IN THE
SUPREME COURT OF THE UNITED STATES

LIEUTENANT PATRICK H. STOCKDALE, ET AL.
Petitioners,

v.

DISTRICT ATTORNEY GENERAL KIM R. HELPER,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

W. Gary Blackburn – Counsel of Record
Bryant Kroll – On Brief
THE BLACKBURN FIRM, PLLC
213 Fifth Avenue North, Suite 300
Nashville, TN 37219
(615) 254-7770
gblackburn@wgarbyblackburn.com
bkroll@wgaryblackburn.com

Counsel for Petitioners

QUESTIONS PRESENTED

Two district court judges denied District Attorney General Kim Helper both absolute and qualified immunity for intentionally causing the Petitioners' terminations in retaliation for exposing public corruption and for filing a lawsuit involving a matter of public concern. The Sixth Circuit affirmed the denial of absolute immunity to Gen. Helper, but reversed on qualified immunity.

Petitioners present the following questions:

1. **Whether the decisional law regarding retaliation under the Petition Clause of the First Amendment was clearly established to place a public official on notice that causing the termination of a public employee violated the Petitioner's First Amendment rights?**

2. **Whether a prosecutor's purported belief that she would be protected by absolute prosecutorial immunity after she retaliated against two police officers and intentionally caused their termination should have any bearing on whether the constitutional right in question was clearly established under existing law?**

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The Petitioners in this case are former Lieutenants of the Fairview, Tennessee Police Department, Lt. Patrick Stockdale and Lt. Timothy "Shane" Dunning."

The Respondent to this Petition is General Kim Helper, the elected District Attorney General for Williamson County, Tennessee. Claims against the City of Fairview, Tennessee were settled and voluntarily dismissed in the trial court and the City of Fairview, Tennessee is not a party to this proceeding.

RULE 29.1 CORPORATE DISCLOSURE STATEMENT

None of the Petitioners herein are a subsidiary or affiliate of a publicly owned corporation that has a financial interest in the outcome of this litigation.

RELATED PROCEEDINGS

1. *Stockdale et al. v. Helper*, 979 F.3d 498 (6th Cir. 2020)
2. *Stockdale et al. v. Helper et al.*, No. 3:17-cv-00241, 2020 U.S. Dist. LEXIS 31051 (M.D. Tenn. Feb. 24, 2020).
3. *Stockdale et al. v. City of Fairview, Tennessee et al.,* Case No. 3:16-cv-01945 (M.D. Tenn. July 21, 2016)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

PETITION FOR A WRIT OF CERTIORARI

Lt. Patrick Stockdale and Lt. Timothy "Shane" Dunning, the petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on October 30, 2020.

OPINIONS BELOW

The October 30, 2020 opinion of the Sixth Circuit Court of Appeals is reported as *Stockdale et al. v. Helper*, 979 F.3d 498 (6th Cir. 2020) and is reprinted in the Appendix A to this Petition, pages 2a to 20. A Petition for Rehearing *En Banc* was denied on December 21, 2020 and is reprinted in the Appendix at page 113a. The district court's memorandum and order granting in part and denying in part the Respondent's Motion for Summary Judgment, App., *infra,* 20a-91a, is unreported but is available at *Stockdale v. Helper*, No. 3:17-cv-00241, 2020 U.S. Dist. LEXIS 31051 (M.D. Tenn. Feb. 24, 2020). The district court's memorandum denying Respondent's Motion to Dismiss is unreported, but is reprinted in the Appendix at 91a-112a,

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on October 30, 2020. Petitioners timely filed a petition for rehearing with a suggestion for rehearing en banc, which was denied on December 21, 2020, App., *infra* at 1a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The First Amendment to the Constitution of the United States provides, in pertinent part, that "congress shall make no law * * * abridging * * * the right of the people * * * to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This case concerns whether two local government employees may sue a prosecutor for retaliation under the Petition Clause of the First Amendment, U.S. Const. Amend. I, cl. 6, when they petition on matters of public concern and the prosecutor caused their employer to terminate them because they had done so.

Lieutenants Pat Stockdale and Shane Dunning blew the whistle on public corruption occurring within the Fairview, Tennessee police department. Lt. Stockdale was concerned about the department's relationship with two security firms and was informed that some officers had falsified documents to obtain secondary employment at the firms. Lt. Stockdale sought assistance from District Attorney General Kim Helper and requested that she refer the matter to the Tennessee Bureau of Investigation.

Gen. Helper had other plans for Fairview. Less than two weeks after Stockdale reported his concerns, Fairview's Police Chief Terry Harris announced his retirement. Gen. Helper immediately had thoughts about who would replace Chief Harris. She inexplicably viewed Stockdale and Dunning as a threat to becoming the next Chief at Fairview. She texted an associate and offered to advocate for her

Judicial District's Drug Task Force Director to become Fairview's next Chief. She referred to Stockdale and Dunning as the "wannabe chiefs." "God help us if it's [D]unning or Stockdale," she said. She agreed with her associate that having Dunning or Stockdale as chief would be "worse than Sanders or Clinton as the next President."

Fairview's City Manager placed Dunning and Stockdale on administrative leave. The Williamson County Sheriff's Office was called in to investigate the Fairview Police Department, and Helper told a colleague that her preferred candidate now stood a better shot. After the Sheriff's Office released their investigative report, Helper did not bring criminal charges against any officer. The report contained stale and unsubstantiated allegations against Dunning and Stockdale from the vary officers who were involved in falsifying documents at Fairview.

Lieutenants Dunning and Stockdale sued the City and its Board of Commissioners, and obtained a temporary restraining order enjoining and restraining the City from retaliating against them. In the interim, Scott Collins became Fairview's City Manager. The case was mediated and settled, and the two were returned to work. Collins reviewed the Sheriff's report and did not belief that anything within it justified firing Stockdale and Dunning.

In October 2016, one of Helper's assistants advised her Scott Collins was restructuring the FVPD and eliminating the detective position. On October 18, Helper contacted Mayor Carroll to discuss her concerns regarding the FVPD restructuring, but the Mayor referred Helper to Collins. Collins spoke with Mayor

Carroll, who informed him that Helper opposed his decision to restructure the department and that Helper was considering removing the assistant district attorneys from the Fairview City Court.

As City Manager, Collins had the sole discretion to hire and fire Fairview employees. On October 18, 2016, Collins called Helper to discuss her concerns regarding the proposed changes. The October 18 Call became heated within the first 60 seconds. Collins explained to Helper why his proposed changes to the detective division were beneficial. Collins thanked Helper for her comments, but advised her that the changes would take place as he had determined.

The topic then shifted to the Plaintiffs. Helper told Collins that she did not like the fact that the Plaintiffs had settled their case and were returning to work. Helper stated that she did not like the direction of the Fairview Police Department as she knew it. Collins told Helper to place her concerns about Stockdale and Dunning in writing.

On October 19, 2016, CM Collins emailed Helper stating:

> As we discussed yesterday, I understand that you have some concerns regarding some members of our police department staff. If you can provide me with those concerns or directives, it will assist me with the reorganization of the department."

On October 20, 2016, CM Collins received the following email from Helper:

> Mr. Collins, per our conversation, this Office has concerns about reports initiated/investigated solely by Officers Shane Dunning or Pat Stockdale. Because of the information contained in the Williamson County Sheriff's Department Investigative report, we will be required to turn that report over to defense counsel in cases where Officers Dunning and/or Stockdale are involved. Without independent corroboration from another law enforcement officer and/or independent witnesses, the testimony of Officers Dunning and/or Stockdale may be impeached, thus

> creating challenges for the State in proving its case beyond a reasonable doubt. (*Giglio v. United States,* 405 U.S. 150 (1972)).

Collins told Helper that she placed the City in the position of having to terminate the Petitioners. Petitioners had clean personnel files, and Collins did not belief that the Sheriff's report constituted *Giglio* material. Helper nonetheless refused to withdraw her *Giglio* Email, and Collins served Notices of Intended Dismissal on October 31, 2016, stating that Helper's *Giglio* Email impaired the Petitioner's ability to act independently and credibly as law enforcement officers and prompting their termination.

Dunning and Stockdale sued Gen. Helper and the City of Fairview. They settled their claims against Fairview leaving a First Amendment claim and state law claims against Helper. The district court denied Gen. Helper absolute immunity because she was not acting as an advocate for the state and denied her qualified immunity on grounds that the law for retaliation under the Petition Clause was well-established. The district court relied on this Court's decision in *Borough of Duryea v. Guarnieri,* 564 U.S, 379 (2010) and the Sixth Circuit's decision *Campbell v. Mack,* 777 F. App'x 122, 136 (6th Cir. 2019). The Sixth Circuit nonetheless reversed the denial of qualified immunity to Gen. Helper on grounds that the law was not clearly established.

The Sixth Circuit's decision below conflicts with the decisions of this Court, which have repeatedly held that a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question.

The contours of a right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," but that the very action in question need not be held unlawful. *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020); *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

In addition, the Sixth Circuit reasoned that the law for Petitioners' First Amendment retaliation claims was not sufficiently clear "because a reasonable prosecutor would have found the *absolute* immunity question a close one in this context, that strongly suggests that *qualified* immunity applies." App. 18a. However, a public official's belief that their conduct would be covered by absolute immunity has no bearing on whether the constitutional right in question was clearly established under existing law. This approach places the wrong emphasis on whether Helper believed she was absolute immune and could therefore act with impunity, when the focus should be on the Petitioners' rights under the First Amendment. Qualified immunity analysis is completely independent of the absolute immunity analysis. A prosecutor's understanding of whether her conduct is immune does not inform the prosecutor's understanding of whether that conduct is constitutional.

Qualified immunity was not created to protect those who "knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). By requiring the Petitioners to find caselaw directly on point to overcome qualified immunity, the Sixth Circuit has created a safe-haven for public officials who knowingly violate the constitution, which has led to an absurd result.

The decision below is an important question of federal law that has not been settled by this Court and stands contrary to this Court's precedent. This case now serves as a template for prosecutors in the Sixth Circuit and other jurisdictions to violate a public employee's right to petition the government for redress. This decision will have a profound impact on police officers in the Sixth Circuit because it will enable prosecutors to serve as the cat's paw to knowingly violate the constitution. This case is therefore an ideal vehicle for resolving important questions about qualified immunity, which is in an issue of national importance.

A. Constitutional Background

The First Amendment guarantees "the right of the people * * * to petition the Government for a redress of grievances." U.S. Const. Amend. I, cl. 6. This "[c]lause was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble." *McDonald v. Smith,* 472 U.S. 479, 485 (1985). Recognizing that "[t]hese First Amendment rights are inseparable," this Court has held that "there is no sound basis for granting greater constitutional protection to statements made in a petition * * * than other First Amendment expressions." *Ibid.*

In *Borough of Duryea v. Guarnieri,* 564 U.S, 379 (2010), this Court analyzed the Petition Clause in context of the public concern test set forth in *Pickering v. Board of Education,* 391 U.S. 563, 568, 20 L.Ed. 811, 88 S. Ct. 1731 (1967), and held that public employees have a First Amendment right to under the Petition Clause if it involved a matter public concern.

B. District Court Proceedings.

Helper moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b) on grounds that she was absolutely immune for her conduct. She did not raise the defense of qualified immunity, but Judge Aleta Trauger, *sua sponte,* denied her qualified immunity. The case proceeded into discovery and was reassigned to Judge Eli Richardson. Helper moved for summary judgment asserting various defenses, including qualified and absolute immunity, which Judge Richardson denied.

Plaintiffs' claims were reduced to a 42 U.S.C. § 1983 claim for First Amendment Retaliation, and claims under Tennessee state law for tortious interference with a business relationship and official oppression. *See* App. at 75a, 87-88a.

Helper appealed the denial of immunity shortly before trial.

C. Court of Appeals Proceedings.

The Sixth Circuit correctly found that Helper's actions were not tied to the judicial process when she interfered with the staffing decisions at the City of Fairview and *Giglio*-impaired Lt. Stockdale and Lt. Dunning. *See* App. 16a-17a. They were not witnesses in any criminal prosecution, she had no obligation to produce any exculpatory evidence to criminal defense, and nothing within it could be used to impeach their testimony. *See* App. 12a-14a. "[S]he tried only to affect personnel decisions in the department, not to win a case." App. 10a.

However, the Sixth Circuit granted Helper qualified immunity because she "did not violate any clearly established law." App. 18a. The Sixth Circuit explained:

> We can resolve the claim on the ground that Helper did not violate any clearly established law. *See Pearson*, 555 U.S. at 227. To meet this imperative, the claimant must show that case law put the issue "beyond debate. *Aschroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). That simply was not the case here.
>
> Ask what Helper would have seen had she consulted precedent before acting. She would have encountered a tangle of cases about absolute immunity, most of which favored the prosecutor as just shown. That it has taken numerous pages in the federal reporter to make sense of the issue sends a first signal that liability is far from clearly established. Because a reasonable prosecutor would have found the *absolute* immunity question a close one in this context, that strongly suggests that *qualified* immunity applies.
>
> App.18a.

The Sixth Circuit distinguished *Campbell v. Mack* 777 F. App'x 122 (6th Cir. 2019) on grounds that the case did not involve a lawsuit against an official who did not, and could not, take the adverse action. App. 18a. The Sixth Circuit distinguished *Fritz v. Charter Township of Comstock* (*Fritz I*), 592 F.3d 718 (6th Cir. 2010) on grounds that it only allowed a retaliation claim against a public official who pressured a private employer to take adverse action in response to protected speech.

Because the district court denied Helper summary judgment on Petitioner's state law claims for official oppression and tortious interference with a business relationship, the Sixth Circuit remanded the issue to the district court to decide whether to exercise supplemental jurisdiction over the state law claims. App. 20a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT THAT CLEARLY ESTABLISHED CONSTITUTIONAL VIOLATIONS NEED NOT BE DIRECTLY ANALOGOUS TO THE CASE AT BAR.

The contours of Petitioners' First Amendment Rights were clearly established and placed Gen. Helper on notice that her conduct was unlawful. In *Hope v. Pelzer*, this Court explained:

> As we have explained, qualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.' *Saucier* v. *Katz*, 533 U.S. at 206. For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see . *Mitchell* v. Forsyth, 472 U.S. 511, 535, 86 L. Ed. 2d 411, 105 S. Ct. 2806, n. 12; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson* v. *Creighton*, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987).

Hope v. Pelzer, 536 U.S. 730, 739 (2002).

In *Ashcroft v. al-Kidd*, this Court reiterated that the right need be "sufficiently clear" but not "directly on point":

> A Government official's conduct violates clearly established law when, at the time of the challenged conduct, "[t]he contours of [a] right [are] sufficiently clear" that every "reasonable official would [have understood] that what he is doing violates that right." *Anderson* v. *Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. See *ibid.; Malley* v. *Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).
>
> *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 2083 (2011).

A directly analogous case is not required to put officials on notice that their activity is unlawful. To require such a stringent application of the law has yielded absurd results in the application of qualified immunity, which is exactly what happened in the case below.

A. The Law Was Clearly Established That Public Officials Who Retaliate Against Private or Public Employees Who Petition The Government To Redress Grievances Violates the First Amendment of the United States Constitution.

Exposing public corruption is at the core of the protections guaranteed by the First Amendment. The importance of this function for the press is clear. In *Branzburg v. Hayes*, 408 U.S. 665, 727, 92 S. Ct. 2646, 2672 (1972), this Court held:

> The press "has been a mighty catalyst in awakening public interest in governmental affairs**, exposing corruption among public officers and employees** and generally informing the citizenry of public events and occurrences . . . .
>
> *Id.* (emphasis added)(collecting cases).

For public employees claiming retaliation under the Petition Clause of the First Amendment, this Court applied *Pickering* public concern test in *Borough of Duryea v. Guarnieri* as follows, "Petitions to the government assume an added dimension when they seek to advance political, social, or other ideas of interest to the community as a whole." *Guarnieri*, 564 U.S. 379, 395, 131 S. Ct. 2488, 2498 (2011). "Petition, as a word, a concept, and an essential safeguard of freedom, is of ancient significance in the English law and the Anglo-American legal tradition." *Id.* (citing 1 W. Blackstone, Commentaries *143). "The right to petition applied to petitions from nobles to the King, from Parliament to the King, and from the people to the

Parliament, and it concerned both discrete, personal injuries and great matters of state." *Guarnieri* at 395, 2498 (other citations omitted).

The Sixth Circuit, however, required Dunning and Stockdale to find an identical case in order to overcome Helper's assertion of qualified immunity, which is contrary to this Court's holding in *Ashcroft v. Al-Kidd* and *Hope v. Pelzer*. The qualified immunity analysis should not focus on Helper's purported right to communicate to individuals outside of the scope of her duties, but rather, the analysis must focus on whether the contours of Stockdale and Dunning's rights to petition the courts under the First Amendment were sufficiently clear to place her on notice that her actions were unlawful.

Starting with this Court's decision in *Guarnieri,* the law was clearly established that the Petitioners' had First Amendment rights to petition the courts for redress over a matter of public concern. *Guarnieri*, alone, was sufficient to place Helper on notice of the rights in question. Sixth Circuit precedent has even further defined the contours of First Amendment rights to place Gen. Helper on notice that her retaliation against Dunning and Stockdale would be unlawful.

In the Sixth Circuit, "a plaintiff alleging First Amendment retaliation 'must prove that 1) he engaged in protected conduct, 2) the defendant took an adverse action that would deter a person of ordinary firmness from continuing to engage in that conduct, and 3) the adverse action was taken at least in part because of the exercise of the protected conduct.'" *Holzemer v. City of Memphis*, 621 F.3d 512, 520 (6th Cir. 2010)(quoting *Siggers-El v. Barlow,* 412 F.3d 693, 699 (6th Cir.

2005)(citing *Thaddeus-X v. Blatter*, 175 F.3d 378, 393 (6th Cir. 1999) (*en banc*)). "This inquiry is intensely context-driven: 'Although the elements of a First Amendment retaliation claim remain constant, the underlying concepts that they signify will vary with the setting--whether activity is 'protected' or an action is 'adverse' will depend on context.'" *Holzemer* at 520 (citing *Thaddeus-X*, 175 F.3d at 388). The rule stated in *Holzemer* does not require that the defendant also be the plaintiff's employer or even that the adverse action result in termination. *Holzemer* requires only that the defendant take "an adverse action that would deter a person of ordinary firmness from continuing to engage in that conduct." *Id.* at 520.

In *Fritz v. Charter Township of Comstock,* 592 F.3d 718 (6th Cir. 2010), the Sixth Circuit reversed dismissal of a retaliation claim brought by a private citizen against a public official who pressured the plaintiff's private employer to take adverse action against her because she engaged in protected speech. Under *Fritz,* the law was clearly established that if Helper had retaliated against a private employee and caused their termination, it would violate the First Amendment.

In *Paterek v. Vill. of Armada*, 801 F.3d 630 (6th Cir. 2015), the Sixth Circuit allowed a First Amendment claim to proceed against a defendant on a "cat's paw theory," which "refers to a situation in which 'a biased [official], who lacks decision-making power, influences the unbiased decision-maker to [take] an adverse [enforcement action]." *Paterek,* 801 F.3d at 651 (quoting *Bobo v. United Parcel Serv., Inc.,* 665 F.3d 741, 756 (6th Cir. 2012). Thus, the law was sufficiently clear to Gen. Helper that, even if she lacked the ability to take an adverse action against somebody,

if she influenced the decisionmaker to take an adverse action against a private person.

In *Ashcroft,* four Justices of this Court held in a concurring opinion that:

> "Some federal officers perform their functions in a single jurisdiction, say, within the confines of one State or one federal judicial district. They "reasonably can anticipate when their conduct may give rise to liability for damages" and so are expected to adjust their behavior in accordance with local precedent. *Davis* v. *Scherer*, 468 U.S. 183, 195, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984); see also *Anderson* v. *Creighton*, 483 U.S. 635, 639-640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

Ashcroft v. al-Kidd, 563 U.S. 731, 746, 131 S. Ct. 2074, 2086 (2011).

Although not a federal employee, Gen. Helper was aware that her job was limited to criminal prosecutions within Williamson County, Tennessee. But she had no jurisdiction or authority at all to interfere with municipal affairs within the City of Fairview, Tennessee. That office and those duties belonged exclusively to the Fairview City Manager. Thus, she was on notice that her conduct of reaching out to the City Manager to influence his restructuring of the police department exceeded the scope of her duties as a prosecutor entirely. This is highlighted by the fact that Lieutenant Stockdale and Dunning's state law claims for tortious interference with a business relationship and official oppression, survived summary judgment and the Sixth Circuit's opinion. She therefore knew or should have known that her conduct was tortious.

II. THE SIXTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW REGARDING ABSOLUTE AND QUALIFIED IMMUNITY THAT CONFLICTS WITH THE DECISIONS OF THIS COURT.

A. The Functional Approach for Absolute Immunity is Distinct from the Qualified Immunity Analysis

In *Imbler v. Pachtman,* 424 U.S. 409, 47 L.ed 2d 128, 96 S. Ct. 984 (1976), this Court held that a state prosecutor had absolute immunity for the initiation and pursuit of a criminal prosecution, including presentation of the State's case at trial. *Id.* at 421. This Court "focused on the functions of the prosecutor that had most often invited common-law tort actions." *Id.* at 424. "Those Considerations supported a rule of absolute immunity for conduct of a prosecutors that was 'intimately associated with the judicial phase of the criminal process.'" *Id.* at 430.

Malicious prosecution is the most obvious common-law tort action filed against a prosecutor. Under Tennessee law, there is no common-law tort immunity for tortious interference with a business relationship or official oppression, which demonstrates that Helper's conduct was beyond the pale when she caused Plaintiff's terminations. The unlawfulness of her conduct is therefore "'sufficiently clear" to defeat qualified immunity "even though existing precedent does not address similar circumstances." *City of Escondido v. Emmons,* 139 S. Ct. 500, 504 (2019)(quoting *D.C. v. Wesby,* 138 S. Ct. 577, 590 (2018)).

In *Burns v. Reed,* 500 U.S. 478, 114 L. Ed. 2d 547, 111 S. Ct. 1934 (1991), this Court extended absolute immunity to a prosecutor who participated in a probable-

cause hearing, but denied absolute immunity for providing legal advice to the police on the propriety of hypnotizing a suspect and on whether probable cause existed to arrest that suspect. *Id.* at 489-90.

"In determining whether particular actions of government officials fit within a common-law tradition of absolute immunity, or only the more general standard of qualified immunity, we have applied a 'functional approach,' which looks to 'the nature of the function performed, not the identity of the actor who performed it," *Buckley,* 509 U.S. at 269, 113 S. Ct. at 2613 (internal citations omitted).

"[T]he *Imbler* approach focuses on the conduct for which immunity is claimed, not on the harm that the conduct may have caused or the question whether it was lawful." *Buckley v. Fitzsimmons*, 509 U.S. 259, 271, 113 S. Ct. 2606, 2615 (1993).

B. Qualified Immunity Focuses on the Injured Party's Constitutional Rights.

Qualified immunity analysis is distinct from absolute immunity. For qualified immunity, "government officials are not subject to damages liability for the performance of their discretionary functions when 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Buckley* at 268 (quoting *Harlow* v. *Fitzgerald*, 457 U.S. at 818). "In most cases, qualified immunity is sufficient to 'protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.'" *Buckley,* at 268 (quoting *Butz* v. *Economou*, 438 U.S. at 506).

Helper was not acting within the scope of her duties as an advocate for the state. She therefore could not have been performing any "discretionary function." Qualified immunity should therefore not apply.

Nonetheless, the focus is on whether *the Petitioners' rights*, not Helper's actions, were clearly established and a reasonable prosecutor knew or should have known about those rights. The Sixth Circuit approach for qualified immunity grants prosecutors *carte blanche* to search for circuit splits to defeat qualified immunity. Allowing a prosecutor to find obscure cases involving absolute immunity to defeat constitutional claims via qualified immunity is unprecedented and rewards government officials who knowingly violate the law.

III. THIS CASE INVOLVES QUESTIONS OF EXCEPTIONAL IMPORTANCE.

Qualified immunity is a national issue with pending legislation seeking its complete abolition for police officers.[1] H.R. 1280 would not eliminate qualified immunity for other government officials, prompting legislators to reintroduce H.R. 7085, the Ending Qualified Immunity Act, to eliminate the defense of qualified immunity entirely. These legislative actions underscore the national importance of qualified immunity. This case provides the Court with the opportunity to clarify this issue with respect to prosecutors, which would serve as guidance in its application to other government officials.

[1] H.R. 1280 – George Floyd Justice in Police Act of 2021.

Prosecutorial overreach through a "*Giglio*-impairment" or placement of an officer on a "Brady index" or "Brady list," is a matter of great importance to police officers across this nation. Numerous cases involving prosecutorial retaliation against the police have arisen across the country.[2]

The decision below affects the First Amendment rights of public employees and police officers to petition the courts without fear of retaliation. The Opinion also affects the conduct of prosecutors in all ninety-five (95) counties across the state of Tennessee, as well as the states within the Sixth Circuit. The proceedings before this Court therefore involve questions of exceptional importance.

The case at bar may become a template for prosecutorial abuse in Tennessee, Kentucky, Ohio, and Michigan for at least two reasons. First, under the Sixth Circuit's approach, a prosecutor who acted totally outside of her jurisdiction but who mistakenly believed she would be protected by absolute immunity can defeat liability, which overlooks an analysis of the prosecutor's distinct actions through this Court's functional approach.

The case at bar has already grasped the attention of various jurisdictions looking for guidance on prosecutorial immunity.[3] This case therefore provides an

---

[2] *See, e.g., Tillotson v. Dumanis*, No. 10cv1343 WQH (MDD), 2012 U.S. Dist. LEXIS 26129 (S.D. Cal. Feb. 28, 2012), affirmed, *Tillotson v. Dumanis*, 567 F. App'x 482, 483 (9th Cir. 2014); *Nazir v. Cty. of L.A.*, No. CV 10-06546 SVW (AGRx), 2011 U.S. Dist. LEXIS 26820 (C.D. Cal. Mar. 2, 2011); *Harris v. Chelan Cty.*, No. 2:17-CV-0137-JTR, 2019 U.S. Dist. LEXIS 72779, at *4 (E.D. Wash. Apr. 30, 2019); *Roe v. City & Cty. Of San Francisco,* 109 F.3d 578, 584 (9th Cir. 1997); *Lane v. Marion Cty. DA's Office*, 310 Or. App. 296, 306 (2021).

[3] *See, e.g., Krile v. Lawyer,* 2020 ND 176, (ND 2020)(citing *Stockdale v. Helper,* No. 3:17-cv-00241, 2020 U.S. Dizt. LEXIS 31051, 2020 WL 887593 (M.D. Tenn. Feb. 24, 2020)(Richardson, J.); *Hogan v. City of Fort Walton Beach*, No. 3:18-cv-1332-MCR-HTC, 2019 U.S. Dist. LEXIS 236294, at *4 n.6 (N.D. Fla. Mar. 29, 2019)(citing *Stockdale v. Helper, Stockdale v. Helper*, No. 3:17-CV-0241, 2017 U.S. Dist. LEXIS 130657, 2017 WL 3503243, at *1 (M.D. Tenn. Aug. 16, 2017)(Trauger, J.); *Roe v. Lynch*, No. 20-1702, 2021 U.S. App. LEXIS 14062, at *14 (1st Cir. May

ideal vehicle for this Court to revisit the clarify the important questions of law raised herein.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully pray that this Court grant their petition for a writ of certiorari. In the event this Court chooses not to grant plenary review, it should summarily reverse the court of appeals because the law was sufficiently clear to defeat Gen. Helper's claim of qualified immunity.

Dated: May 20, 2021.

Respectfully submitted,

THE BLACKBURN FIRM, PLLC

/s/ W. Gary Blackburn
W. Gary Blackburn – Counsel of Record
Bryant Kroll
213 Rep. John Lewis Way North, Suite 300
Nashville, Tennessee 37219
(615) 254-7770
gblackburn@wgaryblackburn.com
bkroll@wgaryblackburn.com

12, 2021)(Lipez, J., concurring)(citing *Stockdale v. Helper*, No. 3:17-cv-0241, 2017 U.S. Dist. LEXIS 130657, 2017 WL 3503243, at *5-6 (M.D. Tenn. Aug. 16, 2017)(Trauger J)