No. 20-951

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, OHIO, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

WESLEY HOTTOT*
INSTITUTE FOR JUSTICE
600 University Street
Suite 1730
Seattle, WA 98101
(206) 957-1300
whottot@ij.org

MARIE MILLER
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
mmiller@ij.org

* *Counsel of Record*

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The Institute for Justice (IJ) timely notified the parties of its intention to submit an amicus brief in this case, as required by Supreme Court Rule 37.2(a). Petitioner consented, but Respondent withheld consent. IJ respectfully moves this Court, under Supreme Court Rule 37.2(b), for leave to file the attached brief in support of Petitioner.

This case presents the Court with the opportunity to resolve an equally divided Circuit split that has been deepening for decades. The split is over when a municipality can be liable under 42 U.S.C. § 1983. The Sixth Circuit, like three other Circuits, requires clearly established law—a standard for qualified immunity—as a prerequisite to municipal liability for inadequate training. That requirement departs from the text, history, and purpose of § 1983, as well as from this Court's decisions interpreting the statute. It also departs from the law of four other Circuits—one of which issued a decision after the Petition was filed. The result is that individuals in 18 states are denied any remedy for constitutional violations, shielding more than 36,000 local governments from accountability.

IJ is a nonprofit public-interest law firm dedicated to defending the foundations of a free society, including the ability to hold the government and its officials accountable. IJ represents clients and files amicus briefs in cases like this, concerning the scope of government accountability. In the attached brief, IJ offers the Court

an analysis of how four Circuits have strayed from the text, history, and purpose of § 1983 and this Court's decisions interpreting the statute. It also highlights how this case offers two ways to resolve the split of authority: one broad, the other narrow.

Accordingly, this Court should grant the motion to file the attached brief as amicus curiae.

Respectfully submitted,

WESLEY HOTTOT*
INSTITUTE FOR JUSTICE
600 University Street
Suite 1730
Seattle, WA 98101
(206) 957-1300
whottot@ij.org

MARIE MILLER
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
mmiller@ij.org

* *Counsel of Record*

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BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Institute for Justice (IJ) is a nonprofit, public-interest law firm dedicated to defending the foundations of a free society. One such principle is the ability of the American people to hold the government and its officials accountable. IJ represents clients in cases concerning the scope of government accountability[2] and it regularly files amicus briefs on the topic.[3]

IJ urges review (and reversal) of the Sixth Circuit's rule that municipal liability requires a clearly-established-law inquiry akin to the standard for individual liability, where qualified immunity applies. In this case, the court applied that rule to hold the City of

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[1] No counsel for a party authored this amicus brief in whole or in part. No person other than amicus or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Amicus timely notified the parties that it intended to file this brief.

[2] *See*, *e.g.*, *Brownback* v. *King*, 140 S. Ct. 2563 (argued Nov. 9, 2020); *Serrano* v. *Customs & Border Protection*, 975 F.3d 488 (5th Cir. 2020), *cert. petition filed*, No. 20-768 (Dec. 1, 2020); *West* v. *City of Caldwell*, 931 F.3d 978 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 111 (2020); *Lech* v. *Jackson*, 791 F. App'x 711 (10th Cir. 2019), *cert. denied*, 141 S. Ct. 160 (2020).

[3] *See*, *e.g.*, *Tanzin* v. *Tanvir*, 141 S. Ct. 486 (2020); *Hernandez* v. *Mesa*, 140 S. Ct. 735 (2020); *Jessop* v. *City of Fresno*, 936 F.3d 937 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2793 (2020).

Euclid, Ohio, could not be liable for the death of Luke Stewart because no clearly established law prohibited Euclid police officers from killing him in precisely the way they did.

Amicus wishes to explain how the Sixth Circuit's rule (and that of three other Circuits) conflicts with Congress's determination that municipalities are liable when they "cause[] 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," 42 U.S.C. § 1983, conflicts with decisions of this Court interpreting § 1983, and conflicts with decisions of four other Circuits—one of which clarified its position after the Petition was filed. Amicus concludes by offering two ways this Court could resolve the equally divided split of authority.

SUMMARY OF THE ARGUMENT

IJ agrees with Mr. Stewart's estate: Certiorari is warranted for the reasons stated in the Petition. Amicus writes to explain how the Sixth Circuit has conflated municipal liability and modern qualified-immunity doctrine. Amicus also offers two ways this Court could resolve this case (and the split of authority it represents) at the merits stage. Unlike the Sixth Circuit's approach, amicus's proposals are consistent with the text and purposes of § 1983.

The Sixth Circuit is now one of four Circuits that use a clearly-established-law inquiry for municipal-liability claims. That inquiry requires lower courts to dismiss claims of municipal liability under § 1983 unless the constitutional violation in question is "clearly established" in binding authority. This standard sounds familiar because it has been lifted from the qualified-immunity context, which concerns individual, rather than municipal, liability. *See*, *e.g.*, Pet. App. 16a–17a.

The Sixth Circuit's rule departs from this Court's precedent in two ways.

First, it abandons the "deliberate indifference" standard for municipal liability and replaces it with the qualified-immunity standard for individual liability. But the doctrine of qualified immunity was shaped by very different history, policies, and concerns—which is why municipalities can exhibit "deliberate indifference" without clearly established law addressing an identical violation of another person's rights. Indeed, four Circuits take this approach, specifically rejecting the clearly-established-law inquiry used below.

Second, requiring clearly established law gives municipalities *de facto* immunity from inadequate-training claims. This conflicts with *Owen* v. *City of Independence*, 445 U.S. 622 (1980), which held that the history and policies behind § 1983 do not support reading the statute in a way that would shield municipalities from liability, even when individual government actors relied in good faith on existing case

law. Requiring a clearly established right in municipal-liability cases would effectively freeze the case law as it exists today, immunizing municipalities from all future constitutional violations.

A clearly-established-law inquiry finds no support in the text and history of § 1983 and is "uniquely amiss" considering the statute's purposes. *See Owen*, 445 U.S. at 651; Act of Apr. 20, 1871, ch. 22, 42 Stat. 13 ("An Act to enforce the Provisions of the Fourteenth Amendment * * * ."). Yet the equally divided Circuit split on this issue has deepened for more than two decades,[4] depriving the residents of 18 states[5] of constitutional protection when their rights are violated at the hands of inadequately trained officers shielded by qualified immunity.

This case is a good vehicle for resolving this important issue in either of two ways.

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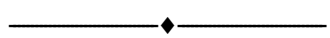
[4] After the Petition was filed, the Tenth Circuit confirmed its alignment with the Second, Ninth, and Eleventh Circuits. *Compare Lance* v. *Morris*, No. 19-7050, 2021 WL 162343, at *10–11 (10th Cir. Jan. 19, 2021), *Horton* v. *City of Santa Maria*, 915 F.3d 592, 603 (9th Cir. 2019), *Askins* v. *Doe No. 1*, 727 F.3d 248, 254 (2d Cir. 2013), *Young* v. *City of Augusta*, 59 F.3d 1160, 1171–73 (11th Cir. 1995), *and Walker* v. *City of New York*, 974 F.2d 293, 297–98 (2d Cir. 1992), *with Bustillos* v. *El Paso Cnty. Hosp. Dist.*, 891 F.3d 214, 222 (5th Cir. 2018), *Szabla* v. *City of Brooklyn Park*, 486 F.3d 385, 393 (8th Cir. 2017) (en banc), *Hagans* v. *Franklin Cnty. Sheriff's Office*, 695 F.3d 505, 511 (6th Cir. 2012), *and Joyce* v. *Town of Tewksbury*, 112 F.3d 19, 23 (1st Cir. 1997) (en banc).

[5] *See* note 10, *infra*, and accompanying text.

First, the Court could reexamine its complicated treatment of § 1983 claims under *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978). The Court's distinction between unconstitutional policies (for which municipalities can be held liable) and vicarious liability (from which municipalities are immune) is ripe for reconsideration and particularly tenuous in inadequate-training cases such as this. The outrageous facts of this case illustrate the problem: Under the Sixth Circuit's rule, a municipality can affirmatively *encourage* the use of excessive force, only to escape liability for inadequate training because no binding authority holds with a high degree of specificity that municipalities cannot intentionally train officers to violate people's rights.

Second, and more narrowly, the Court could clarify that the clearly-established-law inquiry for qualified immunity has no place in municipal-liability analysis. The factual and legal parallels between this and another recent Sixth Circuit case (which reached the opposite conclusion) demonstrate the absurdity of importing a clearly-established-law inquiry into the municipal-liability context.

The Court should grant the Petition.



ARGUMENT

I. Widespread confusion about when a municipality can be liable has led four Circuits to improperly import a qualified-immunity standard into the municipal-liability context.

Since *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978), municipal-liability claims under § 1983 have become increasingly nuanced, with distinct standards governing different types of claims. *See Board of Cnty. Comm'rs of Bryan Cnty.* v. *Brown*, 520 U.S. 397, 404–05 (1997); *id.* at 417–18 (Souter, J., dissenting). Claims based on policymakers' affirmative acts are governed by the stringent "moving force" causation standard. *Monell*, 436 U.S. at 694. Claims based on inadequate training are governed by the same causation standard plus a "deliberate indifference" standard of fault. *City of Canton* v. *Harris*, 489 U.S. 378, 392 (1989).

As "ever finer distinctions" for municipal liability have developed, *Brown*, 520 U.S. at 430 (Breyer, J., dissenting), this Court has repeatedly reversed lower court decisions denying qualified immunity.[6] Little

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[6] *See Plumhoff* v. *Rickard*, 572 U.S. 765, 779 (2012); *see*, *e.g.*, *Mullenix* v. *Luna*, 577 U.S. 7 (2015) (summary reversal); *Taylor* v. *Barkes*, 575 U.S. 822 (2015) (same); *Carroll* v. *Carman*, 574 U.S. 13 (2014) (same); *Stanton* v. *Sims*, 571 U.S. 3 (2013) (same); *Ryburn* v. *Huff*, 565 U.S. 469 (2012) (same); *see also Morrow* v. *Meachum*, 917 F.3d 870, 876 (5th Cir. 2019) (observing that "we must think twice before denying qualified immunity" because the Supreme Court "routinely wields" the remedy of summary reversal to correct denials of qualified immunity).

wonder, then, that some Circuits have turned to the clearly-established-law test of qualified immunity when faced with applying the uncertain "deliberate indifference" standard for municipal-liability claims.

Indeed, the Sixth Circuit—like the First, Fifth, and the Eighth Circuits[7]—has determined that the "deliberate indifference" standard has been eclipsed by a test designed for assessing the qualified immunity of individuals. In trying to "thread the needle" between permissible and impermissible municipal liability under *Monell*, however, the Sixth Circuit made two critical errors. *Arrington-Bey* v. *City of Bedford Heights*, 858 F.3d 988, 995 (6th Cir. 2017). First, this Court has already threaded that needle for inadequate-training claims, and it did so without requiring clearly established law. And, second, applying the qualified-immunity standard to municipalities conflicts with *Owen* v.

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[7] *See Bustillos*, 891 F.3d 214; *Szabla*, 486 F.3d 385; *Joyce*, 112 F.3d 19. Explaining their adoption of the clearly-established-law inquiry, the Sixth and Eighth Circuits relied on a pair of Second Circuit cases, *Townes* v. *City of New York*, 176 F.3d 138, 143–44 (2d Cir. 1999), and *Young* v. *County of Fulton*, 160 F.3d 899 (2d Cir. 1998). *See Arrington-Bey* v. *City of Bedford Heights*, 858 F.3d 988, 995–96 (6th Cir. 2017); *Szabla*, 486 F.3d at 393. But a more recent Second Circuit panel rejected the reasoning in those cases, explaining that the entitlement of individual officers to qualified immunity is "irrelevant to the liability of the municipality." *Askins* v. *Doe No. 1*, 727 F.3d 248, 254 (2d Cir. 2013) ("To rule * * * that the City of New York escapes liability for the tortious conduct of its police officers because the individual officers are entitled to qualified immunity would effectively extend the defense of qualified immunity to municipalities, contravening the Supreme Court's holding in *Owen*."); *accord Walker*, 974 F.2d at 297–98.

City of Independence, 445 U.S. 622 (1980), in which this Court declined to extend qualified immunity to municipalities.

A. Municipalities can be "deliberately indifferent" to a person's constitutional rights without the plaintiff satisfying the clearly-established-law standard for qualified immunity.

This Court has already balanced permissible and impermissible uses of municipal liability for inadequate-training claims under *Monell*. And it did so without overruling *Owen* and extending qualified immunity to municipalities.

Under this Court's decisions since *Monell*, when the "moving force" of a constitutional violation was an employee's training, the municipality can be liable if a policymaker chose the training program with "deliberate indifference" toward the rights of people with whom employees would interact. *Canton*, 489 U.S. at 388; *Monell*, 436 U.S. at 694. A training program demonstrates the requisite deliberateness if the right at issue is the "sort" of right implicated by the tasks employees perform in "usual and recurring situations with which they must deal," and if the training would lead employees to violate rights of that "sort." *Canton*, 489 U.S. at 388, 391; *Connick* v. *Thompson*, 563 U.S. 51, 62 (2011); *see Brown*, 520 U.S. at 407.

In *Canton*, this Court provided an example of a broad class of rights to which a municipality can be

deliberately indifferent. The Court recognized that police officers deal with fleeing felons, are tasked with arresting them and equipped with firearms, and thus face situations implicating citizens' rights not to be subjected to deadly force. 489 U.S. at 390 n.10. If a municipality did not train officers about limits on the constitutional use of deadly force, it demonstrated deliberate indifference toward the constitutional "rights"—plural—of fleeing felons not to be subjected to deadly force. *Id.*; *cf. Brown*, 520 U.S. at 415–16 (recognizing, when evaluating a hiring-decision claim, that the relevant disregard was "for a high risk that [the hired officer] would use excessive force in violation of respondent's federally protected right").

This Court distinguished *Canton* in *Connick*. In that case, a district attorney had not trained prosecutors about defendants' constitutional rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963). *Connick*, 563 U.S. at 57. But junior prosecutors were already familiar with *Brady* based on their legal training, so the absence of training by the district attorney did not demonstrate deliberate indifference toward all *Brady* rights. *Id.* at 67. The relevant class was limited to prosecutorial disclosure of exculpatory crime lab reports and other scientific evidence. *Id.* at 59, 62.

The "stark contrast" between these examples springs from the extensive legal training attorneys receive. *Id.* at 64. The class of rights in this case is closer to *Canton*. Unlike the prosecutors in *Connick*, Euclid police officers do not have extensive legal training or

continuing legal education obligations. And yet, Euclid policymakers chose not to train their officers about the seriousness of people's right to be free from unreasonable deadly force. Euclid's policymakers did the opposite: They affirmatively trained officers with juvenile jokes and trivializations, including a depiction of officers beating defenseless people.

As a result, under this Court's municipal-liability decisions, the "deliberate indifference" standard is met. Euclid's policymakers demonstrated deliberate disregard for people's rights not to be subjected to excessive force, and Luke Stewart's death resulted from officers' disregard of the same "sort" of right.

But the Sixth Circuit's rule narrows the class of deliberately disregarded rights to the vanishing point. Under that rule, it does not matter that aspects of the training program "contradict the ethical duty of law enforcement officer[s] 'to serve the community; to safeguard lives and property; * * * and to respect the constitutional rights of all to liberty, equality, and justice.'" *Wright* v. *City of Euclid*, 962 F.3d 852, 882 (6th Cir. 2020) (quoting *Law Enforcement Code of Ethics*, Int'l Assoc. of Chiefs of Police, https://bit.ly/3iegoKV). Nor does it matter that Euclid's outrageous training might call for single-incident liability, the possibility of which this Court left open in *Canton*. *See* 489 U.S. at 390; *see also Wright*, 962 F.3d at 881–82 (quoting *Jackson* v. *City of Cleveland*, 925 F.3d 793, 836–37 (6th Cir. 2019)); *cf. Connick*, 563 U.S. at 68 ("The possibility of single incident liability that the Court left open in *Canton* is not this case.").

Rather than address the obvious inadequacies of Euclid's training program, the Sixth Circuit considered only the egregiousness of one officer's behavior. The Circuit's approach *requires* courts to assume the officer's perspective and determine whether a reasonable officer in that person's shoes, when the injury was inflicted, would have known his conduct was unconstitutional. *See Arrington-Bey*, 858 F.3d at 995 ("[I]t must be obvious (*i.e.*, clearly established) that the conduct will violate constitutional rights."); *see also Hernandez* v. *Mesa*, 137 S. Ct. 2003, 2007 (2017) (reiterating that the proper vantage point for conducting qualified-immunity analysis is that of the defendant officers when they engaged in the conduct in question). Because the Sixth Circuit's rule fixates on "the circumstances with which [the particular officer] was confronted," it fails to appreciate how policymakers can demonstrate deliberate disregard for an entire class of rights. Instead, the Sixth Circuit characterizes the right at issue with the same "high 'degree of specificity'" used to assess the qualified immunity of individuals. *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 590 (2018) (alteration in original) (quoting *Mullenix* v. *Luna*, 577 U.S. 7, 13 (2015) (per curiam)).

As a result, the Sixth Circuit's rule captures only a sliver of this Court's "deliberate indifference" standard, while it suffers from two other infirmities.

First, it eliminates mechanisms "to enforce the Provisions of the Fourteenth Amendment." Act of Apr. 20, 1871, ch. 22, 42 Stat. 13. Specifically, the Sixth Circuit's rule forbids recovery for violations of rights not

yet spelled out in the Federal Reporter with a high degree of specificity, and it removes the incentive for municipalities to teach officers to avoid violating people's rights in situations they are likely to encounter. *See Owen*, 445 U.S. at 651–52 ("The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights.").[8] What is training for if not to prepare officers for situations they have yet to face? And, if municipalities have no enforceable obligation to train their officers about people's constitutional rights, how could a reasonable officer be expected to know when those rights would be violated? After all, police officers are not trained, as attorneys are, to perform legal research and assess the fine points of judicial decisions. *See Connick*, 563 U.S. at 66–67.

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[8] By removing this incentive to caution against violating rights in foreseeable situations, the Sixth Circuit's rule conflicts with the impetus for § 1983's precursor. The Ku Klux Klan Act of 1871 would have been little more than a hollow promise of redress if it required prior appellate decisions based on identical situations. *See generally* Wayne McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 Va. L. Rev. 1, 29 (1974) (observing that, without municipal liability when individual officers are immune, the effect "is to render section 1983 ineffectual from the standpoint of deterrence"); Richard Briffault, *Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1149 (1977) (recounting the expansion, in part through the Act of 1871, of federal courts' jurisdiction during Reconstruction).

Second, if the Sixth Circuit's approach were correct, this Court's reasoning in *Connick* would have to be wrong. If clearly established law were required for municipal liability, the decision in *Connick* would have simply said so: The *Brady* right was not clearly established. But that is not what the Court did; it decided the inadequate-training claim without considering clearly established law.[9]

By tying the municipal-liability analysis to qualified immunity, the Sixth Circuit's rule overrides this Court's "deliberate indifference" standard. And because that rule creates *de facto* qualified immunity for municipalities, it also runs afoul of *Owen*.

B. The standard for individual liability is a poor fit for municipal liability.

Forty years ago, in *Owen* v. *City of Independence*, this Court declined to extend qualified immunity to municipalities. 445 U.S. 622 (1980). The Court reasoned that the common-law traditions and the policies behind qualified immunity do not support reading § 1983 as "*sub silentio* extend[ing] to municipalities a qualified immunity based on the good faith of their officers." *Id.* at 638. That holding has remained undisturbed, even as this Court has developed various

[9] *Cf. Glisson* v. *Indiana Dep't of Corr.*, 849 F.3d 372, 378–79 (7th Cir. 2017) (en banc) (addressing deliberate indifference without considering whether the law was clearly established).

categories of claims under § 1983 and revised the qualified-immunity doctrine. *See Brown*, 520 U.S. at 405–07 (summarizing development of municipal-liability jurisprudence).

Nevertheless, the First, Fifth, Sixth, and Eighth Circuits have granted more than 36,000 local governments across 18 states *de facto* qualified immunity for training that obviously and predictably leads to the violation of people's constitutional rights.[10] In those jurisdictions, if an officer who violates a person's constitutional rights would be entitled to qualified immunity, the municipality cannot be liable for causing the violation through inadequate training. This brand of qualified immunity is *de facto* because it makes showing "clearly established law" a requirement to prove the plaintiff's claim, rather than a requirement to overcome an affirmative defense. *See Harlow* v. *Fitzgerald*, 457 U.S. 800, 817–18 (1982). For the person whose rights have been violated, however, the result is the same: zero legal redress unless the right was clearly established in binding authority.

The modern qualified-immunity doctrine is unsound, lacking a basis in the common law underlying

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[10] *See* U.S. Census Bureau, 2017 Census of Governments, Tbl. 2, https://bit.ly/2MVh9Np (First Circuit: Maine (834 local governments), Massachusetts (858), New Hampshire (541), Puerto Rico (no data), Rhode Island (129); Fifth Circuit: Mississippi (969), Louisiana (516), Texas (5,343); Sixth Circuit: Kentucky (1,322), Michigan (2,863), Ohio (3,897), Tennessee (906); Eighth Circuit: Arkansas (1,541), Iowa (1,941), Minnesota (3,643), Missouri (3,768), Nebraska (2,538), North Dakota (2,664), South Dakota (1,916)).

modern § 1983 jurisprudence.[11] But regardless of whether this Court reconsiders its qualified-immunity jurisprudence, the doctrine reflects specific policy goals that address the individual liability of government employees. The doctrine does not apply to municipalities any more than individuals enjoy sovereign immunity. *See Tanzin* v. *Tanzir*, 141 S. Ct. 486, 493 (2020); *cf. Wyatt* v. *Cole*, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring, joined by Scalia, J.) ("We need not decide whether or not it was appropriate for the Court in *Harlow* to depart from history in the name of public policy, reshaping immunity doctrines in light of those policy considerations. But I would not extend that approach to other contexts.").

The Sixth Circuit's rule (and that of the First, Fifth, and Eighth Circuits) makes municipal liability dependent on individual liability. But that approach undermines the purpose of § 1983, lacks a basis in the statute's text and common-law history, and runs afoul of this Court's reasoning in *Owen*.

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[11] *See*, *e.g.*, *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1871–72 (2017) (Thomas, J., concurring in part); *Crawford-El* v. *Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting, joined by Thomas, J.); *Wyatt* v. *Cole*, 504 U.S. 158, 170–71 (1992) (Kennedy, J., concurring, joined by Scalia, J.); *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987) (observing that in *Harlow*, "the Court completely reformulated qualified immunity along principles not at all embodied in the common law"); *Creighton*, 483 U.S. at 647 (Stevens, J., dissenting, joined by Brennan and Marshall, JJ.). *See generally* William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797 (2018).

1. Remedial purpose

Congress enacted the precursor to § 1983, the Ku Klux Klan Act of 1871, to provide a federal remedy for violations of rights secured by the Constitution. *See Monroe* v. *Pape*, 365 U.S. 167, 171 (1961) ("Its purpose is plain from the title of the legislation, 'An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.' "), *overruled in part by Monell*, 436 U.S. 658. The Act became law in the aftermath of the Civil War and in the wake of the Fourteenth Amendment's ratification. At the time, state remedies were largely unavailable against state and local officials, leaving victims of unconstitutional conduct with no defendant to sue. *Id.* at 174 (observing an aim "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice").

The Sixth Circuit's rule recreates that problem. Because states enjoy sovereign immunity, and because qualified immunity usually insulates individual officers from litigation, municipal liability is often the only avenue for redress of constitutional violations. But the Sixth Circuit's rule closes that lone avenue whenever inadequate training was the "moving force" of the constitutional violation and recovery from individual officers is unavailable because they are entitled to qualified immunity. As a result, the Sixth Circuit's rule thwarts the remedial purpose of § 1983, again leaving those whose rights have been violated without any defendant to sue.

2. Text and history

The rule also lacks a sound basis in the statutory text and common-law history. The text of § 1983 says nothing about immunities or the clear establishment of constitutional rights. Yet, this Court has read the statute as silently adopting qualified immunity for individual officers. *See Procunier* v. *Navarette*, 434 U.S. 555, 561 (1978). Setting aside this Court's decisions "completely reformulat[ing] qualified immunity along principles not at all embodied in the common law," the doctrine's application to municipalities has never been read into § 1983 in similar fashion. *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part) (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987)); *see Owen*, 445 U.S. at 639.

Indeed, in the decades leading up to § 1983's precursor, common-law protection of local governments from liability was precarious. In the first half of the nineteenth century, some states protected local governments from liability for common-law torts, based on a British tradition that local governments could not be liable without legislation stating otherwise.[12] But this tradition held less force (if any at all) when local

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[12] *See* Fred Smith, *Local Sovereign Immunity*, 116 Colum. L. Rev. 409, 424–26 (2016); *see*, *e.g.*, *Butler* v. *Jordan*, 750 N.E.2d 554, 560–66 (Ohio 2001) (recounting common-law history of municipal immunity in the state: "Ohio courts in the early 1800s did not share the view that local government units were immune from liability"). *See generally* Edwin M. Borchard, *Government Liability in Tort*, 34 Yale L.J. 1 (1924).

governments were sued for statutory torts, and states' reliance on the tradition had waned by 1850.[13]

In the second half of the century, local governments continued to enjoy some protection from liability for torts. But that protection generally applied only to "governmental" or "discretionary" activities, and it rested on notions of state sovereignty. By enacting § 1983's forerunner under express constitutional power to enforce the Fourteenth Amendment, Congress "abolished whatever vestige of the State's sovereign immunity the municipality possessed." *Howlett* v. *Rose*, 496 U.S. 356, 376 (1990) (quoting *Owen*, 445 U.S. at 647–48); *see* U.S. Const. amend. XIV, § 5; *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976) (establishing that the enforcement provisions of § 5 of the Fourteenth Amendment necessarily limit the principle of state sovereignty embodied in the Eleventh Amendment). Municipalities also had "no 'discretion' to violate the Federal Constitution." *Owen*, 445 U.S. at 649. As a result, once the 1871 Act became law, traditional notions of sovereign immunity no longer protected municipalities from liability.

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[13] *See* Smith, *supra* note 12, at 426; David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 14 (1972); *see*, *e.g.*, *Farnum* v. *Town of Concord*, 2 N.H. 392, 393 (1821) (reasoning that the common-law tort protection derived from the British tradition did not apply to a statute providing for a cause of action against a locality).

3. Owen's reasoning

The abrogation of municipal immunity reflects good policy. This Court in *Owen* recognized that if municipalities were protected by a defense of their officers' good faith, "many victims of municipal malfeasance would be left remediless," and policymakers would not be encouraged "to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights." 445 U.S. at 651–52. The same is true if municipalities are shielded from liability when the violated right was not "clearly established."

Recovery from public rather than personal funds also means that two predominant policy concerns that have shaped qualified immunity for individuals do not apply to municipalities. Those concerns are (1) that talented candidates for public service would be deterred by the threat of personal damages, and (2) that individuals executing their official duties would do so "with undue timidity," knowing they may be individually liable. *Owen*, 445 U.S. at 653–54 nn.37–38 (quoting *Wood* v. *Strickland*, 420 U.S. 308, 321 (1975)); *see also Richardson* v. *McKnight*, 521 U.S. 399, 408–12 (1997) (concluding that the qualified-immunity doctrine's purposes do not support its extension to private prison guards).

The Sixth Circuit's rule precludes municipal liability based on inadequate training whenever an officer is entitled to qualified immunity—including when policymakers provide inadequate training to the officer

in bad faith. This shows how far astray the doctrine of clearly established law has gone; a § 1983 plaintiff in the Sixth Circuit would be better off facing the hurdle this Court rejected in *Owen*: qualified municipal immunity turning on the officer's good or bad faith.

The Sixth Circuit distinguishes *Owen* by pointing out that (1) the municipal action in that case "directly" caused the constitutional injury, while inadequate-training claims require the "deliberate indifference" of policymakers; and (2) a municipality's indifference cannot "in fact be deliberate" unless that right was clearly established. *Arrington-Bey*, 858 F.3d at 995.

This is distinction without difference. The reasoning in *Owen* applies equally to claims based on municipal acts "directly" causing injury and those "indirectly" doing so through inadequate training. And (as discussed above) a municipality's indifference can "in fact be deliberate" without clearly established law. This Court's decisions since *Owen* confirm its reasoning. What matters under this Court's decisions is not whether policymakers had existing law to reference; what matters is whether policymakers chose a course of action likely to produce constitutional violations of the sort that resulted. That is the situation in this case. Euclid trained officers to take deadly force less than seriously. The "deliberate indifference" standard should not be contorted to grant Euclid *de facto* qualified immunity—nor should 36,000 other local governments enjoy qualified immunity—when the text and purposes of § 1983, and this Court's precedents, say otherwise.

* * *

The case law has been developing for more than two decades. Four Circuits require a clearly-established-law inquiry; four others have explicitly rejected that approach.[14] The split is deep and mature. This Court should seize this opportunity to resolve the disagreement and confusion surrounding municipal liability under § 1983.

II. This case is a good vehicle for resolving the split in either of two ways.

This case offers an opportunity to resolve the split of authority in one of two ways—one broad, the other narrow.

A. The Court should overrule judicially created prerequisites to liability under § 1983.

Amicus urges the Court to reconsider and eliminate the "municipal policy" requirements this Court developed starting in *Monell*. Having determined in *Monell* that § 1983 does not contemplate *respondeat superior* liability—only liability based on municipal "policies"—this Court next drew a line between governmental policies equivalent to governmental actions, on one hand, and omissions, on the other. In cases of

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[14] *See* Pet. 11–18 (discussing Circuit decisions that reject the Sixth Circuit's rule as the test for deliberate indifference); *see also* *Lance* v. *Morris*, No. 19-7050, 2021 WL 162343 (10th Cir. Jan. 19, 2021).

omissions (including inadequate-training cases), the additional "fault" requirement attaches, and the "deliberate indifference" standard governs.

These distinctions should be undone because they are unsupported by the text, history, and purpose of § 1983. The fundamental distinction in *Monell* between liability resting on "policy" and vicarious liability has been ripe for reconsideration for some time.[15] And that distinction is most likely to "collapse[]" in cases that invoke this Court's stringent culpability and causation requirements—including cases involving inadequate-training claims. *Brown*, 520 U.S. at 415. This is one of those cases.

Even if the Court were to leave intact *Monell*'s basic "policy" requirement, it should do away with the act/omission distinction. Euclid's training program shows how that distinction crumbles when a policymaker *promotes* the use of excessive force. *Cf. Brown*, 520 U.S. at 407 (contrasting inadequate-screening case with inadequate-training case based on existence of training program). Euclid's training program is the functional equivalent of "an order to 'go out and rough-up some suspects.'" *Id.*, 520 U.S. at 424 (Souter, J., dissenting, joined by Stevens and Breyer, JJ.).

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[15] *See Brown*, 520 U.S. at 430–37 (Breyer, J., dissenting, joined by Stevens and Ginsburg, JJ.) (recognizing that "the case for reexamination [of *Monell*'s 'policy' limitation on liability] is a strong one"); *Vodak* v. *City of Chicago*, 639 F.3d 738, 747 (7th Cir. 2011) (observing that *Monell*'s "policy" limitation is "based on what scholars agree are historical misreadings," and citing scholarly articles).

Accordingly, the judicially invented requirement of fault should not apply in this situation, much less be heightened by the Sixth Circuit's rule. *Id.* at 410.

This case provides a clean vehicle to bring municipal liability under § 1983 into line with the statutory text and common-law history. The Court should take the case and eliminate the judicially created categories of claims that have grown out of *Monell*.

B. Alternatively, the Court should hold that clearly established law is not required for municipal liability.

The narrower way to resolve the split would be to explain that a clearly-established-law inquiry has no place in the municipal-liability context. Again, this case is a great vehicle: The parallels between the decision below and another Sixth Circuit decision, *Wright* v. *City of Euclid*, 962 F.3d 852 (6th Cir. 2020), decided just two months earlier, demonstrate how the Sixth Circuit's rule leads to absurd inconsistencies.

This case and *Wright* both involved the same use-of-force training and the same constitutional right to be free from unreasonable force. Both cases also involved a municipal-liability claim based on deliberately indifferent training and individual-liability claims against the police officers. But the Sixth Circuit arrived at opposite outcomes—allowing the municipal-liability claim to go forward in *Wright*, while dismissing it in this case. This inconsistency highlights the flaws of the Sixth Circuit's approach. That approach

prohibits relief against municipalities based on inadequate-training claims when the officer inflicting the injury is entitled to qualified immunity. This, in turn, makes the liability of municipalities turn on the court's decision about an individual officer's actions.

Consider the parallels between the two cases. In both, police underwent the same training program, which included materials making light of officers' use of excessive force on defenseless persons. *Compare Wright*, 962 F.3d at 860, 862–64, *with* Pet. App. 16a. In both cases, the Sixth Circuit concluded that the evidence would support finding that the use of force was excessive, in violation of the Fourth Amendment. *Compare Wright*, 962 F.3d at 865–72, *with* Pet. App. 12a.

In *Wright*, Euclid police officers approached Lamar Wright in the driver's seat of his vehicle. When he did not immediately get out of the car, officers pepper-sprayed him and tased him in his stomach, causing him to bleed where staples held a colostomy bag to his body. 962 F.3d at 861–62. The Sixth Circuit concluded that the officers were *not* entitled to qualified immunity and held that liability could be imposed based on the city's inadequate use-of-force training, without a past pattern of comparable violations. *Id.* at 869, 871–72, 881–82.

In this case, Euclid police officers approached Luke Stewart in the driver's seat of his vehicle. One officer got into the passenger seat as Stewart started to drive away. Pet. App. 3a–4a. Stewart stopped the vehicle, but the officer did not get out. Instead, he tased

Stewart six times and shot him five, killing him. Pet. App. 5a–6a. The court concluded that the evidence would support finding that the officer's force was excessive, but that the officer was entitled to qualified immunity. Pet. App. 12a–15a. Under the Sixth Circuit's rule for inadequate-training claims, then, liability could not attach based on inadequate training. Pet. App. 16a–17a.

Because the panels in *Wright* and *Stewart* both performed the Sixth Circuit's clearly-established-law inquiry, neither considered whether the "sort" of constitutional violation that resulted was obviously a likely consequence of the training program. Had they done so, the deliberate-indifference claim in both cases would have survived, regardless of the outcome of the plaintiffs' claims against the individual officers. In this way, this case spotlights how the Sixth Circuit's rule leads to inconsistent results that are themselves inconsistent with this Court's "deliberate indifference" standard.

CONCLUSION

Lower courts struggle to apply this Court's "deliberate indifference" standard for municipal liability. The longstanding Circuit split over whether that standard requires a clearly-established-law inquiry makes matters worse. The rule adopted by the Sixth Circuit in this case—also the rule in the First, Fifth,

and Eighth Circuits—departs from the text and history of § 1983 and this Court's precedents.

The Petition should be granted.

Respectfully submitted,

WESLEY HOTTOT*
INSTITUTE FOR JUSTICE
600 University Street
Suite 1730
Seattle, WA 98101
(206) 957-1300
whottot@ij.org

MARIE MILLER
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
mmiller@ij.org

* *Counsel of Record*

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