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, OH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER

Every judge who has reviewed the City of Euclid's use-of-force training has found it troubling. In *Wright v. City of Euclid*, Judge Bush wrote that "the offensive statements and depictions in the training contradict the ethical duty of law enforcement officer[s]." 962 F.3d 852, 882 (6th Cir. 2020). The district court in this case "caution[ed] that the Euclid Police Department seems to view the use of force (including deadly force) with cavalier indifference." Pet.App.76a-78a. And the panel below characterized the training program as "inappropriate," opining that "[e]ven the components of the program that can be stomached appear skimped." Pet.App.16a.

Petitioner should be allowed to explain how this troubling training program reflected deliberate indifference to the constitutional rights of her son and Euclid's other citizens. But because of the Sixth Circuit's clearly-established-law rule, she was foreclosed from even making that argument. Since at least the Ninth, Tenth, and Eleventh Circuits would allow her to make her case—and since nothing in this Court's precedents justifies a per se rule that a plaintiff must point to "clearly established law" in order to prove deliberate indifference—this Court should grant certiorari.

1. *Split.* A municipality may be liable where its employee violates the Constitution. *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 406-07 (1997). A plaintiff might argue, for instance, that a municipality's informal custom of doing things a certain way or its failure to vet, train or discipline an employee caused that employee to violate the Constitution. *Id.* In such cases, the plaintiff must prove the municipality acted with deliberate indifference. *Id.*

These "municipal employee" cases stand in contrast to cases where the "municipal action itself"—think a legislative enactment or a final policymaker's decision—violated the Constitution, which require no showing of deliberate indifference. *Id.* at 405; *Arrington-Bey v. City of Bedford Heights, Ohio*, 858 F.3d 988, 994-95 (6th Cir. 2017).

So far, so good. Respondent and all the circuits agree on that statement of the law. BIO 13. But the circuits are hopelessly divided about whether proving a municipality deliberately indifferent requires pointing to "clearly established law"—specific, published circuit court precedent—declaring the municipal employee's actions unconstitutional. The Sixth Circuit—like the First, Fifth, and Eighth—says yes. So if the municipal employee herself receives qualified immunity (because no clearly established law barred her conduct), the municipality cannot be held liable for that employee's constitutional violation (because a plaintiff cannot prove deliberate indifference without that clearly established law). By contrast, at least three circuits—the Ninth, Tenth, and Eleventh—allow a plaintiff to prove deliberate indifference without necessarily pointing to such clearly established law. Pet. 11-16.

a. The BIO makes no effort to reconcile that tension. Start with *Kirkpatrick v. County of Washoe*, 843 F.3d 784 (9th Cir. 2016). Respondent suggests that case is "distinguishable" because "the court found that the [need to change the] social workers' training regarding separating parents and children was 'so obvious' that failure to do so was deliberately indifferent." BIO 17. But in this case, Petitioner made the same argument—that the flaws in Respondent's use-of-

force training were "so obvious" that "failure" to change the training was "deliberately indifferent." Appellant Br. 61-63; *cf. Wright*, 962 F.3d at 881-82 (finding, in different suit involving same training, that "need for more or different training is so obvious" that Respondent acted with deliberate indifference). The Sixth Circuit would not even consider that argument because it—unlike the Ninth Circuit—requires a threshold showing of clearly established law.

As to *Quintana v. Santa Fe Cnty. Bd. of Comm'rs*, 973 F.3d 1022 (10th Cir. 2020), Respondent says that it "does not address whether a city was deliberately indifferent to use of force training." BIO 16. True enough. But the requirement of deliberate indifference applies to *all* "municipal employee" cases, not only failure-to-train cases. *Bryan Cnty.*, 520 U.S. at 404-05; Martin A. Schwartz, *Section 1983 Litigation Claims & Defense*, §7.07 (2013). *Quintana* was a "municipal employee" case; plaintiffs thus had to show deliberate indifference; and the Tenth Circuit found they had done so, even though the relevant municipal employees had not violated clearly established law. *Quintana*, 973 F.3d at 1033-34, 1033 n.5. The Tenth Circuit does not apply the clearly-established-law rule in other kinds of municipal employee cases, including failure-to-train cases, either. *See Myers v. Oklahoma Bd. of Cnty. Comm'rs*, 151 F.3d 1313, 1317 (10th Cir. 1998); Pet. 12.

Finally, the BIO claims *Young v. Augusta, Ga.*, 59 F.3d 1160 (11th Cir. 1995), "is distinguishable because it did not deal with an individual or clearly established law." BIO 17. Precisely. *Young* found a municipality deliberately indifferent without looking to clearly established law. In the First, Fifth, Sixth, and

Eighth Circuits, a finding of deliberate indifference would *have* to "deal with…clearly established law." Indeed, in the Sixth Circuit, judges can sua sponte consider reject a finding of deliberate indifference based on a lack of clearly established law even where a defendant doesn't argue as much. *See Arrington-Bey*, 858 F.3d at 994-95; Br. of Defendants/Appellants, *Arrington-Bey*, 858 F.3d 988 (No. 16-3317), 2016 WL 4506248.

Respondent is also wrong that *Young* is "distinguishable" because "there was a pattern of [Eighth Amendment violations] that should have put the city policy makers on notice." BIO 17-18. As a reminder, plaintiffs can prove deliberate indifference by showing either (i) a "pattern of constitutional violations" that should have alerted the municipality of the need to change course; or (ii) that a constitutional violation was an "obvious" consequence of the municipality's failure. *See* Pet. 24-25. The *Young* plaintiff chose the first route; Petitioner the second. But that's a distinction without a difference for purposes of the circuit split: The Ninth, Tenth, and Eleventh Circuits don't apply the clearly-established-law rule in "obvious consequence" cases, either. *Kirkpatrick*, 843 F.3d at 793-97; *Bass v. Pottawatomie Cnty. Pub. Safety Ctr.*, 425 F. App'x 713, 716-23 (10th Cir. 2011); *Jernigan v. City of Montgomery, Ala.*, 806 F. App'x 915, 919-20 (11th Cir. 2020).

b. Respondent suggests these cases are just applying "rigorous standards of culpability and causation" on a case-by-case basis and that there is no "categorical rule" at play. BIO 15-16. Nonsense. In this case, for instance, the Sixth Circuit expressed grave concerns about Respondent's training program.

Pet.App.16a. But it did not even ask whether that training program reflected deliberate indifference; it simply announced that Petitioner could not prove deliberate indifference because "Stewart's rights were not clearly established in the precedent of this circuit." Pet.App.17a. The same is true of other circuits applying the clearly-established-law rule. Pet. 18-20.

Respondent also argues that there's no "categorical rule" because the clearly-established-law rule doesn't apply in cases where there's no need to prove deliberate indifference—that is, cases where the municipality itself, rather than a municipal employee, violated the Constitution. BIO 13. That's true, but irrelevant. The question presented is about how to prove deliberate indifference in municipal liability cases where such proof *is* required.

c. Were there any doubt, cases about the scope of interlocutory review confirm the split. Those cases turn on the same question as the case here. Municipal defendants are not entitled to interlocutory review unless their liability is "inextricably intertwined" with qualified immunity. Circuits that apply the clearly-established-law rule consider municipal liability claims on interlocutory review because a lack of clearly established law for qualified immunity purposes necessarily disposes of deliberate indifference for municipal liability purposes. *See, e.g.*, *Roberts v. City of Omaha*, 723 F.3d 966, 975-76 (8th Cir. 2013); *Arrington-Bey*, 858 F.3d at 994-95. In the Ninth, Tenth, and Eleventh Circuits, though, municipalities can't seek interlocutory review because the two questions are not "inextricably intertwined." *See Horton by Horton v. City of Santa Maria*, 915 F.3d 592, 603-05 (9th Cir. 2019); *Saunders v. Sheriff of Brevard Cnty.*, 735 F. App'x

559, 563 (11th Cir. 2018); *Brown v. City of Colorado Springs*, 709 F. App'x 906, 916-17 (10th Cir. 2017).

d. Finally, Respondent argues that the split is not "well-developed." BIO 15. It's hard to know what Respondent means. There are en banc opinions (from the Eighth and Ninth Circuits) on each side of the split. The Tenth Circuit has reaffirmed its position following dueling concurrences squarely debating the merits of the clearly-established-law rule. *See Quintana*, 973 F.3d at 1034 & n.5; *Contreras on behalf of A.L. v. Dona Ana Cnty. Bd. of Cnty. Comm'rs*, 965 F.3d 1114, 1124-25 (10th Cir. 2020) (Carson, J., concurring in part and concurring in the judgment) (urging adoption of clearly-established-law rule); *id.* at 1139-41 (Baldock, J., concurring in part and dissenting in part) (expressing doubts about clearly-established-law rule). Litigants in circuits that reject the clearly-established-law rule have urged its adoption,[1] and scholars have long noted the split.[2] To the extent Respondent is arguing that certiorari must be denied because none of the circuits have used the phrase "circuit

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[1] *See, e.g.*, Petition for Rehearing En Banc at 23-24, *Wright v. Beck*, 981 F.3d 719 (9th Cir. 2020) (No. 19-55084) (urging adoption of clearly-established-law rule); Defendants/Appellees' Response Brief, *Contreras*, 965 F.3d 1114 (No. 18-2176), 2019 WL 1010824, at *38-46 (same); Corrected Response Brief, *Fenn v. City of Truth or Consequences*, 983 F.3d 1143 (10th Cir. 2020) (No. 19-2201), 2020 WL 1502402, at *53-55 (same); Corrected Response Brief, *Holmes v. Town of Silver City*, 826 F. App'x 678 (10th Cir. 2020) (No. 19-2169), 2020 WL 418376, at *11 (same); Answering Brief, *Ma v. City of Los Angeles*, 756 F. App'x 735 (9th Cir. 2019) (No. 17-56544), 2018 WL 3018930, at *44 (same).

[2] *See, e.g.*, Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 946 & n.299 (2014); Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. St. Thomas L.J. 477, 482 & n.34 (2011).

split," that has never posed an obstacle to this Court's review.[3]

2. *Merits.* Respondent treats as self-evident that "a city could not have a policy of deliberate indifference to constitutional rights that were not clearly established." BIO 16. But that is precisely the question on which the circuits are divided.

Respondent's sole argument for the clearly-established-law rule is that Justice O'Connor's concurrence in *City of Canton v. Harris*, 489 U.S. 378 (1989), suggested a municipality could not be found "deliberately indifferent" where it lacked "clear constitutional guideposts." *Id.* at 397. For starters, Justice O'Connor's concurrence was just that—a concurrence. None of this Court's majority opinions have ever used the "clear constitutional guideposts" formulation.[4]

More importantly, Justice O'Connor herself could not have meant the word "clear" to import the "clearly-established-law" standard from qualified immunity

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[3] *See, e.g.*, *Smith v. Bayer Corp.,* 564 U.S. 299, 305 (2010) (granting certiorari because "the order issued here implicates two circuit splits"; citing five circuit court cases, none of which mention a split).

[4] *See id.* at 390 ("[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need."); *Bryan Cnty.*, 520 U.S. at 413 n.1 (deliberate indifference is "conscious disregard for the known and obvious consequences of [one's] actions"); *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (deliberate indifference requires "actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights").

cases. Justice O'Connor pointed to the "constitutional limitations on the use of deadly force" to "arrest fleeing felons" in *Tennessee v. Garner*, 471 U.S. 1 (1985), as an example of a "clear constitutional guidepost[]." *City of Canton*, 489 U.S. at 390 n.10; *id.* at 396 (O'Connor, J., concurring). But as this Court has repeatedly explained, *Garner*'s limitation on deadly force does not, in the ordinary case, provide "clearly established law" for purposes of qualified immunity—it's not specific enough. *See, e.g.*, *Mullenix v. Luna*, 577 U.S. 7, 12-14 (2015). So the "clear constitutional guideposts" Justice O'Connor envisioned are not the same as the "clearly established law" required to overcome qualified immunity.

If there were any ambiguity about the scope of this Court's precedents—and Respondent certainly doesn't point to any—first principles of statutory interpretation counsel against Respondent's reading. The text of 42 U.S.C. § 1983 makes no mention of "clearly established law" or "deliberate indifference" and definitely doesn't say that deliberate indifference turns on clearly established law. Pet. 20-21. Nor does the common law counsel that result: "Deliberate indifference" wasn't a requisite for municipal liability at common law, and whatever debate there is about the scope of qualified immunity in 1871, no one has argued that the inquiry involved "clearly established law" in the sense of specific, published circuit precedent.[5] Pet. 26-32. That Justice O'Connor once used the word "clear" in a concurrence isn't a basis for adopting a rule that

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[5] *See* Andrew S. Oldham, *Official Immunity at the Founding* (April 12, 2021), at *7-11, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3824983; Pet. 26-27 & nn.8-9 (collecting scholarship).

forecloses proof of municipal liability absent clearly established law.

Ultimately, Respondent simply insists again and again that "rigorous standards of culpability and causation" govern when a municipality is liable for its employees' constitutional violations. BIO i, 2, 10, 11, 14. Petitioner agrees. Respondent is free to argue there was no causal connection between its training program and Officer Rhodes's decision to shoot; that it was not obvious the training would lead to excessive force; or that Petitioner has "disproportionate[ly] focus[ed]" on one training to the exclusion of Respondent's others. BIO 3-5, 10, 12-13. Respondent is even free to argue that the lack of published circuit court precedent involving an officer who gets into a suspect's car before shooting is somehow relevant to its culpability. But that lack of published circuit court precedent cannot be automatically dispositive of the deliberate indifference inquiry.

3. *Vehicle.* The question presented was pressed and passed upon below. Pet.App.17a. The Sixth Circuit's sole basis for finding that Petitioner could not hold Respondent liable was that there was no clearly established law regarding an officer inside a fleeing suspect's vehicle. Pet.App.15a, 17a.

This Court will seldom see such a clean vehicle for resolving the question. Though courts decide hundreds of municipal employee cases each year, it will rarely be so apparent that the clearly-established-law rule is outcome-dispositive. In many cases, a court finding no clearly established law will not address whether there was a constitutional violation in the first place, making it unclear whether plaintiffs can make out a § 1983 claim at all. Pet. 33 & n.15. In many

more, plaintiffs would not satisfy the stringent culpability and causation requirements for municipal liability with or without the clearly-established-law rule. This Court has previously denied two petitions raising the question presented; each suffered from those (and other) vehicle flaws.[6]

In this case, by contrast, the Sixth Circuit ruled on the underlying constitutional question, finding Luke Stewart's Fourth Amendment rights violated before concluding there was no clearly established law. Pet.App.12a. And because the Sixth Circuit considered the same training program, on a similar record, in *Wright v. City of Euclid*, and found Respondent liable where the clearly-established-law rule did not preclude doing so, this Court is assured that there is at least a reasonable chance that the clearly-established-law rule changed the outcome in this case. *See* 962 F.3d at 881-82.[7]

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[6] *See Contreras on Behalf of A.L. v. Dona Ana Cnty. Bd. of Cnty. Comm'rs*, 141 S. Ct. 1382 (2021); *Arrington-Bey v. City of Bedford Heights, Ohio*, 138 S. Ct. 738 (2018). Moreover, the *Contreras* opinion featured four different writings, none of which controlled on the municipal liability question. *Contreras*, 965 F.3d at 1114. And both cases predated the Tenth Circuit's reaffirmation of its position after the Sixth Circuit entered the fray and a Tenth Circuit judge argued for the adoption of the clearly-established-law rule. *See Quintana*, 973 F.3d at 1034.

[7] Respondent urges that *Wright* is irrelevant because "[i]n *Wright*, the plaintiff contended broadly the connection to the training was a result of the use of force." BIO 18. That assertion is puzzling. The theory on which *Wright* sided with the plaintiff in that case is the same theory that Petitioner in this case put forth. *Compare Wright*, 962 F.3d at 881 ("A reasonable jury could find that the City's excessive-force training regimen and practices gave rise to a culture that encouraged, permitted, or acqui-

4. *Importance.* It has been a decade since this Court last weighed in on the scope of municipal liability. *See Connick v. Thompson*, 563 U.S. 51, 54 (2011). In that time, federal courts have resolved some 10,000 such claims—police shooting cases and civil forfeiture cases, religious expression cases and prison conditions cases, and everything in between.[8] Municipal liability cases serve a critical function, identifying and deterring more systemic causes of constitutional violations than individual officer suits can. *Owen v. City of Independence*, 445 U.S. 622, 651-52 (1980). This Court should take this rare opportunity to resolve a foundational question about how plaintiffs may hold municipalities liable for the misconduct of their employees.

CONCLUSION

For the foregoing reasons and those in the petition, certiorari should be granted.

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esced to the use of unconstitutional excessive force.") *with* Appellant Br. 79 ("Critically, the EPD's training materials explicitly also encouraged unjustified violence.").

[8] *See, e.g.*, *Est. of Jones by Jones v. City of Martinsburg*, 961 F.3d 661 (4th Cir. 2020), *as amended* (June 10, 2020); *Nichols v. Wayne Cnty.*, 822 F. App'x. 445 (6th Cir. 2020); *Deferio v. City of Syracuse*, 770 F. App'x 587 (2d Cir. 2019); *Lapre v. City of Chicago*, 911 F.3d 424 (7th Cir. 2018).

Respectfully submitted,

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May 3, 2021