigan Department of Corrections,

knowingly completed the incorrect form in order to lodge the arrestee in the county jail for violating the terms of his probation. 557 F.3d at 376. The defendant used a "parole detainer form" despite knowing that the arrestee was not on parole and that "a detained parolee, unlike a detained probationer, was not entitled to an immediate hearing before a judge." *Id*. The Sixth Circuit consequently determined that the arrestee's right to a prompt hearing was clearly established and that the parole agent's conduct was not "objectively reasonable" considering that he "had plenty of time to ponder the decision of whether to lodge [the plaintiff] in the jail using the incorrect detainer form." *Id*. at 379–80.

Drogosch therefore places "beyond debate" the constitutional question of knowingly completing an improper detainer form that prevents a prompt probable cause determination. *al-Kidd*, 563 U.S. at 741. But *Drogosch* did not address, let alone assign, the responsibility of securing prompt determinations in a case with facts like these where a prosecutor witnesses the offense and advises that probable cause exists, and multiple officers are involved, at some level, during the arrest. So, *Drogosch* cannot place the MSP Defendants on notice as to the illegality of their conduct and cannot satisfy the clearly established prong of the qualified immunity analysis as to the MSP Defendants' conduct.

Neither *Cherrington* nor *Drogosch* clearly established the law and placed the illegality of the MSP Defendants' conduct beyond debate.

3. Recent unpublished opinions from the Sixth Circuit confirm an absence of clearly established law.

Finally, two of the Sixth Circuit's recent unpublished opinions are helpful in showing that the law was not clearly established. Of course, unpublished opinions do not, by themselves, clearly establish the law. But here, the existence of two recent unpublished opinions by the Sixth Circuit that reached the opposite conclusion underscore that the law as it pertains to the MSP Defendants was not clearly established. If different panels of the same court reach meaningfully different conclusions in cases with similar facts, the law cannot be clearly established.

In the first unpublished case, *Rayfield* v. *City of Grand Rapids*, the plaintiff was arrested without a warrant and detained for nearly three days without receiving a probable cause determination. 768 F. App'x at 499. According to the pleadings, the delay was attributed to the transfer of the plaintiff's custody from the city police department to the county jail and the police department's failure to inform the jail of how long it had custody of plaintiff prior to the transfer. *Id*. at 499–500, 509.

The Sixth Circuit held that the right to "receive a probable-cause hearing within 48 hours . . . was not 'clearly established' as applied to [the plaintiff's] case[,]" *id*. at 509, and further explained:

> Although we have recognized that, per [*Riverside*], officers are on notice that defendants have a right to a probable-cause hearing within 48 hours, *Cherrington*, 344 F.3d at 644,

> *Cherrington* does not deal with the factually and legally distinct situation presented by [the plaintiff's] case, namely when two municipalities, both of which have authority to process a detainee, jointly manage the custody of a pre-hearing detainee.

Id.

Similar reasoning applies here. Just as in *Rayfield*, Brown's custody was transferred from MSP (which does not maintain any jail or other penal institution to house pretrial detainees) to the county jail. App. 6a. And just as the Sixth Circuit recognized that *Cherrington* was not particularized to the facts of a case involving the transfer of a detainee between law enforcement agencies, *Rayfield*, 768 F. App'x at 509, it similarly should have ruled that it was not clearly established that the MSP Defendants' conduct was unlawful here where custody of Brown was transferred from the MSP to Genesee County.

In the second unpublished opinion, *Roberson* v. *Wynkoop*, the Sixth Circuit reversed the denial of qualified immunity where a state police trooper had completed a warrant packet for the prosecutor to review but, through no fault of his own, the probable cause determination was held after the 48-hour window had expired. Case No. 21-1240, 2021 WL 5190902 (6th Cir. Nov. 9, 2021). In its opinion, the Sixth Circuit noted that "[t]he Michigan State Police do not own or operate their own jails[,]" but "[i]nstead, state troopers rely on other agencies and actors in the criminal justice system to ensure that arrestees receive their probable cause determination." *Id*., 2021 WL 5190902, at *3. The court further noted that "there are no facts

in the record to indicate that [the trooper] (or any of his fellow state troopers) have previously encountered [such a] situation, so it was not objectively unreasonable for [the Trooper] to expect the process to occur in a timely manner as it normally does." *Id.*

The same reasoning applies here. Hanson witnessed Brown's offenses and advised Dhooghe that probable cause existed for the arrest before Brown was arrested. There is nothing in the record suggesting the MSP Defendants had previously encountered such a situation. Nor is there binding precedent placing the MSP Defendants on notice that each had an obligation to ensure that Brown received a prompt probable cause determination. Accordingly, as the Sixth Circuit stated in *Roberson*, "it was not objectively unreasonable" for any of the MSP Defendants "to expect the process to occur in a timely manner." *Id.*

Further, as was true in *Rayfield*, the MSP does not operate or maintain any jails, so the process of lodging detainees necessarily requires coordination among multiple jurisdictions, increasing the opportunity for miscommunication. Although Genesee County presented evidence of its fresh arrest reports that detail county detainees who are approaching the 48-hour-period following their warrantless arrests, those reports were not sent to any of the MSP Defendants. See App. 39a n.3.

Until binding precedent makes it clear that the MSP Defendants should each have acted in securing a complaint and warrant for an offense they did not observe, the MSP Defendants are entitled to qualified immunity. "[S]pecificity is especially important in the Fourth Amendment context" as "it is sometimes

difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." 577 U.S. at 12 (cleaned up). Here, the requisite specificity is absent. Even the district court recognized that "the complicated factual scenario surrounding Brown's arrest preclude[d it from] granting her motion for partial summary judgment." App. 44a.

If these uncontested facts made it too difficult for the district court to determine which of the MSP Defendants bear responsibility for Brown's lack of a probable cause determination, how were the MSP Defendants supposed to determine the responsible party? And ultimately, where liability must be assessed on an individual basis, it was legal error for the court to lump all MSP Defendants together as contributing to an arrest and therefore losing the protections of qualified immunity.

4. Opinions from the Fifth and Tenth Circuits show that the Sixth Circuit opinion is an outlier.

Other circuits have recognized the limited effect of *Cherrington* and *Drogosch* in clearly establishing the law outside the factual context of a common warrantless arrest. For example, in *Wilson* v. *Montano*, the Tenth Circuit relied on *Cherrington* and *Drogosch* in denying qualified immunity to an officer who made a warrantless arrest but failed to file a complaint and

initiate the criminal process.[2] See 715 F.3d 847, 854 (10th Cir. 2013). Yet the Tenth Circuit recognized that *Cherrington* and *Drogosch* do not extend the duty of ensuring that an arrestee receives a prompt probable cause determination "to any officer who assists in an arrest." *Id.* at 854–55. This was clear to the Tenth Circuit in 2013, and it should have been clear to the Sixth Circuit in 2023.

Additionally, in *Jones* v. *Lowndes County*, the Fifth Circuit addressed the argument made by a plaintiff who spent longer than 48 hours in jail due to a lack of available judges that the arresting officer "should have made more effort to contact a judge over the weekend" to ensure a prompt probable cause determination was obtained. 678 F.3d 344, 351 (5th Cir. 2012). The Fifth Circuit ultimately rejected the argument that the officer should have done more, explaining that "we cannot conclude a reasonable officer would have known he was required to make alternative arrangements such as skipping his Monday morning shift or preparing a written report to enable another officer to attend the probable cause determination in his place." *Id.* Critically, the Fifth Circuit recognized that the arresting officer "had no way of knowing the county judges would choose to close their courtrooms early that Monday afternoon or that their

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[2] Similar to Mich. Comp. Laws § 764.13, New Mexico law assigns the responsibility of bringing the warrantless arrestee before a magistrate for a probable cause determination to the arresting police officer, see N.M. Stat. Ann. § 35-5-1. However, unlike Mich. Comp. Laws § 764.13, which only requires the arresting officer to present a complaint to the magistrate, New Mexico law specifically requires the arresting officer to file the criminal complaint, see N.M. Stat. Ann. § 35-5-1.

doing so was unlawful." *Id*. Here too, Knapp and Willoughby, who were called merely to assist Dhooghe, had no way of knowing that Dhooghe and Hanson would not follow through with completing the necessary paperwork after Brown's arrest.

As this Court stated in *Wilson* v. *Layne*, "[i]f judges . . . disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." 526 U.S. 603, 618 (1999). Because the judges in *Rayfield*, *Roberson*, *Wilson*, and *Jones* reached the opposite conclusion as the judges did below, the law as it pertains to the MSP Defendants conduct here cannot be clearly established—particularly where Brown's custody was transferred from the state police to the county jail, where the eyewitness to the underlying offense was a prosecuting attorney who advised the MSP Defendants regarding probable cause for Brown's arrest and would have had to request a warrant for one to issue, and where Knapp, Willoughby, and Shingleton merely assisted in Brown's arrest.

Because there is no clearly established precedent that supports Brown's claims, the MSP Defendants were not fairly placed on notice that their actions were unconstitutional. See *Saucier*, 533 U.S. at 202. They are entitled to qualified immunity. This Court should either grant this petition or summarily reverse the Sixth Circuit.

5. Even under Michigan law, it would not be clear to a reasonable officer that each of the MSP Defendants were required to provide Brown with a probable cause determination.

Considering that the Sixth Circuit requires courts to look towards state law when assigning *Riverside* obligations, it is worth noting that even under Michigan law it would not be clear to a reasonable officer that each of the MSP Defendants were obligated to ensure that Brown received a prompt probable cause determination.

To begin, insofar as *Cherrington* and *Drogosch* imposed this *Riverside* obligation on the arresting officer, neither Brown nor the Sixth Circuit identified any Michigan opinion that classified officers such as Dhooghe or Shingleton as arresting officers. That is because they never placed their hands on Brown and never had custody over her person. See *Gonzales*, 97 N.W.2d at 19. As a consequence, absent any factually specific opinions, it follows that state law could not have placed them on notice of their requirement to ensure that Brown received a prompt, probable cause determination.

As for Willoughby and Knapp, the absence of clearly established state law is even more apparent. Though both might be Brown's arresting officers, as they had custody of her for a short time, common sense suggests that Willoughby and Knapp reasonably assumed Dhooghe and Hanson would take the necessary steps to ensure that Brown received a prompt, probable cause determination.

Even more, although Michigan Compiled Laws § 764.13 does require that the arresting officer bring the detainee before a judge, it does so not for purposes of a probable cause determination, but rather for an arraignment. Michigan law does not supply the clear line of duty left uncertain by this Court's discussion in *Gerstein* and *Riverside* regarding the allocation of responsibility for warrantless arrests and an expeditious determination of probable case.

Specifically, Michigan Compiled Laws § 764.13 provides that the arresting officer shall present the complaint for the arrestee to the magistrate:

> A peace officer who has arrested a person for an offense without a warrant shall without unnecessary delay take the person arrested before a magistrate of the judicial district in which the offense is charged to have been committed, and *shall present to the magistrate a complaint stating the charge against the person arrested*.

(Emphasis added). The initial probable cause determination, however, "traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony." See *Gerstein*, 420 U.S. at 120. For Michigan, that occurs at the time of the signing of the complaint.

Again, specifically, Michigan Compiled Laws § 764.1c provides that "[i]f the accused is in custody upon an arrest without a warrant, a magistrate, upon finding reasonable cause . . . , shall . . . either" (1) issue a warrant or "(2) *[e]ndorse upon the complaint* a finding of reasonable cause and a direction to take the

accused before a magistrate[.]" (Emphasis added). And for a complaint to issue, Michigan law requires that the magistrate make a finding of "reasonable cause" based on the "[f]actual allegations of the complaint[,]" "[t]he complainant's sworn testimony[,]" and "[t]he complainant's affidavit." Mich. Comp. Laws § 764.1a(4).

Accordingly, when a person is arrested without a warrant, a magistrate judge makes his or her determination based upon a review of the complaint and the complaining witness' affidavit before "endors[ing] upon the complaint a finding of reasonable cause." Mich. Comp. Laws § 764.1c(1)(b). Then, at least under statute, the arresting officer is required to bring the detainee for an arraignment.[3] See Mich. Comp. Laws § 764.13.[4]

This background is important here where none of the officers observed the underlying criminal offense, where the county prosecutor had already made a representation regarding probable cause, and where the

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[3] In fact, a magistrate does not make an in-person decision regarding probable cause until the preliminary examination, which, by statute, typically occurs two or three weeks after the arraignment. See Mich. Comp. Laws § 766.4(1).

[4] Although Michigan law technically requires the arresting officer to bring the detainee before a magistrate for an arraignment, the MSP does not maintain its own jail. It relies "on other agencies and actors in the criminal justice system" to ensure that detainees are brought for their court hearings. See *Roberson*, 2021 WL 5190902, at *3; see also Mich. Comp. Laws § 51.75 (providing that the county sheriff "shall have the charge and custody of the jails of his county, and of the prisoners in the same"). In other words, MSP troopers do not typically transport their arrestees to court hearings.

county jail had custody of Brown. And although Dhooghe and Shingleton had worked with Prosecutor Hanson on the criminal investigation of Brown's son and perhaps could have secured her affidavit, Knapp and Willoughby had no such involvement. Thus, no Michigan law placed the MSP Defendants on notice that they had an obligation to ensure that Brown received a prompt judicial determination of probable cause.

This is particularly true for Knapp and Willoughby. How could it be objectively unreasonable[5] for either to assume that Dhooghe and Hanson were going to follow through with the necessary paperwork, especially considering that Knapp and Willoughby were not involved with Brown's alleged offense or the underlying criminal investigation? One would not expect such a responsibility to fall to officers who merely responded to a colleague's request for assistance.

Again, the Sixth Circuit has instructed courts to "look to state law to determine who is responsible for ensuring that a judicial determination of probable cause is made within 48 hours after an arrest." *Cherrington*, 344 F.3d at 644. But under Michigan law, there do not appear to be any statutes or binding precedent that would place the burden of ensuring that Brown received a prompt judicial determination of probable cause on any of the MSP Defendants. Because even state law fails to clearly establish the law

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[5] See *Scott* v. *United States*, 436 U.S. 128, 137 (1978) (explaining that this Court has "almost without exception in evaluating alleged violations of the Fourth Amendment[,] . . . first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him").

regarding the MSP Defendant's conduct here, this Court should grant this petition and reverse the Sixth Circuit's opinion below.

B. The Sixth Circuit's rule does not strike an appropriate balance between the competing interests of maintaining public safety and preventing prolonged detentions based on incorrect suspicion.

As for the violations prong, it is necessary to revisit the purpose of the 48-hour rule that this Court established in *Gerstein* and *Riverside*.

In *Gerstein*, this Court explained that "[m]aximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification *prior to* any arrest, but such a requirement would constitute an *intolerable handicap* for legitimate law enforcement." 420 U.S. at 103 (emphasis added). Although this Court had previously "expressed a preference for the use of arrest warrants when feasible," it acknowledged that it "has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant." *Id*. The Court described its refusal to invalidate arrests supported by probable cause but without warrants as a "practical compromise" that prevents the danger of the suspect escaping or committing further crimes while providing the police with sufficient time to gather the necessary evidence. *Id*. at 113–14.

Similarly, when this Court in *Riverside* established 48 hours as a presumptively reasonable period of time during which police must obtain review from a

neutral and detached magistrate, it explained that the competing interests at stake in this "practical compromise" were, on the one hand, the "strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity," and, "[o]n the other hand," the danger of "prolonged detention based on incorrect or unfounded suspicion." *Riverside*, 500 U.S. at 52. Importantly, in providing for this "practical compromise," this Court instructed that "the Fourth Amendment requires every State to provide prompt determinations of probable cause, but that the Constitution does not impose on the States a rigid procedural framework." *Id.* at 53.

Though the MSP Defendants maintain that Dhooghe (the OIC) should be entitled to qualified immunity based on the unique factual circumstances, the Sixth Circuit could have balanced these competing interests by creating a rule that assigns *Riverside* obligations to the OIC or investigating officer. But in deciding that each of the MSP Defendants violated Brown's constitutional rights, the Sixth Circuit essentially created a new rule that assigned *Riverside* obligations to each individual police officer that is involved in a warrantless arrest and provided little to no flexibility.

In so doing, the court disregarded the plain language of a state statute that assigned the obligation to "*a* peace officer," see Mich. Comp. Laws § 764.13 (emphasis added), and expanded the obligation to potentially numerous police officers: to the officer who places an arrestee in handcuffs, to the officers who direct that an arrest is made, to the officers who merely

assist in making an arrest, and to the officer who is part of the decision to make an arrest. Further demonstrating the rigidity of this rule is that, at least at face value, there does not appear to be any exception for objectively reasonable conduct. (If there were, one would certainly expect that each of the MSP Defendants would have been entitled to qualified immunity.)

Again, the MSP Defendants would understand a rule that assigns *Riverside* obligations to the OIC of the underlying investigation or investigating officer (Dhooghe, in this case) because, generally, the OIC of an investigation that results in a warrantless arrest, or an officer that happens upon a crime while on patrol, will likely have sufficient information to prepare a detailed complaint and affidavit for the prosecutor's review. That officer generally has authority over the investigation and will make the ultimate decisions with respect to the disposition of the arrestee, as contrasted with another subordinate officer participating in the case or an officer from another police agency. If the OIC fails to take the necessary steps to ensure that a probable cause determination is made, it follows that he or she could be liable under § 1983.

But the broad net cast by the Sixth Circuit's new rule presents practical problems for law enforcement. Take, for example, a police officer who responds to a domestic violence call and quickly discovers that an aggravated assault has occurred and identifies the assailant. The responding police officer will then likely arrest the assailant without a warrant but still need to complete the investigation and interview the relevant witnesses. How does the responding officer accomplish both tasks? The officer requests assistance

from a supervisor or fellow officer who will respond to the scene, take the assailant into custody, and subsequently lodge the assailant in jail. As a matter of practice, the assisting officer does not complete a police report or request that the prosecutor issue charges. Rather, that responsibility falls on the officer who conducted the investigation, identified the assailant, and has ultimate authority in that case.

For another example, during the execution of a high-risk search warrant of a property, if police identify several persons with illegal drugs or weapons on the property, warrantless arrests are again likely to follow. Given the number of officers involved in the execution of high-risk search warrants, the number of officers who are "involved" in the decision to make a warrantless arrest is substantial. Who has the *Riverside* obligations? Is it the officers who swore out the affidavit in support of the search warrant and made the request for assistance in executing the warrant? Is it the officers who executed the search warrant? Under the opinion here, both categories of officers would appear to have *Riverside* obligations, along with each individual officer involved in the decision-making process. But nothing in the opinion below speaks to how those obligations are to be satisfied.

This rule strikes a poor balance of the competing interests this Court addressed in *Gerstein* and *Riverside*. On the one hand, the rule does provide some protection for warrantless arrestees by creating an incentive for all officers involved in the arrest to ensure that a prompt, probable cause determination is made. But on the other hand, the rule will substantially chill the willingness of police officers to assist their fellow

officers when the need to make a warrantless arrest arises within the same police agency—and the chilling effect applies with even greater force when one police agency asks another to assist in the warrantless arrest of a suspected felon based on probable cause.

The Sixth Circuit's new rule has expanded the risk of liability to every police officer involved in making, or deciding to make, a warrantless arrest.

This new rule offers minimal protections against prolonged detention based on unfounded suspicion. (In fact, it was applied for the first time in a case where the Sixth Circuit determined that probable cause existed for the arrest.) The rule further hampers law enforcement's ability to respond to criminal activity that occurs in their presence. And it does so through subjecting individual police officers to liability even though they may have minimal knowledge of the underlying offense and insufficient capability to ensure that the necessary post-arrest paperwork is completed. In other words, implementation of the Sixth Circuit's rule will harm both state law enforcement and the public alike, while providing minimal protection against prolonged detentions based on unfounded suspicions.

This Court should grant this petition, vacate the Sixth Circuit's opinion, and create a new rule that limits any *Riverside* obligations to the appropriate police officer or officers with the requisite knowledge and power to ensure that a prompt probable cause determination is convened. In the alternative, this Court should summarily reverse the Sixth Circuit's opinion below for failing to adhere to the well-established law regarding qualified immunity.

CONCLUSION

This Court should grant the petition and reverse the Sixth Circuit, or, in the alternative, summarily reverse the Sixth Circuit.

Respectfully submitted,

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