No. 16-538

In the Supreme Court of the United States

WAYNE COUNTY, MICHIGAN, *et al.*,
Petitioners,

v.

LINDA RICHKO, as Personal Representative
of the Estate of Jeffrey Horvath,
Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE MICHIGAN MUNICIPAL LEAGUE AND MICHIGAN MUNICIPAL LEAGUE LIABILITY & PROPERTY POOL IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF

The Michigan Municipal League and Michigan Municipal League Liability and Property Pool move for leave to file an *amici curiae* brief in support of petitioner, pursuant to Supreme Court Rule 37.2(b). *Amici* are filing this motion because respondents have withheld consent for filing this brief.

Amici's brief may assist the Court in determining whether to grant certiorari to review the issues presented in this case. *Amici* have a longstanding interest in the proper development of the law of qualified immunity, particularly as it relates to state and local municipalities and their employees involved in the high-risk and difficult task of dealing with prisoners in jail facilities. Individuals working in local jail facilities, such as those working in the local county jail at issue here, are not mental health experts trained at predicting an individual's propensity for violence, predictions that even trained mental health professionals are often unable to accurately make. In addition, many local governments currently lack sufficient jail cells or funds to expand their jails to provide single cells for large proportions of current inmates. A rule essentially requiring this approach would be unfeasible for many local governments due to the lack of cells and the cost. *Amici*'s brief attempts to shed light on the practical considerations and potential difficulties that flow from the current published decision and to offer an analysis of qualified immunity and the duties of jailors that may shed light on the context within which the issues arise.

Amici therefore request the Court to grant this motion for leave to file this brief *amici curiae.*

Respectfully submitted,

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QUESTIONS PRESENTED BY PETITIONERS

Did the Circuit Court's extension of single-incident *Monell* liability for the sudden and unforeseeable assault upon a pretrial detainee by another pretrial detainee in Wayne County Jail's mental health ward deemed by the Circuit Court to have been caused by the County's unwritten "de facto" policy of *not requiring* a review of data entries related to the aggressor in an external database constitute an unwarranted expansion of single-incident *Monell* liability, which has been only recognized by this Court to be *potentially* available in the very limited and narrow context of failure to train police officers in their duties regarding deployment of appropriate force as proposed in *Canton v. Harris*, 489 U.S. 378, 390, n 10?

Did the Circuit Court err in over-generalizing the "clearly established" duty in this case by stating "[t]he constitutional right at issue in this case – [decedent's] right to be free from violence at the hands of other inmates – was clearly established by the Supreme Court in *Farmer v. Brennan*, 511 U.S. 825 (1994), *see* App. 10a, and by ignoring Petitioner Larry Cameron's qualified immunity defense, which was based on the argument that there is no clearly established right to a screening of mental health information for pretrial detainees to ensure that they do not pose a risk of harm to themselves or others (a correct statement of the law recently confirmed by the Circuit Court in *Taylor v. Little*, 58 F. App'x 66 (6th Cir. 2003)?

Can an individual governmental employee be liable for the constitutional tort of "deliberate indifference" as defined and applied by this Court in *Farmer v. Brennan*, 511 U.S. 825 (1994) (to inmates under the

Eighth Amendment); *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) (to pretrial detainees under the Fourteenth Amendment) where the victim of the constitutional harm is the subject of a random unforeseeable attack, and who is completely unknown to the individual defendant before the incident and part of no specifically known and vulnerable class?

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STATEMENT OF INTEREST[1]

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of hundreds of Michigan cities and villages, many of which are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance.

The Michigan Municipal League Liability & Property Pool was established under 1982 PA 138 to develop and administer a group program of liability and property self-insurance for Michigan municipalities. The principal objectives of the Pool are to establish and administer municipal risk management service, to reduce the incidents of property and casualty losses occurring in the operation of local government functions, and to defend the Pool's members against liability losses.

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici curiae, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for petitioners has consented to this filing; counsel for respondent has not.

Amici have a longstanding interest in the proper development of the law of qualified immunity, particularly as it relates to state municipalities and their employees, including the social worker, nurse, and deputy petitioners in this case. The United States Supreme Court has frequently reiterated, and even recently so, that qualified immunity shields governmental employees from liability because the doctrine affords "government officials breathing room to make reasonable but mistaken judgments." *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774 (2015).

Qualified immunity is particularly important in the prison context. Jailors should reasonably be expected to receive some general medical training, but they are not mental health experts in evaluating and predicting a mental health individual's propensity for violence absent a specific articulated threat. Not even trained mental health professionals are held to such a standard. This case does not present a situation where a detainee's propensity for violence was ignored. *Amici Curiae* therefore request that this Court grant the petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

The Sixth Circuit's decision to allow this deliberate indifference case to proceed to the jury contravenes everything this Court has said about qualified immunity. Petitioners include a social worker, a nurse, and a deputy who were responsible for evaluating a detainee while he was in custody in jail and responding to any disturbances. The social worker, Petitioner Cameron, did perform a mental-status examination (MSE) on detainee Brandon Gillespie and found that, while having an extensive mental health history, he did

not need to be housed alone in a single cell. The death of another individual later housed with detainee Gillespie is plainly a tragedy, but it is equally plainly not the occasion for a constitutional case, let alone for a disregard of qualified immunity. Nonetheless, the district court refused to afford qualified immunity on the basis that jailors have a duty to search out and evaluate medical records to ascertain someone's medical prognosis and predict violence, and the Sixth Circuit refused to disturb that decision. The errors that infect that conclusion are legion.

Circuits around the country have refused to hold mental health professionals, including psychologists, liable for failure to predict that an individual is going to be violent – even when past, frequent, violent tendencies were relayed by the mental health patient to a professional. Statutes exist in many states which further insulate mental health professionals from liability for a patient's violence to a third party. Despite the immunity afforded to individuals professionally trained to diagnose and treat mental illness, the Sixth Circuit's decision imposes a duty on jailors, who lack such formal training, to not only check and evaluate a detainee's history of mental illness, but also to predict whether a particular detainee is likely to be violent.

Compounding that error, the Sixth Circuit believed that petitioners violated the clearly established right "to be free from violence at the hands of other inmates." (Opinion, p 8), citing *Farmer v. Brennan*, 511 U.S. 825 (1994). But as this Court has repeatedly held, the clearly established law that jailors are alleged to

violate cannot be established at that level of generality or qualified immunity becomes meaningless.

This case well illustrates that dynamic. While cases finding deliberate indifference to serious medical needs are numerous, cases providing clear notice to jailors as to their constitutional obligations to check medical records and predict a mental health detainee's likelihood to become violent while housed in jail are non-existent. When jailors admit an individual with a mental health problem, they face a genuinely difficult dynamic. A jailor should not be stripped of his qualified immunity unless both his constitutional obligation and his violation of that obligation were clear. Here, the Sixth Circuit stripped petitioners of all that protection by defining the clearly established law at an impossibly high level of generality, deeming those generalities clearly established and sending petitioners off to the jury. That mode of proceeding is far too insensitive to the difficulties officers face when a detainee is admitted with mental health risk factors. Jailhouse officials are charged with obeying clearly established constitutional law and applicable state law. They are not charged with being mental health experts. By ignoring that basic distinction—and well-established principles of qualified immunity—the decisions below are a recipe for subjecting public officials to personal liability not because they violate clearly established constitutional principles that put them on clear notice, but simply because a detainee tragically died while they were on duty. That is the antithesis of qualified immunity.

ARGUMENT

The Sixth Circuit Decision – Holding Jailhouse Officials Strictly Liable For A Mental Health Detainee Who Happened To Turn Violent In Their Custody Despite Failing To Demonstrate Any Potentially Violent Behavior Earlier – Is Fundamentally Incompatible With Everything This Court Has Said About Qualified Immunity

Review is warranted because the Sixth Circuit flatly disregarded this Court's qualified-immunity precedents. This Court "often corrects lower courts when they wrongly subject individual officers to liability." *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015). That is especially true when a decision withholding qualified immunity from public officials is not just wrong but, as here, egregiously wrong. Public officials may be denied qualified immunity only when their conduct violates a constitutional or statutory right *and* when "the right at issue was clearly established at the relevant time." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014). If either of these two conditions is not present, qualified immunity attaches. Courts may address these conditions in any order. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Here, contrary to the Sixth Circuit's analysis, both conditions plainly fail.

A. The Statistics Regarding the Mental Health of Jail Inmates Underscore the Enormous Burden On State and Local Governments That the Sixth Circuit Decision Creates

As of 2013, "[o]ne in four adults – about 61.5 million Americans – experiences mental illness in a given year. National Alliance on Mental Illness ("NAMI"), Mental Illness Facts and Numbers (2013). One in 17 adults – about 13.6 million Americans – "live with a serious mental illness such as schizophrenia, major depression, or bipolar disorder." *Id*. And "[a]bout 9.2 million adults have co-occurring mental health and addiction disorders." *Id*.

These statistics are even more startling in the jail setting, where "it has been shown that about 20 percent of prison inmates have a serious mental illness[.]" Dean Aufderheide, *Mental Illness in America's Jails and Prisons: Towards a Public Safety/Public Health Model*, April 1, 2014. *See also* National Alliance on Mental Illness: Mental Health by the Numbers, accessed Aug 9, 2016 (citing Glaze, L.E. & James, D.J. (2006). Mental Health Problems of Prison and Jail Inmates. Bureau of Justice Statistics Special Report. U.S. Department of Justice, Office of Justice Programs Washington, D.C. Retrieved March 5, 2013 - See more at: http://www.nami.org/Learn-More/Mental-Health-By-the-Numbers#sthash.lpuJPHEa.dpuf) (noting that "[a]pproximately 20% of state prisoners and 21% of local jail prisoners have 'a recent history' of a mental health condition." Studies further show that "50 percent of males and 75 percent of female inmates in state prisons, and 75 percent of females and 63 percent of male inmates in jails, will

experience a mental health problem requiring mental health services in any given year." *Id*. The American Psychiatric Association reports that between 2.3 and 3.9% of inmates in state prisons are estimated to have schizophrenia or another psychotic disorder, and between 2.1 and 4.3 percent suffer from bipolar disorder. *Id*.

The increasing number of mentally ill persons in jails is a direct result of a movement to "deinstutitonalize" these individuals. National Institute of Corrections, Mentally Ill Persons in Corrections. In 1959, over half a million mentally ill patients were housed in state mental hospitals; by the late 1990s, this number decreased to approximately 70,000. *Id*. As a result, mentally ill persons are more likely to live in local communities, and come into contact with the criminal justice system and ultimately be placed in jails. *Id*.

B. Jailors Do Not Have a Duty to Protect Detainees From Harm From Another Detainee in the Absence of a Specific Reason to Suspect That the Detainee Will Become Violent

It is not disputed that institutions such as prisons and mental hospitals having custody over dangerous persons, have a duty to members of the public to exercise reasonable care to control their inmates or patients. Restatement (Second) of Torts § 319 (1965). The question raised in this case is how far that duty extends.

Circuits around the country have refused to hold mental health professionals, such as psychologists,

liable for failure to predict that an individual is going to be violent – even when past, frequent violent tendencies were relayed by the mental health patient to a professional. *Fredericks v. Jonsson*, 609 F.3d 1096 (10th Cir. 2010). In *Fredericks*, for example, the Tenth Circuit affirmed the lower court's ruling that under Colorado's mental health professional liability statute, Colo. Rev. Stat. § 13-21-117, a psychologist who performed a mental-health evaluation of an individual (Wellington) on probation for previously stalking the plaintiffs was not liable for the failure to predict Wellington's subsequent attempt to break into the plaintiffs' home. The Tenth Circuit reached this conclusion even though Wellington had been recently hospitalized for having suicidal thoughts following a drinking incident, was placed on antidepressant medication, was previously convicted for stalking the plaintiffs for over four years, violated his probation, and informed the psychologist that he used to have frequent violent fantasies involving members of the plaintiffs' family, but no longer did. 609 F.3d at 1098, 1105.

In *Rousey v. U.S.*, 115 F.3d 394 (6th Cir. 1997), the Sixth Circuit (predicting and applying Maine law) held that mental health professionals at a government psychiatric hospital had no duty to detain a voluntarily admitted mental patient or to otherwise control his conduct, and thus the plaintiff who was shot by the patient three weeks after his discharge could not recover damages from the United States on the basis of negligent discharge. In so ruling, the Sixth Circuit noted that no duty to warn exists where the psychiatrists reasonably determined that the patient posed no immediate or direct threat to anyone. *Id*. at

399. *See also Credeur ex rel. Credeur v. U.S.*, 97 F. App'x 500 (5th Cir. 2004) (psychiatrist owed no duty to plaintiffs injured in automobile accident caused by the Veterans Administration's psychiatric patient, where the patient did not even know the plaintiffs when the accident occurred and made no threat against them as identified victims).

Consistent with this, statutes exist in a number of states which protect mental health professionals from civil liability for failure to predict a mental health patient's violent behavior and warn or protect any person accordingly. Colo. Rev. Stat. § 13-21-117 (protecting physicians, social workers, psychiatric nurses, psychologists, or other mental health professionals and hospitals); LSA-RS.9:2800.2 (under Louisiana statute, a psychologist, psychiatrist, marriage and family therapist, licensed professional counselor, or social worker's duty "to warn or to take reasonable precautions to provide protection from violent behavior" only arises "[w]hen a patient has communicated a threat of physical violence, which is deemed to be significant in the clinical judgment of the treating [professional], against a clearly identified victim or victims, coupled with the apparent intent and ability to carry out such threat[…]"); Tex. Health & Safety Code § 611.004(a)(2) (Texas statute permits mental health professionals to disclose confidential information only if the professional determines that there is "a probability of imminent physical injury by the patient to the patient or others or there is a probability of immediate mental or emotional injury to the patient…"); 50 P.S. § 7114 (Pennsylvania's Mental Health Procedures Act grants immunity from civil liability to mental health facilities and professionals for

discharging patients in the absence of willful neglect or gross negligence).

The single exception to these statutes is that rare set of circumstances where the patient has communicated to a mental health care provider a serious threat of imminent physical violence against a specific person or persons. *See* Colo. Rev. Stat. § 13-21-117. However, it is extremely difficult to predict dangerousness of mentally ill individuals – even for psychiatrists trained to do just that. According to one legal scholar, "[o]ne factor which has impeded the ability of psychiatrists to predict the dangerousness of mentally ill persons accurately is the lack of a clear-cut association between mental illness (or any particular form of mental illness) and dangerous behavior." Bernard L. Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. Pa. L. Rev. 439, 447-448 (December 1974). Even schizophrenics like the individual here were not found to exist "significantly more often in the criminal population." *Id*. at 448. "Psychiatrists as well as courts tend to perceive dangerousness as an attribute of an individual, as a quality which one ought to be able to define, predict, and measure." *Id*. at 448. But research shoes that dangerousness is difficult to perceive – and the propensity for violence even more so.

In disregard of this law, the Sixth Circuit placed a duty on jailors to review medical records in detail and to predict a propensity for violence. Given the statistical evidence demonstrating that even qualified pyschiatrists and mental health professionals cannot accurately predict a propensity for violence, such a duty is completely unworkable. Further, while the

Sixth Circuit suggests that Gillespie's arrest for "attempted assault with a dangerous weapon" should have also put petitioners on notice of a propensity for violence (Opinion, p. 13), statistics show that mentally ill individuals who are incarcerated or detained are almost always done so for a violent offense. Among state prisoners who had a mental health problem, nearly half (49%) had a violent offense as their most serious offense. Mental Health Problems of Prison and Jail Inmates, http://www.bjs.gov/content/pub/pdf/mhppji.pdf, p 7. The Sixth Circuit's emphasis on Gillespie's detainment for a violent felony as supporting a substantial risk of harm to Horvath overlooks its own observation that prior incarceration for violent felonies "merely suggests that [Gillespie], not unlike many inmates in our prison system, is prone to antisocial and sometimes violent behavior." *Taylor v. Little*, 58 F. App'x 66, 68 (6th Cir. 2003). The *Taylor* Court continued, prior incarceration for violent felonies "does not suggest that prison officials should have been aware that he might randomly attack a fellow inmate." *Id*.

Under a reasonable reading of the Sixth Circuit's opinion, mental health detainees incarcerated for a violent crime should be placed in single-occupancy cells. This creates a very unworkable, and expensive, problem. The American Prison system houses an estimated 2.2 million inmates. Thierry Godard, *The Economics of the American Prison System*, March 23, 2016 https://smartasset.com/insights/the-economics-of-the-american-prison-system (last visited August 9, 2016). While the average cost of incarcerating an American Prisoner varies among states, the cost ranges from $14,000 - $60,000 per inmate. (*Id*.). Jails would

have to be doubled in size in order for all mental health individuals who engage in violent crimes to be placed in their own cells.

Not surprisingly, there is no robust of consensus of cases requiring mental health detainees to be automatically housed in separate cells. Rather, it is only when specific vulnerability is present that a duty to segregate inmates may arise. Jimmie E. Tinsley, *Governmental Entity's Liability for Injuries Inflicted on Prisoner in Assault by Fellow Prisoner*, 33 Am. Jur. Proof of Facts 2d 303 (Originally published in 1983) ("[a]bsent some reason to know that a particular inmate is in a peculiarly vulnerable position, prison authorities have no reason to take any special steps for his protection."). This vulnerability is typically indicated when the inmate has previously been threatened or assaulted by other inmates, is a younger inmate, or is of slight build. *Id*. Other types of situations in which the Sixth Circuit has previously found that a fact question existed as to whether the risk to the plaintiff was sufficiently serious so as to warrant the denial of qualified immunity typically involve those where the attacker asked the officer a theoretical question about attacking the plaintiff, *Street v. Corrections Corporation of America*, 102 F.3d 810, 816 (6th Cir. 1996), where a prison guard's employment record contained repeated references to his propensity to discrimination against and abuse African-American prisoners, *Curry v. Scott*, 249 F.3d 493 (6th Cir. 2001), or where an inmate becomes "marked" by another inmate for informing officials that an individual was engaging in illegal activities. *Flint ex rel. Flint v. Kentucky Dept. of Corrections*, 270 F.3d 340 (6th Cir. 2001). In contrast, this is not a case

where Gillespie told petitioners of his intent to harm Horvath, or where Horvath was flagged as a tattletale. Petitioners had no reason to suspect that Gillespie might harm someone like Horvath, to whom Gillespie had no apparent connection. *Taylor*, *supra*.

The Eighth Circuit's analysis in *Webb v. Lawrence County*, 144 F.3d 1131 (8th Cir. 1998), is instructive on this point. In *Webb*, the plaintiff, prisoner Webb, claimed that he was sexually assaulted by another inmate while housed in the Lawrence County Jail in South Dakota. At the time, Webb was nineteen years old, was 5'4" tall, and weighed 120 pounds. *Id*. at 1133. Webb brought a 42 U.S.C. § 1983 civil rights claim alleging an Eighth Amendment violation, which the district court dismissed. *Id*. at 1134. On appeal, Webb claimed that the district court erred in granting summary judgment in favor of the defendants, particularly where "there was circumstantial evidence of a substantial risk of serious harm because defendants knew that [the assaulter] was a sexual predator who obviously posed a substantial risk of serious harm especially to young and physically slight inmates." *Id*. at 1134.

The Eighth Circuit rejected Webb's argument, finding that he failed to create a genuine issue of material fact under *Farmer's* subjective knowledge standard. *Id*. at 1135. Specifically, the *Webb* Court rejected the defendants' general knowledge of inmate rape in the prison systems and that the assaulter was a sexual offender, as sufficient to establish that the defendants actually knew the assaulter posed a substantial risk of harm to Webb:

> We agree with the district court that Webb failed to create a genuine issue of material fact under *Farmer v. Brennan's* subjective knowledge standard. There was no evidence that defendants actually knew that Wyman [the attacker] posed a substantial risk of harm to Webb. Although defendants knew that, in general, inmate rape and assault is pervasive in this nation's prison system, there was no evidence or allegations that inmate rape is a common occurrence in this particular jail. Although defendants knew that Wyman was a sexual offender, there was no evidence that Wyman had assaulted any other inmates or caused any problems while incarcerated.

Id. at 1135. Similarly, the *Webb* Court agreed that defendants' knowledge was insufficient to satisfy the "lesser objective knowledge standard" the Eighth Circuit applied before *Farmer v. Brennan*. On this point, the *Webb* Court stated:

> Even assuming for the purposes of analysis that the risk of sexual assault faced by young, physically slight inmates like Webb was obvious, and thus sufficient to put defendants on notice of its existence, "*Farmer* [*v. Brennan*] specifically rejects the idea that liability may be found when a risk is 'so obvious that it should [have been] known.'"

144 F.3d at 1135, quoting *Jensen v. Clarke*, 73 F.3d 808, 811 (8th Cir. 1996) (citing *Farmer v. Brennan*, 511 U.S. 825; 114 S. Ct. 1970; 128 L. Ed. 2d 811 (1994)). The subjective test requires more than that – and here, the Sixth Circuit essentially conflates two distinct

prongs of the test, (1) that the individual defendant was subjectively aware of a substantial risk of harm to the inmate and (2) that the individual was deliberately indifferent to it. Instead, the Sixth Circuit adopts a subjective test that imposes liability despite the absence of evidence that the individual defendant knew or drew an inference of a substantial risk of serious harm from facts available to him. This is contrary to this Court's longstanding teachings and review is therefore warranted.

C. This Court's Review is Necessary Because the Constitutional Rule Applied By the Sixth Circuit Was Far From "Beyond Debate" and Was Articulated at the Highest Level of Generality.

Even if petitioners violated a constitutional right, the pertinent constitutional rule was not clearly established, providing another ground for qualified immunity for petitioners. Very recently, in *Mullenix*, this Court reiterated:

> The doctrine of qualified immunity shields officials from civil liability so long as their conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L.Ed.2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982)). A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. ——, ——, 132 S. Ct. 2088,

> 2093, 182 L.Ed.2d 985 (2012) (internal quotation marks and alteration omitted). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al–Kidd,* 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L.Ed.2d 1149 (2011).

Mullenix v. Luna, 136 S. Ct. 305, 308 (2015).

This Court has "repeatedly told courts not to define clearly established law at a high level of generality." *Id.* (alteration marks omitted) (quoting *al-Kidd*, 563 U.S. at 742. This is because to be "clearly established," the contours of a constitutional right must have been so "sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff*, 134 S. Ct. at 2023. This Court has emphatically delivered the same message clearly and consistently: The "right allegedly violated must be established, not as a broad general proposition, but in a particularized sense so that the contours of the right are clear to a reasonable official." *Id*. at 2094 (quotation marks and citations omitted). When a court defines the right at issue at a high level of generality, it "avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff*, 134 S. Ct. at 2023.

The Sixth Circuit ignored all this. The extent of its virtually non-existent qualified-immunity analysis was limited to stating that "[t]he constitutional right at issue in this case – Horvath's right to be free from violence at the hands of other inmates – was clearly established by the Supreme Court in *Farmer v. Brennan*[.]" (Opinion, p. 8). This is simply a statement

of the governing Eighth Amendment and Fourteenth Amendment standard in the broadest possible sense. Just as "[q]ualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures," *Sheehan*, 135 S. Ct. at 1776, so too is it no immunity at all if clearly established law can simply be defined as the right to be free from deliberate indifference to a substantial risk of harm to a detainee. The Sixth Circuit cited no cases that would have put jailors on notice that they could be held liable under a strict-liability standard if a detainee happened to die at the hands of violence from another detainee who exhibited no alarming symptoms of violent behavior, even after a mental-status examination was performed in accordance with jail procedure.

Even supposing the jailors erred in judgment, a reasonable jailor could have believed that the law required no more of him than to perform a mental-status examination. Under the Sixth Circuit's analysis, the jailor also had a duty to review medical records and predict violence. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The doctrine allows "ample room for mistaken judgments." *Id.* at 343. It affords "government officials breathing room to make reasonable but mistaken judgments." *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014). And it attaches even when, "with the benefit of hindsight, the officers may have made some mistakes." *Sheehan*, 135 S. Ct. at 1775 (quotation marks omitted). Despite this Court's admonition that "[c]ourts must not judge officers with the 20/20 vision of hindsight," *id.* at 1777

(quotation marks omitted), that is precisely what the Sixth Circuit did here.

The Sixth Circuit's plainly incorrect qualified-immunity analysis merits plenary review. Additionally, in light of the disregard of the decision below for past decisions of this Court including *Mullenix*, 136 S. Ct. at 308, the Court may wish to consider summary reversal or to grant, vacate, and remand in light of *Mullenix*.

CONCLUSION

The Court should grant the petition for certiorari, summarily reverse, or grant, vacate, and remand in light of *Mullenix*.

Respectfully submitted,

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