No. 20-____

IN THE
Supreme Court of the United States

MARY STEWART, AS ADMINISTRATOR OF THE ESTATE OF LUKE O. STEWART, SR., DECEASED,

Petitioner,

v.

CITY OF EUCLID, OH, ET AL.,

Respondent.

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

To hold a municipality liable under § 1983 for a constitutional violation by its employee, a plaintiff must prove the municipality acted with "deliberate indifference" toward the possibility of such a constitutional violation. *City of Canton v. Harris*, 489 U.S 378, 388-89 (1989). In this case, Petitioner sought to hold the city of Euclid, Ohio, accountable where a Euclid police officer shot and killed Luke Stewart in violation of the Fourth Amendment. Petitioner argued that Euclid's official training—featuring clips from a Chris Rock sketch (sample "tip" for "how not to get your ass kicked by the police": "get a white friend") and cartoons of cops beating unarmed civilians—exhibited that "deliberate indifference."

The Sixth Circuit granted the police officer qualified immunity, holding that no clearly established law forbade his conduct. And in the Sixth Circuit—as in the First, Fifth, and Eighth Circuits, but unlike in the Ninth, Tenth, and Eleventh Circuits—the absence of clearly established law prohibiting an individual officer's conduct entirely forecloses a finding of "deliberate indifference" for purposes of municipal liability.

The question presented is:

Where a municipal employee has violated the Constitution, must a plaintiff point to "clearly established law" (such as would overcome a defense of qualified immunity by an individual officer) in order to prove deliberate indifference for municipal liability purposes?

PARTIES TO THE PROCEEDING

Petitioner Mary Stewart, as Administrator of the Estate of Luke O. Stewart, Sr., Deceased, was the plaintiff in the Northern District of Ohio and the plaintiff-appellant in the United States Court of Appeals for the Sixth Circuit.

Respondent City of Euclid, Ohio, was a defendant in the district court and defendant-appellee below.

Matthew Rhodes, Euclid Police Officer, was a defendant in the district court and defendant-appellee below.

Louis Catalani, Euclid Police Officer, was a defendant in the district court.

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Petitioner Mary Stewart respectfully petitions this Court for a writ of certiorari to review the judgment of Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion (Pet. App. 1a-34a) is published at 970 F.3d 667. The district court's opinion (Pet. App. 35a-78a) is unpublished and available at 2018 WL 7820181.

JURISDICTION

The Sixth Circuit Court of Appeals entered judgment on August 14, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

INTRODUCTION

The official police use-of-force training conducted by the city of Euclid, Ohio, features segments from a Chris Rock sketch entitled "How not to get your ass kicked by the police!" (sample "tip": "get a white friend") and a cartoon of a police officer beating a prone civilian (caption: "protecting and serving the poop out of you"). Pet.App.76a-77a. A Euclid police officer shot Petitioner's son in violation, the Sixth Circuit held, of the Fourth Amendment. Petitioner argued that the training encouraged, or at least condoned, excessive force, thereby leading to that constitutional violation. And she argued that the training was so obviously repugnant as to evince "deliberate indifference" to the rights of Euclid's citizens. The Sixth Circuit nonetheless affirmed the grant of summary judgment to Respondent.

Two months earlier, in *Wright v. City of Euclid*, the Sixth Circuit had considered a case against the same city regarding the same "very troubling" training program. 962 F.3d 852, 862-64, 884 (2020). There, as here, the Sixth Circuit found that a Euclid police officer violated the Fourth Amendment. *Id.* at 862-64. There, as here, plaintiff argued that the training encouraged, or at least condoned, excessive force, thereby leading to the constitutional violation. And there, as here, plaintiff argued that the training program was so obviously repugnant as to evince "deliberate indifference" to the rights of Euclid's citizens. *Id.* at 881-82. But the *Wright* panel, unlike the panel in this case, reversed the grant of summary judgment to the City of Euclid. *Id.*

There was just one difference between the two cases. In *Wright*, an officer attempted to extract the

plaintiff from his car and tased him in the process—something that prior Sixth Circuit precedent happened to foreclose. *Id.* at 859-62. In this case, an officer attempted to extract the victim from his car, then climbed into the car with him and shot him at point blank range—a form of excessive force that had not made its way to the Sixth Circuit yet. Pet.App.7a. And in the Sixth Circuit, a plaintiff cannot prove a municipality deliberately indifferent without showing that "clearly established law"—the same sort of specific, published appellate precedent used to assess qualified immunity for an individual officer—prohibited the constitutional violation at issue. As a result, Respondent got off scot-free in this case—even though its same reprehensible training program encouraged the excessive force in this case no less than the excessive force in *Wright*.

The difference between the two cases reflects no distinction in Euclid's culpability and cannot be squared with the law. It appears nowhere in the text of § 1983, in the common-law backdrop against which § 1983 was passed, or in this Court's precedents. To the contrary: In *Owen v. City of Independence, Mo.*, 445 U.S. 622, 650 (1980), this Court rejected the argument that municipalities were entitled to qualified immunity on the same basis as individual officers.

The Sixth Circuit's distinction reflects a deep circuit split. Had Euclid been a suburb of Las Vegas, Denver or Miami rather than Cleveland, there's no question that Petitioner's claims would have survived summary judgment. The Ninth, Tenth, and Eleventh circuits (unlike the First, Fifth, Sixth, and Eighth circuits) allow plaintiffs to prove municipal deliberate

indifference even if there is no clearly established law on point.

This Court should grant certiorari to resolve the split between the circuits that hold—consistent with *Owen*—that a municipality may be found deliberately indifferent without resort to the clearly-established-law inquiry and those that—like the Sixth Circuit—do not. The split is ripe for resolution: Most of the circuits have weighed in on the question presented, including en banc decisions on each side of the split.

It is difficult to imagine a better vehicle. This Court does not have to speculate whether the outcome of this case would be different absence the clearly-established-law rule; we *know* so, because the *Wright* case considered the same facts and made clear what would have happened without that rule. Rarely will a case so squarely tee up the dispositive question.

This Court should grant certiorari and reverse.

STATEMENT OF THE CASE

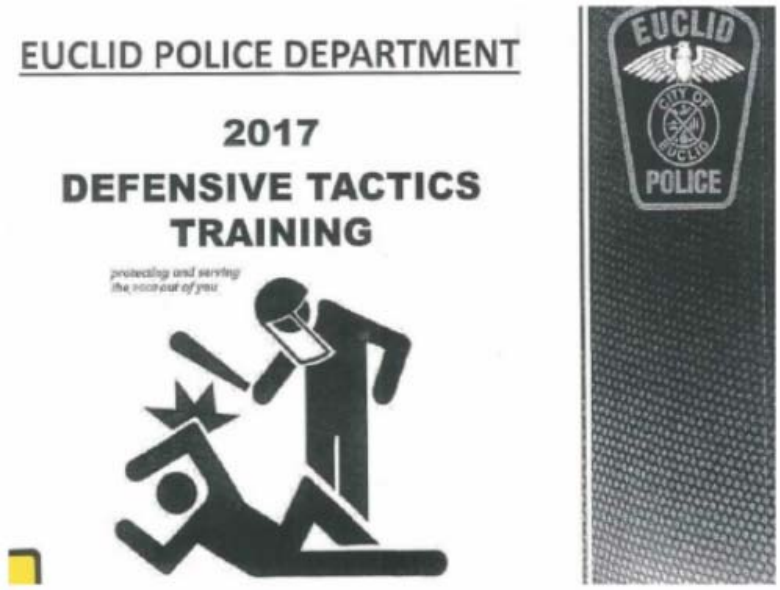
The City of Euclid trains its officers to "protect[] and serv[e] the poop out of you."

In early 2017, all Euclid Police Department officers attended a use-of-force training. Pet.App.76a. That training "display[ed] a disturbing tendency to trivialize the use of excessive force." Pet.App.75a.

For example, the training included a Chris Rock comedy skit called "How Not To Get Your Ass Kicked By The Police!" Pet.App.76a-77a. The "tips" for civilians contained therein included "[i]f you have to give a friend a ride, get a white friend," because "[a] white friend can be the difference between a ticket

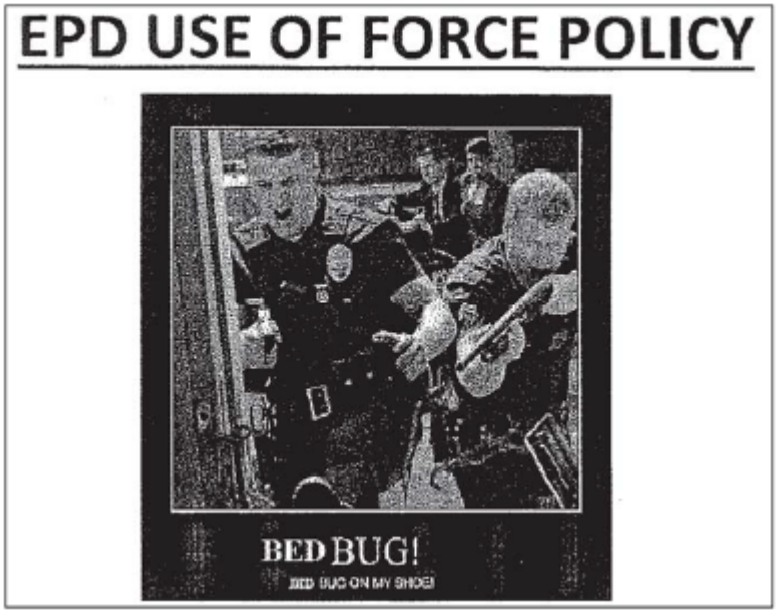
and a bullet in ya'." Pet.App.77a. Rock also joked about the Rodney King incident, claiming King "wouldn't've got his ass kicked" if he'd followed that advice. *Id.*

The training also included various cartoon graphics making light of police violence. One slide depicted a figure of a police officer beating a prone, unarmed civilian. It was captioned "Euclid Police Department Defensive Tactics Training: protecting and serving the poop out of you":



Pet.App.76a.

Another was labeled "EPD Use of Force Policy" and depicted two officers, guns drawn, with the caption, "Bed bug! Bed bug on my shoe!":



Appellant's Br. at 28.

The Euclid Police Department also provides virtually no guidance, in trainings or otherwise, on when or how to remove civilians from vehicles, even though Euclid police officers are routinely tasked with doing so. *Id.* at 25-26. In fact, Euclid police officer Matthew Rhodes had already dragged several civilians out of their vehicles during his first few months on the job—and was attempting to do just that when he shot and killed Luke Stewart. *Id.* at 26.

A call about an idled car ends with a Euclid police officer shooting Luke Stewart.

Viewed in the light most favorable to plaintiffs, the evidence at summary judgment showed the following: On March 13, 2017, Stewart, a 23-year-old Black man, was parked at a friend's house, where he hoped to spend the night. Pet.App.2a. When his friend did not

answer the phone, Stewart decided to sleep in his car. *Id.* At about 7:00 a.m., a resident called the police to report an idled car parked on her street. Pet.App.24a.

Euclid police officer Louis Catalani responded to the call. Pet.App.37a. He saw Stewart sleeping in the driver's seat of the car, a digital scale, and what he believed to be a half-burnt "marijuana blunt." Pet.App.39a. A license plate check revealed that the car's owner had an outstanding warrant, but Catalani could tell Stewart was too young to be that owner. Pet.App.39a.

Catalani radioed Euclid police officer Matthew Rhodes, telling him they were "goina [sic] end up pulling this guy out," referring to the still-sleeping Stewart. Pet.App.39a. Rhodes arrived a few minutes later, parking in front of the car. *Id.*

Neither officer turned on their dashboard camera or belt microphone, so the only record of what happened next is the testimony of Catalani and Rhodes. Pet.App.39a-40a. They testified that Catalani approached the driver's side of the car, and Rhodes the passenger's side. Pet.App.40a. Catalani knocked on the window, and Stewart woke up and waved. *Id.* Stewart then sat up and started the car. *Id.* Rhodes opened the passenger's side of the car and began pushing Stewart. Pet.App.41a. According to the officers, Stewart maneuvered the car around Rhodes' cruiser, and Rhodes hopped fully into the car, closing the door behind him, as Stewart did so. Pet.App.42a-43a.

For the next minute, Stewart drove his car, with Rhodes as his unwanted passenger, down the street at about 25-30 miles per hour. Pet.App.48a. According to

Rhodes, Stewart did not threaten him, attempt to fight him off, or speed up. Pet.App.44a. Rhodes punched Stewart in the head, cutting him open, and tased him six times. Pet.App.5a. Rhodes recalled yelling at Stewart, but does not recall what he yelled—and does not remember whether he asked Stewart to let him out of the car. Pet.App.44a; Pet.App.6a. Stewart stopped the car at least twice during the last minute of his life, once for 10-15 seconds in an intersection and a second time when Rhodes' tasing caused Stewart to drive the car onto a curb (the car was, at that point, in neutral, though Stewart continued to rev the engine). Pet.App.46a-47a; Pet.App.48a-49a.

While the car was stopped and the engine in neutral, Rhodes pulled out his pistol and shot twice into Stewart's torso. Pet.App.49a. Only then did Stewart attempt to "punch" Rhodes. *Id.* Rhodes shot Stewart three more times, 59 seconds after he had entered Stewart's car and less than two minutes from the time officers had knocked on Stewart's window to "pull him out" for having a digital scale in his car. Pet.App.4a, 6a, 25a. Stewart died. Pet.App.6a.

Luke Stewart's mother sues the City of Euclid, and the Sixth Circuit affirms summary judgment.

Luke Stewart's mother, Mary Stewart, sued Rhodes, Catalani, and the City of Euclid under 42 U.S.C. § 1983 for excessive force in violation of the Fourth Amendment.[1] The district court granted

[1] Mary Stewart also brought several state-law claims. Those claims are not at issue in this petition.

summary judgment to all three defendants. Pet.App.78a.

Mary Stewart appealed to the Sixth Circuit. The Sixth Circuit first held that a jury could find Rhodes had violated Luke Stewart's Fourth Amendment right by unreasonably shooting him. Luke Stewart posed no threat: He was unarmed, "was not aggressive toward Rhodes," and, even on Rhodes' telling, "rarely attempted to defend himself," despite being hit and tased. Pet.App.10a. His driving "was not so dangerous to constitute" a threat to the officers or others; by even the defendant officers' estimates, Luke was driving 25-30 miles per hour and stopped twice within a one-minute span. Pet.App.10a-11a. Most importantly, the car was stopped and in neutral at the moment Rhodes shot Luke. Pet.App.11a. Drawing all inferences in plaintiff's favor, the Sixth Circuit held, a jury could find that Rhodes violated Stewart's Fourth Amendment rights. Pet.App.12a.

The Sixth Circuit then went on to consider whether Rhodes was entitled to qualified immunity. It found he was, because "Stewart has pointed to no cases in this circuit involving an officer being driven in a suspect's car, much less a case that shares similar characteristics such as the suspect's level of speed, aggression, or recklessness." Pet.App.14a.

The Sixth Circuit then turned to Mary Stewart's municipal-liability claim against the City of Euclid. It characterized the Euclid Police Department's deadly force training program as "tasteless and inappropriate." Pet.App.16a. But it held that it could not consider any of the evidence of Euclid's "distasteful, perhaps inadequate, training program" because Sixth Circuit precedent did not allow a

finding that a municipality was deliberately indifferent without a finding that clearly established law prohibited the constitutional violation at issue. *Id.* at 16a-17a (discussing *Arrington-Bey v. City of Bedford Heights, Ohio*, 858 F.3d 988, 994-95 (6th Cir. 2017)). In other words, plaintiff could not proceed against the City of Euclid for the same reason she could not proceed against Rhodes.

Judge Donald dissented. She criticized the clearly established law inquiry as leading to "perverse results." Pet.App.22a-23a. She nonetheless would have denied qualified immunity to the officers in this case. *Id.*

REASONS FOR GRANTING THE PETITION

I. The Question Presented Is The Subject Of A Well-Developed Circuit Split.

A. At least three circuits hold that a plaintiff can prove deliberate indifference without clearly established law.

At least three circuits hold that the absence of clearly established law does not categorically preclude proof of deliberate indifference for municipal liability.

Most recently, in *Quintana v. Santa Fe County Board of Commissioners*, 973 F.3d 1022 (10th Cir. 2020), a pretrial detainee died from heroin withdrawal while in custody. *Id.* at 1033-34. Plaintiffs alleged that Santa Fe County was deliberately indifferent to the rights of pretrial detainees because it didn't have any sort of intake protocol for treating withdrawal. *Id.* Claims against every individual defendant who had handled the decedent's intake had

been dismissed because no clearly established law warned of defendants' constitutional obligations with regard to heroin withdrawal. *Id.* at 1033-34 & n.5. The Tenth Circuit nonetheless found that the complaint stated a claim against the municipality even absent any clearly established law, because three other inmates had the same deficient intake. *Id.* at 1034. Just a month earlier, a concurrence by another Tenth Circuit judge had suggested adopting the Sixth Circuit's clearly-established-law rule. *Contreras on behalf of A.L. v. Dona Ana Cty. Bd. of Cty. Comm'rs*, 965 F.3d 1114, 1124-25 (10th Cir. 2020) (Carson, J., concurring). But *Quintana* did not adopt the suggestion.

Prior Tenth Circuit cases hold similarly. In *Myers v. Oklahoma Board of County Commissioners*, 151 F.3d 1313 (10th Cir. 1998), for instance, the Tenth Circuit held that a jury verdict finding that individual officers were not liable for excessive force could not preclude a subsequent suit against the municipality for deliberate indifference, because there is "no inherent inconsistency" between a jury finding no clearly established law for qualified immunity purposes and finding deliberate indifference for purposes of municipal liability. *Id.* at 1317.[2]

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[2] *See also Brown v. The City of Colorado Springs*, 709 F. App'x 906, 916-17 (10th Cir. 2017) (no jurisdiction for interlocutory review of denial of summary judgment to municipality alongside denial of qualified immunity to individual officer because two were not intertwined; "when we resolve an individual-capacity §1983 claim on the clearly-established-law prong of qualified immunity," that resolution does not necessarily have any bearing on whether a municipality can be

The Ninth Circuit, too, rejects the Sixth Circuit's clearly-established-law rule. Sitting en banc in *Kirkpatrick v. County of Washoe*, 843 F.3d 784 (9th Cir. 2016) (en banc), that court considered a case where social workers did not seek a warrant before removing a baby from her mother's care. The court granted the social worker qualified immunity, finding that there was no "clearly established law . . . in a case that remotely resembles this one." *Id.* at 793. But the Ninth Circuit held that "[g]iven the work performed by DSS social workers, the need for DSS to train its employees on the constitutional limitations of separating parents and children is 'so obvious' that its failure to do so is 'properly . . . characterized as "deliberate indifference" to the constitutional rights' of Washoe County families." *Id.* at 796-97. The court thus found sufficient evidence of deliberate indifference to survive summary judgment even in the absence of clearly established law.

The Ninth Circuit recently reaffirmed that rule in *Horton by Horton v. City of Santa Maria*, 915 F.3d 592 (9th Cir. 2019). There, individual officers exercised their right to interlocutorily appeal the denial of qualified immunity at summary judgment, and the Ninth Circuit agreed with the officers, finding no clearly established law on point. *Id.* at 601-02. Municipalities, however, unlike individual officers,

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found deliberately indifferent); *Cox v. Glanz*, 800 F.3d 1231, 1256 (10th Cir. 2015) (similar); *Lynch v. Barrett*, 703 F.3d 1153, 1164 (10th Cir. 2013) (similar); *Medina v. City & Cty. of Denver*, 960 F.2d 1493, 1499-1500 (10th Cir. 1992) (finding officers entitled to qualified immunity but separately evaluating deliberate indifference for municipal liability without reference to clearly established law).

don't have a right to interlocutory review unless the municipal liability claim is "inextricably intertwined" with the qualified immunity claim. *Id.* at 603. When the municipal defendant sought interlocutory review on that basis, the Ninth Circuit denied review, holding that the municipal liability analysis was not sufficiently intertwined with the qualified immunity analysis because one "does not 'necessarily' resolve" the other: "[A] municipality may be liable if an individual officer is exonerated on the basis of the defense of qualified immunity"—that is, where there is no clearly established law on point. *Id.*[3]

The Eleventh Circuit, too, has held that the absence of clearly established law does not foreclose finding a municipality deliberately indifferent. In *Young v. Augusta, Ga.*, 59 F.3d 1160 (11th Cir. 1995), an inmate was handcuffed naked to a metal bed when she suffered a psychotic episode. *Id.* at 1164. The Eleventh Circuit reversed a grant of summary judgment to the municipality, finding sufficient evidence of deliberate indifference because "[t]he record in this case reveals that Young is not the only City inmate who has complained of a lack of adequate treatment." *Id.* at 1172-73. Nowhere did the court look to clearly established law; those other inmates who complained did not do so in published opinions. *Id.*

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[3] *See also Gibson v. Cty. of Washoe, Nev.*, 290 F.3d 1175, 1185-87 & n.7 (9th Cir. 2002) (municipal liability may lie even when individual officers are exonerated on the basis of qualified immunity); *Fairley v. Luman*, 281 F.3d 913, 917 & n.4 (9th Cir. 2002) (same); *Chew v. Gates*, 27 F.3d 1432, 1439 (9th Cir. 1994) (city may still be liable if jury exonerated individual officer based on qualified immunity).

More recently, the Eleventh Circuit considered a case where the district court had found sufficient evidence of deliberate indifference in the many grievances plaintiff filed against the municipality. *Saunders v. Sheriff of Brevard Cty.*, 735 F. App'x 559, 563 (11th Cir. 2018); *see also* Order at 23-24, *Saunders v. Sheriff of Brevard Cty.*, No. 14-cv-877 (M.D. Fla. Nov. 21, 2016), Dkt. 200. On interlocutory review, the Eleventh Circuit reversed the denial of qualified immunity to individual defendants, finding that no clearly established law put them on notice. 735 F. App'x at 571. But it declined to consider the denial of summary judgment to the municipality in that interlocutory posture, because the two questions were not sufficiently intertwined: "[I]f officers violated a plaintiff's constitutional rights but those rights were not 'clearly established,' then *Monell* liability could survive even though qualified immunity would preclude individual liability." *Id.*[4]

Finally, although case law in the Second Circuit is mixed, recent cases suggest that a lack of clearly established law does not foreclose a finding of deliberate indifference in that circuit, either. Although older Second Circuit cases appeared to

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[4] *See also Barnett v. MacArthur*, 956 F.3d 1291, 1301-02 & n.8 (11th Cir. 2020) ("[W]hen an individual defendant is protected from §1983 liability by qualified immunity . . . the municipality is not necessarily absolved of liability."); *Anderson v. City of Atlanta*, 778 F.2d 678, 686 (11th Cir. 1985) ("*Monell* . . . and its progeny do not require that a jury must first find an individual defendant liable before imposing liability on local government.").

adopt the Sixth Circuit's clearly-established-law rule,[5] more recent cases reject that requirement. In *Askins v. Doe No. 1*, 727 F.3d 248 (2d Cir. 2013), the court considered a claim that a municipality had inadequate "training or oversight measures" regarding arrests, Br. of Plaintiff-Appellant, *Askins*, 727 F.3d 248 (No. 12-877), 2012 WL 2884074, at *12. The district court had found individual officers entitled to qualified immunity because there was no clearly established law prohibiting their conduct. The district court assumed that meant that municipal liability was foreclosed, too. *Askins*, 727 F.3d at 253. The Second Circuit reversed, holding that the district court's conclusion "reflects a misunderstanding of the relationship between the liability of individual actors and municipal liability for purposes of *Monell*." *Id.* "[T]he entitlement of the individual municipal actors to qualified immunity because at the time of their actions there was no clear law or precedent warning them that their conduct would violate federal law is . . . irrelevant to the liability of the municipality." *Id.* at 254.[6]

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[5] *See Young v. Cty. of Fulton*, 160 F.3d 899, 903-04 (2d Cir. 1998); *Townes v. City of New York*, 176 F.3d 138, 143-44 (2d Cir. 1999)

[6] *See also Lore v. City of Syracuse*, 670 F.3d 127, 164 (2d Cir. 2012) (rejecting contention that "if [individual officer] is entitled to qualified immunity, the City is immune from responsibility for his actions"); *Curley v. Vill. of Suffern*, 268 F.3d 65, 71-72 (2d Cir. 2001) (if a jury had found "excessive force by the arresting officers, but also found they were entitled to qualified immunity because they acted reasonably in light of existing law," plaintiffs would be entitled to proceed with suit against the municipality).

Thus, in at least three circuits—and likely more[7]—the absence of clearly established law would not

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[7] Although the Third, Fourth, and Seventh Circuits have not yet squarely considered the question presented, all three appear to reject the Sixth Circuit's clearly-established-law rule.

In *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017), the Third Circuit found that individual officers were entitled to qualified immunity in a retaliation case because no clearly established law held the conduct prompting retaliation was protected by the First Amendment. *Id.* at 362. Rather than finding that the absence of clearly established law necessarily foreclosed municipal liability, the Third Circuit remanded for the district court to consider a claim that the city "acted with deliberate indifference" to those First Amendment violations. *Id.*; Br. of Appellants, *Fields*, 862 F.3d 353 (Nos. 16-1651, 16-1650), 2016 WL 6350472, at *48-49.

In *International Ground Transp. v. Mayor & City Council of Ocean City, MD*, 475 F.3d 214 (4th Cir. 2007), the Fourth Circuit categorically held that "when a jury, which has been instructed on a qualified immunity defense as to the individual defendants, returns a general verdict in favor of the individual defendants but against the municipality, the verdict is consistent and liability will lie against the municipality (assuming the verdict is proper in all other respects)." *Id.* at 219-20. In other words, a jury finding that no clearly established law prohibited individual officers' conduct would not foreclose a finding of municipal liability.

Finally, the Seventh Circuit found sufficient evidence of deliberate indifference on the part of a municipality without considering clearly established law. In *Glisson v. Indiana Dep't of Corr.*, 849 F.3d 372 (7th Cir. 2017) (en banc), the Seventh Circuit considered whether a prison system's failure to establish any sort of protocols to care for inmates with chronic illnesses reflected "deliberate indifference." *Id.* at 382. No individual medical officer had been named, and the court did not consider clearly established law at all. *Id.* at 378. Nevertheless, the Seventh Circuit determined that there was enough evidence to go to a jury on deliberate indifference looking to Indiana's health

preclude a finding of deliberate indifference. In those circuits, a panel would have considered the full suite of evidence Petitioner presented—and *Wright* strongly suggests that, had it done so, it would have found enough evidence to send the claim against Respondent to a jury.

B. Four circuits hold that a plaintiff cannot prove deliberate indifference without clearly established law.

By contrast, four circuits hold that the absence of clearly established law categorically precludes a finding of deliberate indifference for purposes of municipal liability.

The Sixth Circuit panel below relied on *Arrington-Bey v. City of Bedford Heights, Ohio*, 858 F.3d 988 (6th Cir. 2017), for the Sixth Circuit's clearly-established-law rule. There, correctional officers killed a bipolar pretrial detainee. *Id.* at 992-94. His mother sued the guards, and the Sixth Circuit found all the individual defendants entitled to qualified immunity because the law was unsettled. *Id*. As a result, the Sixth Circuit refused to consider any other evidence that the municipality was deliberately indifferent, holding that "a municipal policymaker cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established." *Id.* at 994.

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department recommendations and common sense—not clearly established law. *Id.* at 380-82; *see also Thomas v. Cook Cty. Sheriff's Dep't*, 604 F.3d 293, 304-05 (7th Cir. 2010).

Three other circuits have adopted the clearly-established-law rule. In *Joyce v. Town of Tewksbury*, 112 F.3d 19, 23 (1st Cir. 1997) (en banc), the First Circuit granted qualified immunity to two police officers who forced their way into a woman's home, finding no clearly established law on point. *Id.* at 23. It held that the municipal defendant who failed to train those officers could not be held liable either: "[O]ur rationale here for granting qualified immunity to the officers—that the unsettled state of the law made it reasonable to believe the conduct in this case constitutional"—also precluded a finding of deliberate indifference. *Id.*

In *Bustillos v. El Paso County Hospital District*, 891 F.3d 214 (5th Cir. 2018), the Fifth Circuit affirmed a grant of summary judgment to a municipality in a case where county employees had conducted a "brutal" cavity search of plaintiff. *Id.* at 218, 222. The individual employees received qualified immunity because the law was not clearly established. *Id.* at 222. And the Fifth Circuit therefore held, citing the Sixth Circuit, that no further analysis was necessary as to the municipal defendant: "A 'policymaker cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established.'" *Id*.

Finally, the Eighth Circuit, sitting en banc, considered a case where a police officer sicced a dog on a suspect without warning. *Szabla v. City of Brooklyn Park, Minn.*, 486 F.3d 385, 388-89 (8th Cir. 2007). Because the "constitutional requirement that an officer . . . give advance warning before commanding a canine to bite . . . was not clearly established," the municipal defendant's actions could not "properly be

characterized as deliberate indifference." *Id.* at 393-95.

In short, the circuits are insolubly divided on a fundamental question of municipal liability: when a plaintiff can prove deliberate indifference. This Court's intervention is warranted.

II. The Decision Below Is Wrong.

A. Neither the statutory text nor the common law nor precedent support the Sixth Circuit's rule.

The Sixth Circuit's rule forecloses municipal liability even where a municipality is responsible for its employee's violation of the Constitution unless there is "clearly established law" regarding that constitutional violation. That rule has no grounding in the text of § 1983, the backdrop against which § 1983 was passed, or this Court's cases interpreting the statute.

1. 42 U.S.C. § 1983 makes no mention of "clearly established law." Instead, it says: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured."

The text of the statute has an "expansive sweep," *see Owen v. City of Independence, Mo.*, 445 U.S. 622, 635-36 (1980), covering "[e]very person" who "subjects" another to a constitutional violation or "causes" another to be subjected to a constitutional violation. The text "is absolute and unqualified; no

mention is made of any privileges, immunities, or defenses that may be asserted." *Id.*

Under the plain text of the statute, "clearly established law" should form no part of the municipal liability analysis. A municipality is a "person," under the Dictionary Act in force at the time § 1983 was passed. *See* Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431 (repealed 1939) (defining "person" to include "bodies politic and corporate"). And whether that "person" has "cause[d]" another to be "subjected … to the deprivation" of a constitutional right does not turn on clearly established law. For instance, the Sixth Circuit held in the *Wright* case that a jury could find the City of Euclid "cause[d]" the plaintiff to be "subjected" to excessive force by treating police brutality as a joke—no clearly established law necessary for that analysis. *See Wright*, 962 F.3d at 879-82. Under the plain text of § 1983, then, the Sixth Circuit's "clearly established" rule for municipal liability has no place.

2. "[N]otwithstanding § 1983's expansive language and the absence of any express incorporation of common-law immunities," this Court has, in the context of individual officer liability, on occasion held that § 1983 incorporates immunities "firmly rooted in the common law" and "supported by . . . strong policy reasons." *Owen*, 445 U.S. at 637. To the extent "clearly established law" maps onto a common-law immunity, *but see infra*, § I.B.1, its closest analog is the qualified immunity extended to officers acting in "good faith." *See Harlow v. Fitzgerald*, 457 U.S. 800, 815, 818 (1982). And in *Owen*, this Court already rejected the argument that a municipality is entitled to immunity when an individual officer acting in good faith

receives qualified immunity. *Owen* explained that "in the hundreds of cases from [the nineteenth century] awarding damages against municipal governments for wrongs committed by them, one searches in vain for much mention of a qualified immunity based on the good faith of municipal officers." *Id.* at 641.

This Court explained that the so-called "*Thayer* principle"—after "the leading case" of *Thayer v. Boston*, 36 Mass. 511, 515-16 (1837)—held that damages would lie against a municipality even for violations expressly found to have been committed in good faith. Thus, where municipal officials "dug up the soil" on plaintiffs' land to install benches, the City of Boston could be held liable, even "if it was not known and understood to be unlawful at the time," simply because it was "an act done by the officers having competent authority . . . by their offices, to act upon the general subject matter." *Id.* Village trustees could be liable where a street commissioner seized a plaintiff's land, even though everyone involved thought—mistakenly—that the plaintiff had given consent. *Squiers v. Village of Neenah*, 24 Wis. 588, 592 (1869). And a town was liable for the wrongful arrest of a peddler, even though, at the time the arrest was made, no case had held the ordinances under which he was arrested unconstitutional. *McGraw v. Town of Marion*, 34 S.W. 18, 20-21 (Ky. 1896). *See generally Owen*, 445 U.S. at 641-42 & n.22 (collecting cases).

The Sixth Circuit posited that *Owen* rejected immunity only for cases where "an injury arises directly from a municipal act," rather than from "an *employee's* unconstitutional act" that the municipality "failed to prevent." *Arrington-Bey*, 858 F.3d at 994-95 (emphasis in original). But the cases *Owen* pointed to

as applying the *Thayer* principle included cases where liability was predicated on a municipal employee's wrongful act, not a "municipal act." For instance, *Owen* cited *Hawks v. Charlemont*, in which various municipal employees removed stones from plaintiff's land to repair a bridge, causing much of the soil to wash away. 107 Mass. 414, 417-18 (1871). In the Sixth Circuit's parlance, that wrongful act was committed by a municipal employee, rather than the municipality itself—no one suggested that the municipality had authorized removing the stones or that the removal was in any other way the "municipality's act." But the Supreme Judicial Court of Massachusetts nonetheless held the town liable under the *Thayer* principle. Similarly, in *Bunker v. City of Hudson*, 99 N.W. 448, 452 (Wis. 1904), the city had ordered a street graded, but that order did not "expressly authorize[] him to cast a shovelful of earth on plaintiffs' lot." *Id.* Yet the Supreme Court of Wisconsin still held the city liable under the *Thayer* principle for its employee's acts. *Id.*

In short, *Owen* already—and correctly—rejected the idea that there was any atextual immunity to be found at common law that might support the Sixth Circuit's clearly-established-law rule.

3. Finally, this Court's precedents provide no support for the Sixth Circuit's rule. This Court has added the following requirement to § 1983's text: Where, in the Sixth Circuit's terms, the constitutional violation is committed by a "municipal employee," rather than the "municipality itself," a plaintiff must prove that the municipality exhibited "deliberate indifference to the rights of persons with whom [its

employees] come into contact." *City of Canton v. Harris*, 489 U.S. 378, 389 (1989).

This Court has identified at least two ways a plaintiff may prove deliberate indifference, neither of which involves clearly established law. First, a plaintiff may prove deliberate indifference by pointing to a "pattern of similar constitutional violations" by municipal employees, which would have put the municipality on notice of the need for a change in its training or other practices. *Connick v. Thompson*, 563 U.S. 51, 62-63 (2011). That sort of "pattern" analysis, though, is very different from the clearly established law inquiry. On the one hand, plaintiffs may use evidence of *any* constitutional violation, whether or not anyone filed suit or it resulted in a published circuit court opinion, to prove a "pattern," whereas the clearly established law analysis ordinarily restricts itself to constitutional violations announced as such in the Federal Reporter. *Compare Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 407-08 (1997) *with Reichle v. Howards*, 566 U.S. 658, 665-66 (2012). On the other hand, precedent denouncing a constitutional violation by *any* actor may constitute clearly established law for qualified immunity purposes, whereas a "pattern" for deliberate indifference purposes must be of constitutional violations committed by employees of the defendant municipality. *Id.*

A plaintiff may also prove deliberate indifference by showing that the "need for more or different training is so obvious . . . that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton*, 489 U.S. at 390. That may occur where, for instance, "the natural

consequence of the municipality's training regimen is the officials will violate constitutional rights." *Wright*, 962 F.3d at 881. The Sixth Circuit in *Wright* explained that the City of Euclid's training regimen fell into this category—not because of any clearly established law, but because the use of unconstitutional excessive force was a "natural consequence" of a program that "encouraged, permitted, or acquiesced to" it. *Id.* Similarly, this Court has previously noted that a municipality would be deliberately indifferent if it failed to train its police officers on the use of deadly force but armed those officers and deployed them to capture fleeing felons. *Connick*, 563 U.S. at 63-64. "Given the known frequency with which police attempt to arrest fleeing felons and the 'predictability that an officer lacking specific tools to handle that situation will violate citizens' rights,'" such a failing would demonstrate deliberate indifference. *Id.* Here, again, clearly established law has no bearing on deliberate indifference—this Court pointed to the frequency of the officer-civilian interaction and the predictability that the Constitution would be violated, not to clearly established law. *Id.*

Nothing in this Court's precedents, therefore, suggests that the deliberate indifference inquiry (developed for assessing municipal liability) and the clearly established inquiry (developed for assessing individual officer liability) are one and the same—or even have much overlap. Where, as here, plaintiffs presented evidence that a municipality failed to prevent its officers from unnecessarily killing civilians, this Court's precedents do not suggest the municipality can avoid liability simply because no prior Sixth Circuit panel had dealt with a case where

an officer hoisted himself into the passenger seat of a car before shooting the driver. *See Wright*, 962 F.3d at 881-82.

B. The decision below extends two atextual and ahistorical doctrines beyond their limited context.

Indeed, the Sixth Circuit's clearly-established-law rule is *twice* removed from the statute, as it compounds two other rules—the rule that an individual officer is liable only if clearly established law proscribes his conduct and the rule that a municipality is liable only if it acts with deliberate indifference—that themselves have no basis in the text of the statute or the common-law backdrop against which it was passed. To be clear, Petitioner does not seek to overrule either of those doctrines. But neither was commanded by the text of the statute; instead, this Court created each to strike a particular policy balance, and extending each as the Sixth Circuit's rule does would disrupt that balance.

1. Start with the clearly-established-law doctrine. This Court developed the clearly established law doctrine by analogy to the common-law defense of qualified immunity, but it "adjusted" that defense by converting it from a subjective "good faith" defense to an objective defense, measured by reference to precedent. *Harlow*, 457 U.S. at 818. Even if law enforcement officers at common law could claim qualified immunity for unconstitutional assault and battery,[8] no one disputes that the common-law

[8] *But see* William Baude, *Is Qualified Immunity Unlawful*, 106 Cal. L. Rev. 45, 58-60 (2018) [Baude I] (qualified immunity

qualified immunity they claimed bore no resemblance to today's clearly-established-law inquiry.[9] The

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not a "freestanding defense," but one applied to particular torts); William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 73 Stan. L. Rev. Online (forthcoming 2021), at *4-5 [Baude II], *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3746068 (law enforcement officers did not receive qualified immunity); James Pfander, *Zones of Discretion at Common Law*, Northwestern Public Law Research Paper No. 20-27 (Nov. 4, 2020), at *8, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3746475 (no qualified immunity for unconstitutional acts); *Beckwith v. Bean*, 98 U.S. 266, 275 (1878) (no good-faith defense to assault and battery).

[9] Baude I, *supra*, at 60-61; Scott A. Keller, *Qualified & Absolute Immunity at Common Law*, 73 Stan. L. Rev. (forthcoming 2021), at *38-46, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3680714; *Wyatt v. Cole*, 504 U.S. 158, 166 (1992) (*Harlow* "completely reformulated qualified immunity"); *see also* Baude II, *supra*, at *9; James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1863-64 (2010); John F. Preis, *Qualified Immunity and Fault*, 93 Notre Dame L. Rev. 1969, 1986 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1833-34 (2018); John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 258-64 (2013); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 Case W. Res. L. Rev. 396, 414-33 (1987); *Baxter v. Bracey*, 140 S. Ct. 1862, 1862-64 (2020) (Thomas, J., dissenting from denial of certiorari); *Ziglar v. Abbasi*, 137 S. Ct 1843, 1871-72 (2017) (Thomas, J., concurring in part); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting); *Wyatt*, 504 U.S. at 170 (Kennedy, J., joined by Scalia, J., concurring); *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., dissenting); *McCoy v. Alamu*, 950 F.3d 226, 234-237 (5th Cir. 2020) (Costa, J., dissenting); *Reich v. City of Elizabethtown*, 945 F.3d 968, 989 n.1 (6th Cir. 2019) (Nelson Moore, J., dissenting); *Morrow v. Meachum*, 917 F.3d 870, 874 n.4 (5th Cir. 2019);

subjective "good faith" defense at common law was a question for the jury, not for the court. Keller, *supra*, at *27 (collecting cases). The question that disposed of this case—whether prior published Sixth Circuit decisions not only "involve[ed] an officer being driven in a suspect's car," but also a car "that shares similar characteristics such as the suspect's level of speed, aggression, or recklessness," Pet.App.14a—would have formed no part of the qualified immunity analysis at the time § 1983 was drafted. Baude I, *supra*, at 60-61.

This Court created the atextual, ahistorical clearly established law doctrine in the individual officer context to avoid the harshness of individual liability for officers making split-second decisions. *Owen*, 445 U.S. at 653-55. But those considerations simply don't apply to a municipality, which has the luxury of time and reflection to design a training program that, at the very least, doesn't make light of, and even valorize, police violence. *See id.* Because the clearly established law inquiry is judge-made and tailored to the individual officer context, there is no reason to extend it to the municipal liability context.

2. The Sixth Circuit's rule extends yet another atextual doctrine beyond the limited context for which it was created: The requirement that a plaintiff show deliberate indifference before holding a municipality liable.

As with this Court's clearly established law inquiry, the text of § 1983 makes no mention of a

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Thompson v. Cope, 900 F.3d 414, 421 n.1 (7th Cir. 2018); *Rodriguez v. Swartz*, 899 F.3d 719, 732 n.40 (9th Cir. 2018), *cert. granted*, *judgment vacated*, 140 S. Ct. 1258 (2020).

"deliberate indifference" requirement, or, indeed, any mens rea requirement. By contrast, § 1983's criminal counterpart, 18 U.S.C. § 242, otherwise worded similarly, *does* require that the constitutional deprivation be committed "willfully."

Nor does the tort law of 1871 suggest that the statute's drafters would have assumed an unwritten deliberate indifference mens rea.[10] Quite the opposite:

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[10] See, e.g., Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1887, 1934-35 (2018); David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate Over Respondeat Superior*, 73 Fordham L. Rev. 2183, 2203 (2005); Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 DePaul L. Rev. 627, 667 (1999); Susannah M. Mead, *42 U.S.C. § 1983 Municipal Liability: The* Monell *Sketch Becomes a Distorted Picture*, 65 N.C. L. Rev. 517, 535-537 (1987); Charles A. Rothfeld, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. Chi. L. Rev. 935, 936 (1979); Note, Monell v. Department of Social Services*: One Step Forward and a Half Step Back for Municipal Liability Under Section 1983*, 7 Hofstra L. Rev. 893, 921 (1979); Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 Sup.Ct. Rev. 249, 257-61 (1987); Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons From Tort Law and Organization Theory*, 77 Geo. L.J. 1753, 1755 n. 13 (1989); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 489 & n.4 (1986) (Stevens, J., concurring in part and concurring in the judgment); *Board of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 431-37 (1997) (Breyer, J., dissenting, joined by Stevens and Ginsburg, JJ.); *id.* at 430 (Souter, J., dissenting, joined by Breyer and Stevens, JJ.); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 834-44 (1985) (Stevens, J., dissenting); *Vodak v. City of Chicago*, 639 F.3d 738, 747 (7th Cir. 2011); *Pinter v. City of New York*, 976 F. Supp. 2d 539, 550 n.23 (S.D.N.Y. 2013); Brief of Amici Curiae Alliance Defending Freedom & Cato Inst. In Support of Respondent, *Connick*, 563 U.S. 51 (No. 09-571).

The general rule in 1871 was one of respondeat superior—employers were held strictly liable for the wrongdoings of their employees in the course of employment.[11] This Court has assumed statutes of that era to incorporate principles of respondeat superior liability. *See, e.g.*, *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 392-93 (1982) (assuming respondeat superior liability under 42 U.S.C. § 1981, passed in 1866). And municipalities were no exception.[12] In fact, municipalities' liability

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[11] *See, e.g.*, Joel Prentiss Bishop, *Commentaries on the Non-Contract Law and Especially as to Common Affairs Not of Contract or the Every-Day Rights and Torts* § 609 (1889); *Thayer*, 36 Mass. at 516-17. Even when respondeat superior didn't apply, deliberate indifference *still* wouldn't have been the relevant mens rea at common law. Instead, employers could be held liable for negligent supervision and, as the name of the tort suggests, the relevant mens rea was negligence, not deliberate indifference. *See* Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 790 (1890); *Ford v. Parker*, 4 Ohio St. 576, 581-82 (Ohio 1855); *Schroyer v. Lynch*, 8 Watts (Penn.) 453 456-58 (1839); *Dunlop v. Munroe*, 11 U.S. 242, 269 (1812).

[12] *See, e.g.*, *Lee v. Vill. of Sandy Hill*, 40 N.Y. 442, 448-51 (1869) (quoting Joseph Story, Commentaries on the Law of Agency § 456 (1863)) (village liable for highway overseer's mistaken removal of a fence; "[a]ll that is necessary to render the principal liable for the malfeasance or torts of the agent is that the tort must be committed in the course of the agency; not that the agency authorized it"); *City of Oklahoma City v. Hill*, 50 P. 242, 249-50 (Okla. 1897) (city liable for sheriff's conduct while shutting down illegal saloon because "the tort is committed by the city officers in the exercise of some power concerning which they are authorized to act"); *Allen v. City of Decatur*, 23 Ill. 332, 335 (1860) (municipality liable for street encroaching on private property because "[g]overnmental corporations then, from the highest to the lowest, can commit wrongful acts through their authorized agents, for which they are responsible"); Montgomery

for the actions of municipal employees was often assumed to be even more strict than respondeat superior liability.[13]

The "deliberate indifference" requirement, then, came neither from statutory text nor common law.[14] Instead, it was justified based on policy considerations: a lesser mens rea would "open municipalities to unprecedented liability." *City of Canton*, 489 U.S. at 391. But the deliberate

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Hunt Throop, *A Treatise on the Law Relating to Public Officers and Sureties in Official Bonds* §§ 588, 593 (1892); Bishop, *Commentaries* §§ 609, 743, 764.

[13] *See, e.g.*, *Hurley v. Town of Texas*, 20 Wis. 634, 637-38 (1866) (acknowledging the "general principle, that if officers of a corporation do not act within the scope of their authority, the corporation is not responsible for such unlawful acts," but finding "reason and justice obviously require that the city, in its corporate capacity, should be liable" because "the rights, both of the public and of individuals, may be deeply involved"); *Schussler v. Bd. of Comm'rs of Hennepin Cty.*, 70 N.W. 6, 7 (Minn. 1897) (despite "general rule" that "defendant would not be responsible for the unauthorized and unlawful acts of its officers," county was an exception).

[14] In *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), this Court rejected respondeat superior in § 1983 based on the statute's text and legislative history. As to the former, *Monell* concluded that the use of the word "cause" in the text of the statute foreclosed other forms of vicarious liability. *Id.* at 692. But respondeat superior is perfectly compatible with a "causation" requirement; indeed, respondeat superior operates where the employee *causes* a tort. *See* Kramer & Sykes, *supra*, at 256; Rothfeld, *supra*, at 941. As to the latter, *Monell*'s discussion centers almost entirely on the rejection of an amendment making municipalities liable for the acts of private citizens, *Monell*, 436 U.S. at 666-67—an amendment that had nothing to say about liability for the acts of municipal employees, *see Tuttle*, 471 U.S. at 836 & n.8; Kramer & Sykes, *supra*, at 256-65.

indifference requirement as envisioned by this Court's precedents *already* stops that "unprecedented liability"; municipal liability is exceedingly difficult to prove. *See, e.g.*, Fred O. Smith, *Local Sovereign Immunity*, 116 Colum. L. Rev. 409, 430-40 (2016). Fears of "unprecedented liability" therefore would not justify raising the mens rea bar for municipal liability still higher by imposing the Sixth Circuit's clearly-established-law rule.

III. This Case Is An Ideal Vehicle To Resolve The Question Presented.

Precisely the same training program at issue in this case—documented by the same lawyers on similar records and briefing—was considered sufficient evidence of municipal liability just months earlier by a different panel of the Sixth Circuit. The City of Euclid was no more culpable in the *Wright* case than in this one—in each case, plaintiffs sued over the same training program, claiming that it encouraged excessive force. There was no closer connection between that training program and the unreasonable force at issue in *Wright* than between the training and the unreasonable force in this case—the training program had generally encouraged police brutality, not any specific uses of force. And there was no evidence in *Wright* beyond the training that would have justified a different outcome. Yet the *Wright* panel sent a case against the City of Euclid to a jury; this panel, hamstrung by the Sixth Circuit's clearly-established-law rule, could not. This Court thus need not speculate that the question presented was outcome-dispositive here—Judge Bush's opinion in *Wright* makes clear that it was.

This case is a uniquely suitable vehicle to address the question presented for another reason. A municipality can't be liable under §1983 unless there has been a constitutional violation. But in most cases invoking the clearly-established-law rule, this Court won't *know* whether there was an underlying constitutional violation because most courts confronted with an absence of clearly established law resolve the case by granting qualified immunity without confronting the question whether the Constitution was violated.[15] In this case, the Sixth Circuit reached the constitutional question before ruling on clearly established law; it thus provides a unique opportunity for this Court to consider the clearly-established-law rule for municipal liability.

IV. The Question Presented Is Important, And Its Resolution Below Is Troubling.

The clearly-established-law rule affects vast swaths of civil-rights litigation. It applies to cases where police officers enter the doorway of a home and cases where juveniles are put in solitary confinement, cases where a teacher molests a student and cases where property is civilly forfeited without process.[16]

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[15] *See, e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *Sims v. City of Madisonville*, 894 F.3d 632, 638 (5th Cir. 2018); *Arrington-Bey*, 858 F.3d at 992-94; Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 33-34 (2015) (courts decline to rule on underlying constitutional violation in majority of cases with qualified immunity defense).

[16] *See Joyce v. Town of Tewksbury, Mass.*, 112 F.3d 19, 23 (1st Cir. 1997) (en banc); *J.H. v. Williamson Cty., Tenn.*, 951 F.3d 709, 721 (6th Cir. 2020); *Gonzalez v. Ysleta Ind. Sch. Dist.*, 996 F.2d 745, 759-60 (5th Cir. 1993); *Nichols v. Wayne Cty., Mich.*, 822 F. App'x 445, 451-52 (6th Cir. 2020).

Indeed, because there are "far more underlings than policymakers"—that is, far more cases about a municipal employee's acts, to which the Sixth Circuit's rule applies, than to a municipality's acts—the clearly-established-law rule affects the mine run of cases.

This Court has explained that it would be "uniquely amiss" if, "owing to the qualified immunity enjoyed by most government officials, many victims of municipal malfeasance [were] left remediless if the city were also allowed to assert a good-faith defense." *Owen*, 445 U.S. at 651 (citation omitted). That, of course, is precisely what the Sixth Circuit's rule would do—leave victims of police brutality and other "municipal malfeasance" remediless, because in cases where they could not seek relief against individual actors protected by qualified immunity, municipal liability would be off limits, too.

Linking municipal liability to clearly established law also leads to incoherent results. At common law and in this Court's precedents since, the case for municipal liability is weakest when officers go entirely rogue. *See Connick*, 563 U.S. at 78 (Scalia, J., concurring); *Schussler*, 70 N.W. at 7; *Hurley*, 20 Wis. at 637-38. But it's precisely those cases—where an officer does something plainly illegal—where the law is *most* likely to be clearly established. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Moreover, the Sixth Circuit's rule by its own terms applies only cases dealing with "a municipal act," rather than an "*employee*'s unconstitutional act." *Arrington-Bey*, 858 F.3d at 994-95. But the distinction between a "municipal act" and a "municipal employee's act" is, at best, razor thin. *Compare*

Nichols v. Wayne Cty., Mich., 822 F. App'x 445, 451-52 (majority concluded case was a "municipal employee's act" case and applied clearly-established-law rule because city attorney failed to provide retention hearings in civil forfeiture cases) *with id.* at 467-68 (Moore, J., dissenting) (clearly-established-law rule should not apply because city itself, not city attorneys, was responsible for failure to provide retention hearings).

This case also illustrates why the court-made "clearly established law" immunity has been such a lightning rod for criticism. As the dissent below pointed out, "[h]ad Rhodes been standing outside of the car when he used lethal force, this would be a very simple case," as there had been prior opinions addressing that fact pattern. Pet.App.27a. But because Rhodes did something more foolish than other officers who have graced the pages of the Federal Reporter—he got into the passenger seat of the car, closed the door behind him, and rode along with Luke Stewart for one minute before shooting him—the clearly established law inquiry foreclosed liability. Pet.App.14a-15a; *see Zadeh*, 928 F.3d at 479-80 (Willett, J., dissenting).

Finally, the Sixth Circuit's clearly-established-law rule would undermine the purpose of § 1983 itself. The statute was crafted to address local officials' complicity in the racial terror of Reconstruction. Eric Foner, *The Supreme Court & The History of Reconstruction—and Vice Versa*, 112 Colum. L. Rev. 1585, 1601 (2012). As one of the first statutes of its kind, § 1983 was expressly designed to reach conduct that had never before been policed by federal courts. *Id.* It would have been anathema to its drafters that

this foundational civil rights statute would not reach a city whose official police training encouraged violence and racial animus simply because there had not previously been a successful suit about the particular *way* its police officers carried out that violence and animus.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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