No. 21-2640

In the United States Court of Appeals for the Eighth Circuit

DWAYNE FURLOW AND RALPH TORRES, PLAINTIFFS-APPELLANTS, AND HAROLD LINER, PLAINTIFF,

v.

JON BELMAR, ET AL., DEFENDANTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI (CIV. NO. 4:16-254) (THE HONORABLE HENRY A. AUTREY, J.)

OPENING BRIEF OF APPELLANTS DWAYNE FURLOW AND RALPH TORRES

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SUMMARY OF THE CASE

This is a case about a systemic subversion of the Fourth Amendment.

The Constitution guarantees that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation. . . ." U.S. Const. amend. IV. Probable cause must be assessed by "someone independent of the police and prosecution," *Shadwick* v. *City of Tampa*, 407 U.S. 345, 348 (1972), typically a "neutral and detached magistrate." *Gerstein* v. *Pugh*, 420 U.S. 103, 112 (1975).

The St. Louis County Police Department turns this on its head. When its officers want to interview a suspect, they—themselves—issue a statewide "Wanted" for that person's arrest by any other officer who happens to encounter the subject. No magistrate (detached or neutral) approves the issuance of a Wanted, and no procedure exists to challenge a Wanted. Because Wanteds are functionally identical to warrants, it is difficult to imagine a more clear Fourth Amendment violation.

The district court nevertheless held that Wanteds are constitutional if the issuing officer in fact has probable cause. That was error. This Court should reverse the district court's grant of summary judgment and remand for further proceedings. Given the importance of these issues, Appellants respectfully request 15 minutes of oral argument.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. It granted Defendants' motions for summary judgment on October 18, 2018 and entered final judgment on June 23, 2021. Appellants timely filed a notice of appeal on July 23, 2021. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court erred in holding that St. Louis County's "Wanteds" System—which allows officers to issue orders for the arrest of individuals without a judicial determination of probable cause and affords no means to quash or challenge a Wanted—is constitutional under the Fourth, Fifth, and Fourteenth Amendments so long as the Wanted is supported by probable cause. *See* U.S. Const. amend. IV, V, XIV; *Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975); *Cty. of Riverside* v. *McLaughlin*, 500 U.S. 44, 56 (1991); *U.S.* v. *Davis*, 174 F.3d 941 (8th Cir. 1999).

2. Whether the district court erred in finding that the Wanteds for Appellants Furlow and Torres were in fact supported by probable cause. U.S. Const. amend. IV; *Kuehl* v. *Burtis*, 173 F.3d 646 (8th Cir. 1999).

3. Whether the district court erred in affording qualified immunity to the police officer Appellees who issued the Wanteds for Furlow and Torres's arrests, in light of longstanding precedent clearly establishing that probable

cause in support of an arrest must be assessed by a detached and neutral magistrate. *Hope* v. *Pelzer*, 536 U.S. 730 (2002); *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

4. Whether the district court erred in concluding that its conferral of qualified immunity on the police officer Appellees precluded municipal liability under *Monell* v. *Dep't of Social Services of New York*, 436 U.S. 658 (1978) as a matter of law, in contravention of Supreme Court and Eighth Circuit precedent holding that individual and municipal liability are independent inquiries. *See Owen* v. *City of Independence*, 445 U.S. 622 (1980); *Webb* v. *City of Maplewood*, 889 F.3d 483, 487–88 (8th Cir. 2018).

5. Whether the district court erred in granting summary judgment against Count Three of the complaint, when neither party sought summary judgment as to that Count. U.S. Const. amend. V; *Am. Red Cross* v. *Cmty. Blood Ctr. of the Ozarks*, 257 F.3d 859, 863 (8th Cir. 2001); Fed. R. Civ. P. 56(f).

STATEMENT OF THE CASE

This appeal arises from a challenge to St. Louis County's "Wanteds" System, which permits police officers to order warrantless arrests without seeking a judicial determination of probable cause. Appellants Dwayne Furlow and Ralph Torres, along with former Plaintiff Harold Liner, are St. Louis County residents who were arrested and detained on Wanteds, and denied procedural mechanisms to quash those Wanteds.

The Wanteds System: The Functional Equivalent of Warrants

Under the Wanteds System, a St. Louis County Police Department (SLCPD) officer who wishes to question someone may direct a computer clerk to enter a "Wanted" for that person into the regional and statewide law-enforcement database, where it can be viewed by any officer in any police department in Missouri with access to the database. (A_256–57, ¶¶ 132–33, 136.) The Wanted identifies the issuing officer, the subject's name, and the crime for which the subject is wanted for questioning, but provides no detail about the evidence supporting the officer's determination that a Wanted is justified. (A_256, ¶ 132.)

Thereafter, if any officer encounters the person who is the subject of the Wanted, that second officer will arrest the person, take them into custody, and

detain them for questioning by the officer who issued the Wanted. (A_255, ¶¶ 121–23; A_628 (Morrow).) This often occurs during a routine traffic stop or some other encounter in which the second officer has no reason—much less probable cause—to believe the subject of the Wanted has done anything wrong. (A_261, ¶¶ 164–67; A_294 (Gomez); A_680 (Burk); A_405 (Partin).)

In their functional impact, then, Wanteds are arrest warrants as contemplated by the Fourth Amendment, issued unilaterally by SLCPD officers. *See, e.g.*, "Warrant," Black's Law Dictionary (11th ed. 2019) ("A writ directing or authorizing someone to do an act, esp. one directing a law enforcer to make an arrest, a search, or a seizure."). The only difference between a Wanted and a warrant is that no detached or neutral magistrate approves the issuance of a Wanted. That is, both Wanteds and warrants:

- authorize arrest of the subject by any police officer;
- allow the arresting officer to prevent the subject from leaving;
- require the arresting officer to read the subject his or her *Miranda* rights;
- result in the subject being taken into custody, brought to the local jail, photographed, fingerprinted, and DNA swabbed;
- result in the subject's identifying information being entered into

an arrest database; and

- result, often, in detention of the subject overnight.

(A_408 (Partin); A_509 (Walsh); A_16, ¶ 99.)

Wanteds are not remotely isolated or rare events. Rather, the Wanteds System has a massive impact on the lives of St. Louis County residents: Between 2011 and 2016, SLCPD issued over 15,000 Wanteds. Demonstrating the SLCPD's officers' ineffectiveness in assessing probable cause for themselves, those 15,000 Wanteds led to only 2,500 arrests. (A_260, ¶¶ 160–61.) And while a substantial majority of St. Louis County's population is White, data produced by the SLCPD in this case show that in 69 out of 72 months from 2011 to 2016, more Wanteds were issued for Black residents than for White residents. (*See* A_783–84.)

Subjects of Wanteds are not notified that a Wanted has been issued against them, there is no database for individuals to review whether a Wanted has been issued against them or on what basis, and there is no mechanism to challenge the issuance of the Wanted. (A_260, ¶¶ 158–59.) Wanteds can remain in the database for months, years, or indefinitely—even if someone else has been tried and convicted of the underlying crime. (A_257–58, ¶¶ 138–46.)

SLCPD officers and detectives testified to a policy and practice (not

documented in writing) to issue Wanteds in order to interrogate a suspect *before* applying for a warrant. They justified that practice as helping meet a St. Louis County Prosecuting Attorney's Office (PAO) requirement (also not documented in writing) that a suspect be questioned in person before the PAO will appear before a detached and neutral magistrate to seek a warrant. (*E.g.*, A_1470 (Clements).) SLCPD officers further explained that Wanteds may be used as an investigative tool to question a suspect whom the officer cannot reach by phone or in person. (A_284, A_312, A_343 (Gomez); A_553 (Schlueter); A_1471 (Clements); A_399 (Partin).)

While the SLCPD has contended throughout this lawsuit that an officer must have probable cause to issue a Wanted, its officers' testimony suggests that this requirement is not always understood or followed. Officer Partin agreed that a Wanted is a tool to use before deciding whether there is enough evidence to seek a warrant:

> Q: If there wasn't this understanding on your part that you need to speak with the suspect before obtaining an arrest warrant from the prosecutor's office . . . why would you issue a wanted?
>
> A: Because I want to know the whole . . . story before I present the case to them. It does me no good if I present them half the case before trying to get a warrant.

(A_404 (Partin).)

St. Louis County's use of Wanteds appears not to exist anywhere else in the country. The U.S. Department of Justice's 2015 report of its investigation into the Ferguson Police Department concluded that Wanteds in Ferguson (one of over 80 municipalities in St. Louis County, with its own police force) pose "a significant risk of abuse"—because individuals were routinely arrested on Wanteds unsupported by probable cause without meaningful supervisory review—and served as an "end-run around the judicial system." (A_68; A_69 (noting the lack of clarity amongst Ferguson police officers in understanding the legal authority required to issue a wanted, which led to officers issuing Wanteds *because* they lacked probable cause); A_250 ¶¶ 88, 89; *see also* A_249–52, ¶¶ 86–102.)

After the release of the Ferguson Report, the SLCPD amended its own Wanteds policy to specify that an officer must have probable cause to issue a Wanted, while maintaining that probable cause had always been (silently) required. (A_253–54, ¶¶ 109, 112, 113.) After Appellants filed this lawsuit, the SLCPD issued a new General Order requiring pre-approval by a supervisor before a police officer may issue a Wanted. (A_253–54, ¶¶ 111, 114.) But no version of the Wanteds System has ever required—or even permitted—review by a detached and neutral magistrate. (A_255–56, ¶¶ 127–28.) The whole point

of the Wanteds System is to arrest, detain, and interrogate suspects *before* seeking judicial review of whether there was probable cause to justify the arrest.

The Two Wanteds Issued for Appellant Dwayne Furlow

Dwayne Furlow was the subject of two unrelated Wanteds.

1. On the morning of November 11, 2015, while Furlow was taking his daughter to school, his son called Furlow to report that their neighbor, Janet Virgin, had hit the son in the face. (A_244, ¶ 38.) For her part, Virgin called 911. Defendant-Appellee Officer Christopher Partin arrived on the scene in response to that call, and discovered that Virgin accused Furlow of having previously stolen her cell phone. (A_245, ¶ 40.) A taxi driver, who takes Furlow's son to school, observed the incident between Furlow's son and Virgin, but Officer Partin did not take a statement from the driver. (A_245, ¶ 39.) Instead, Officer Partin used the son's phone to speak to Furlow, and demanded that he return home to be questioned. (A_245, ¶¶ 41–43.) Furlow responded that Virgin had assaulted his children, and declined to return home to be questioned. (A_245, ¶¶ 42–44.)

Officer Partin responded with a threat to issue a Wanted, on which he made good later that day. (A_245, ¶¶ 44–45.) Furlow's attorney attempted to

contact Officer Partin and the SLCPD, by phone and email, to challenge the Wanted and also to assert Furlow's invocation of his right to remain silent under the Fifth Amendment. (A_245–46, ¶¶ 46–51.) To no avail: the Wanted remained active until Furlow voluntarily entered the St. Louis County Justice Center one month later to seek the cancelation of the Wanted and, as a result, be free from the threat of sudden arrest. (A_246, ¶¶ 52–53.) The SLCPD canceled the Wanted and the PAO dropped any potential charges against Furlow, having concluded that, among other things, Virgin was "not mentally well." (A_782 (Prosecutor's Note).)

2. On January 25, 2016, Defendant-Appellee SLCPD Officer Kevin Walsh spoke by phone with Furlow about unrelated allegations of domestic assault, and asked Furlow to return home to be questioned. (A_246, ¶¶ 56–57.) When Furlow declined, Officer Walsh said he would issue a Wanted for Furlow, which he did. (A_247, ¶¶ 58–59.)

Three days later, while driving, Furlow was stopped for not displaying his temporary dealer's plates on the rear of his vehicle. (A_247, ¶ 60.) The officers who stopped him noted that this offense would not result in Furlow's arrest, but that they were required to search their database for any outstanding warrants or Wanteds. (A_13, ¶ 72.)

Upon discovering Officer Walsh's Wanted, the officers arrested Furlow, read him his rights, took him into custody, and explained that he would be held for up to 24 hours pursuant to the Wanted, unless Officer Walsh cleared the Wanted first. (A_247, ¶¶ 61–67.) While detained, Furlow invoked his Fifth Amendment rights and refused to answer questions. (A_247, ¶ 62.) Furlow's counsel notified the SLCPD that Furlow was being detained on the basis of an unlawful and retaliatory Wanted, but the SLCPD refused to release him until the full 24 hours elapsed.

Officer Walsh never attempted to question Furlow during those 24 hours, and no charges were filed with respect to the alleged domestic assault. (A_247; A_508 (Walsh).)

The Wanted Issued for Appellant Ralph Torres

Ralph Torres was arrested on a Wanted issued by Defendant-Appellee SLCPD Detective Laura Clements arising from debunked allegations made by Torres's ex-wife.

In late 2014 or early 2015, the Missouri Department of Social Services (DSS) investigated allegations that Torres had engaged in sexual misconduct with his two minor children. In March 2015, DSS determined that these were false allegations contrived by Torres's ex-wife, a conclusion based in part on

their daughter's admission that her mother had told her what to say in her interview. (A_244, ¶ 34; A_1628 (Missouri DSS Letter).)

Two months after the allegations were made to DSS, Detective Clements left a voicemail for Torres. (A_243, ¶ 26.) Torres believed that his ex-wife had attempted to make the same false accusations to the SLCPD, and responded by referring any matters regarding his ex-wife to his attorney. (A_242, ¶ 22; A_1579–80, 1590 (Torres).) On February 23, 2015, when Detective Clements could not reach the attorney, she issued a Wanted for Torres's arrest. (A_243, ¶¶ 27–28.) Detective Clements made no subsequent efforts to visit Torres at his home or to speak with the DSS investigators about their findings. (A_243–44, ¶¶ 31–33.)

On April 1, 2015—by which time DSS had concluded that the allegations against Torres were meritless—SLCPD Officer Scott Leible was patrolling the neighborhood in which Torres lived, and ran a search for outstanding warrants and Wanteds for people living nearby. (A_241, ¶ 11.) Finding the Wanted for Torres, he went to Torres's residence and found him in his garage fixing a bicycle with his eight-year-old son. Officer Leible directed Torres to find childcare so that he could take Torres in for questioning on the Wanted. (A_1623 (Torres SLCPD Investigative Report).) Torres was arrested,

photographed, fingerprinted, and DNA swabbed. (A_16, ¶ 99.)

That night, Detective Clements arrived at the St. Louis County Justice Center, where Torres was being held. (A_242, ¶ 17.) Torres refused to answer any questions, and invoked his right to have his attorney present. (A_242, ¶ 18.) In response, Detective Clements instructed the Justice Center to hold Torres for the full 24 hours, even after the PAO refused to apply for a warrant for Torres. (A_242, ¶¶ 19, 20.) In total, Torres remained in custody for 25 hours. (A_242, ¶ 21.) Detective Clements never sought a judicial determination of probable cause for Torres's arrest.

The Wanteds Issued for Former Plaintiff Howard Liner

Howard Liner was also the subject of two unrelated Wanteds. The district court found a triable issue of fact regarding whether probable cause supported the second Wanted.

1. A SLCPD officer issued a Wanted for Liner's arrest on March 23, 2015, after Liner's girlfriend reported that he had stolen her car. (A_757 (SLCPD Investigative Report on Liner).) After the Wanted was entered, the issuing officer determined that the girlfriend's loan company had repossessed the car, and he canceled the Wanted. A_248, ¶¶ 69–70.) While the Wanted was active, however, Liner faced sudden arrest any time he encountered the police.

2. Officer Ed Schlueter issued a Wanted for Liner's arrest based on an alleged incident on August 25, 2015. (A_248, ¶ 71.) Officer Schlueter arrived at the home of Jaylen Davis, having been alerted to a potential larceny at Davis's residence less than an hour before. (A_760, 764.) Officer Schlueter testified that he spoke with Davis on the phone, who reported that four wheels with 22-inch rims were missing from his front yard and implied that Liner had stolen them. (A_571 (Schlueter); A_248, ¶ 72.) Davis relayed that he had been in the front of his house, speaking with Liner about stereo equipment, and that after he re-emerged from retrieving something in the house he discovered that the wheels were missing and Liner was driving away in a silver BMW with an Illinois license plate. (A_760, 764.) Davis did *not* report having seen Liner take the wheels, but did report that a neighbor had seen a Black man putting wheels in the back of a silver BMW. (A_764.)

At his deposition, Officer Schlueter admitted that he had spoken with Davis only on the phone, and that at the Davis residence he had spoken in person to Davis's mother, who did not claim to have seen Liner take the wheels; Officer Schlueter omitted both of those facts from his investigative report. (A_572 (Schlueter).) Officer Schlueter also did nothing to confirm that Davis owned or rented the wheels in question, and did not run a search for the

make of Liner's car. (A_573–74 (Schlueter).) He nevertheless issued a Wanted for Liner's arrest. (A_764.)

Several weeks later, on October 5, 2015, officers from the St. Louis Metropolitan Police Department ("SLMPD") arrested Liner on the Wanted outside of a restaurant. (A_248, ¶¶ 74–75.) After Liner was booked and processed by both the SLMPD and the SLCPD, Officer Schlueter was notified of Liner's arrest. Nevertheless, Liner spent nearly 29 hours in custody before Officer Schlueter interviewed him. (A_248–49, ¶¶ 74–80.) According to Officer Schlueter's report, Liner confirmed that he owned a silver BMW 325i, which Officer Schlueter noted was too small to fit four 22-inch rims and wheels in the trunk. (A_571–72 (Schlueter); A_248–49, ¶¶ 72, 81.) Officer Schlueter thus released Liner after 30 hours in custody. (A_249, ¶¶ 81–82; 84.) No charges were ever filed.

The Proceedings Below

Appellants filed a Class Action Complaint on February 24, 2016 (ECF No. 1), and a First Amended Class Action Complaint on July 8, 2016 (ECF No. 14), alleging three counts under 42 U.S.C. § 1983: I. Unlawful seizure in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution; II. Retaliation for exercising rights under the Fifth and Fourteenth

Amendments; and III. Deprivation of liberty interests without due process in violation of the Fourteenth Amendment.

On August 25, 2017, Defendants moved for summary judgment (ECF No. 77). The same day, Plaintiffs moved for class certification (ECF No. 80) and for partial summary judgment on Count One (ECF No. 84), arguing that the arrests of Appellants Furlow and Torres and then-Plaintiff Liner pursuant to Wanteds violated the Fourth Amendment's prohibitions against warrantless arrests, and that the County and SLCPD Chief were liable for these violations under *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978).

The Honorable John A. Ross heard oral argument on the pending motions on February 28, 2018, and directed both parties to submit briefing on the question of the fundamental constitutionality of the Wanteds system. (ECF No. 118.) While briefing was ongoing, Judge Ross recused himself, and the case was reassigned to the Honorable Henry E. Autrey.

On October 5, 2018, the district court granted summary judgment to Defendants on Furlow and Torres's claims and denied the motion for class certification. *Furlow* v. *Belmar*, No. 16-cv-254 (HEA), 2018 WL 4853034 (E.D. Mo. Oct. 5, 2018).

1. Regarding the claim of unlawful seizure in violation of the Fourth Amendment (Count One), the court concluded that the officers who issued the Wanteds had probable cause, or at least arguable probable cause. *Id.* at *7–9 (A_165–73). The court never suggested that there was any functional difference between Wanteds and warrants. In fact, the court analogized arrests on Wanteds to the legality of a *Terry* stop based on a wanted flyer, and held that "a wanted based on probable cause that a subject committed some offense is sufficient to support a warrantless arrest for that offense, even though the wanted lacks a description of the circumstances and facts supporting probable cause." *Id.* at *10 (A_172). The court did not consider the central question Plaintiffs-Appellants presented: whether the failure to seek a judicial determination of probable cause violated the Fourth Amendment.

2. On the claim of retaliation under the Fifth and Fourteenth Amendments (Count Two), the court found an invocation of one's Fifth Amendment rights over the telephone to be "meaningless" and thus found that "no constitutional violation" stemmed from issuing Wanteds after Furlow and Torres refused to answer questions or asked for counsel to be present during questioning. *Id.* at *10 (A_173).

3. The court conferred qualified immunity on Detectives Clements and Walsh without considering whether the law clearly established that a detached and neutral magistrate must approve the issuance of an order permitting someone's arrest. Instead, the court focused on whether Clements intended to arrest Torres despite DSS having closed its case against him. *Id.* at *9 (A_169–71). The court also concluded that qualified immunity was appropriate because neither Detective Clements nor Officer Walsh had control over how long Torres and Furlow (respectively) spent in custody, and thus neither of them was responsible for them having spent more than 24 hours detained. The court found that the "delay in seeking a probable cause determination for Torres was based on reasonable, unavoidable delays." *Id.* at *11 (A_175–76).

3. On Count Three—as to which no party sought summary judgment—the court held that Furlow and Torres had not established an actual harm resulting from the restriction on their freedom of movement and the freedom to conduct their lives free of the fear stemming from the issuance of Wanteds. *Id.* (A_176). Further, the court found that Appellants "could not fear a deprivation of liberty where no liberty existed, i.e. they were not free from the threat of arrest because there was probable cause to arrest" Furlow

and Torres. *Id.*

4. The court held that because either qualified immunity was conferred upon, or there was no live claim against, the individual defendants, neither St. Louis County nor SLCPD Chief Jon Belmar (sued only in his official capacity) could be liable under *Monell*. *Id.* (A_177). The court did not consider that entirely different legal standards—and policy justifications—apply to individual and municipal liability, or the clear case law from this Court and the Supreme Court permitting municipal liability even absent individual liability.

5. Because neither Furlow nor Torres's claims survived summary judgment, the court denied plaintiffs' motion for class certification. *Id.* at *12 (A_177).

With respect to now-deceased former Plaintiff Liner's claims regarding the Wanted for the supposedly stolen wheels, the district court denied summary judgment on Counts One and Three, finding that "there are genuine disputes of fact that are material to the issue of whether or not [Officer] Schlueter had arguable probable cause to enter a wanted for Liner." *Furlow* v. *Belmar*, 2019 WL 1227460, at *5 (E.D. Mo. Mar. 15, 2019) (A_189). The court noted that based on the undisputed facts, "Schlueter could not

reasonably have believed there to be probable cause to arrest Liner without a warrant." *Id.* at *6 (A_191). The parties conducted additional discovery, but Liner passed away before trial. His estate settled his claims, which are not before this Court.

With Liner's claims resolved, the district court entered final judgment, from which Appellants Furlow and Torres timely appealed.

SUMMARY OF ARGUMENT

The Fourth Amendment, made applicable to the states through the Fourteenth Amendment, provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV, XIV; *Maryland* v. *Pringle*, 540 U.S. 366, 369 (2003) (citing *Mapp* v. *Ohio*, 367 U.S. 643 (1961)).

As the Supreme Court has long held, the Fourth Amendment demands that the assessment of whether probable cause supports an arrest warrant be made not by "the officer engaged in the often competitive enterprise of ferreting out crime," but by a detached and neutral magistrate. *Johnson* v. *United States*, 333 U.S. 10, 14 (1948). Where an officer makes a warrantless arrest in exigent or otherwise exceptional circumstances, a judicial officer must nevertheless promptly assess thereafter whether the arrest was supported by probable cause, to guard "against the misuse of the law enforcement process." *Gerstein* v. *Pugh*, 420 U.S. 103, 118 (1975) (citation omitted).

St. Louis County's Wanteds System flouts those safeguards. Wanteds are warrants by another name; the two are functionally identical. Yet SLCPD

officers may issue statewide Wanteds without presenting their assessment of probable cause to a detached and neutral magistrate for review. Wanteds thus afford SLCPD officers the powers of an arrest warrant, while depriving the citizens of the constitutionally required safeguard against an officer's incorrect (even innocently incorrect) assessment of the evidence. Wanteds are therefore unconstitutional even if—in a given case, or in all cases—the issuing officer actually had probable cause to believe the subject of the Wanted had committed a crime. And SLCPD officers openly admit that Wanteds are issued as an investigatory tool, to question suspects, before deciding whether the evidence is sufficient to present the arrestee to a magistrate—in direct violation of the Fourth Amendment.

The district court erred in granting summary judgment to Appellees.

First, by adopting—and not examining, explaining, or questioning—Appellees' premise that a Wanted is constitutional where supported by probable cause, the district court bypassed the fundamental question presented by this case: may a police officer, even where he has probable cause, issue the equivalent of a statewide arrest warrant without any review by a detached and neutral magistrate, to have the suspect arrested and held in custody to be interviewed by the issuing officer? The district court assumed

that the answer to that question is "Yes." The Fourth Amendment compels the answer "No."

Second, even under that view of the law, the district court erred in concluding, post hoc, that probable cause supported the Wanteds for Furlow and Torres. Officer Partin issued a Wanted for Furlow when he knew nothing other than that his neighbor Virgin, whom the prosecutor later found not entirely credible, had stated that Furlow had stolen her cell phone. Officer Walsh issued a Wanted for Furlow because Furlow refused to return home to be questioned. And Detective Clements issued a Wanted for Torres's arrest because she could not reach him or his attorney by phone. None of those Officers had probable cause, or even arguable probable cause. Even under the district court's legally erroneous view that Wanteds are constitutional where supported by probable cause, then, these Wanteds would be unconstitutional.

Third, the district court erred in conferring qualified immunity on the individual police officer Appellees simply because of its (otherwise erroneous) post hoc conclusion that their arrests were supported by probable cause. That is not the law, and therefore cannot support immunity. The right not to be arrested without the issuance of a warrant, approved by a detached and neutral magistrate, barring exigent circumstances or other exceptions not

present here, is clearly established and thus forecloses qualified immunity.

Fourth, the district court erred in holding that its grant of qualified immunity to the individual police officer Appellees alone precluded municipal liability under *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), as a matter of law. The Supreme Court has established that individual and municipal liability are entirely distinct as a matter of history and policy. *See Owen* v. *City of Independence*, 445 U.S. 622, 652–55 (1980). Indeed, the Supreme Court and this Court have explained that the policy reasons allowing for municipal liability are *stronger* where individual officers obtain qualified immunity, because otherwise the plaintiffs who suffered under an unconstitutional policy would be left without any remedy. *See Webb* v. *City of Maplewood*, 889 F.3d 483, 487–88 (8th Cir. 2018) (citing *Owen*, 445 U.S. at 661).

Fifth, the district court erred in granting summary judgment on Count Three, which alleged a lack of adequate procedural safeguards in the Wanteds System. Neither party sought summary judgment as to that count, and the court gave no notice it intended to adjudicate that question. Its decision was also legally incorrect; the court held that because the officers had probable cause to believe that Furlow and Torres had committed crimes, neither Furlow nor Torres had a liberty interest in remaining free from unlawful

arrest. This holding recapitulates the core error of the court's analysis. Individuals have a liberty interest in remaining free from arrest until a detached and neutral magistrate approves the issuance of a warrant. The district court's no-harm, no-foul approach finds no support in the Constitution or this Court's cases.

This Court should vacate and reverse the district court's grant of summary judgment and remand for further proceedings, including consideration of Appellants' motion for class certification, which the district court did not assess on the merits and instead denied only because it granted judgment against Appellants' individual claims.

STANDARD OF REVIEW

This Court reviews the grant of summary judgment de novo. *Kenney* v. *Swift Transp., Inc.*, 347 F.3d 1041, 1044 (8th Cir. 2003); *Walker* v. *Bowersox*, 526 F.3d 1186, 1188 (8th Cir. 2008). Summary judgment is appropriate only if, in viewing the evidence in the light most favorable to Plaintiffs, there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *see also Gilkerson* v. *Nebraska Colocation Centers, LLC*, 859 F.3d 1115, 1118 (8th Cir. 2017).

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT WANTEDS ARE CONSTITUTIONAL AS A MATTER OF LAW IF SUPPORTED BY PROBABLE CAUSE, EVEN WITHOUT A DETACHED AND NEUTRAL MAGISTRATE'S IMPRIMATUR

The district court's opinion skipped right over the question presented by this case: does the Fourth Amendment permit a system by which police officers unilaterally decide whether there is probable cause and then issue the functional equivalent of an arrest warrant, without review of the probable-cause determination by a detached and neutral magistrate? Rather than grappling with that question, in an unprecedented expansion of police power, the district court held that any "warrantless arrest" is "consistent with the Fourth Amendment if it is supported by probable cause," *Furlow*, 2018 WL 4853034, at *7 (citations omitted) (A_165). Notably, the district court never suggested that Wanteds differed from warrants in their function. The court then went on to assess only whether the Wanteds for Furlow, Torres, and Liner had such support—substituting after-the-fact judicial review for the Fourth Amendment's mandate that, barring exceptions not applicable here, a detached and neutral magistrate assess probable cause *before* a suspect is arrested.

Appellants address the district court's assessment of probable cause in Point II below, but begin here with the core issue over which the district court elided. The court erred by failing to recognize that *even where* supported by probable cause, Wanteds are unconstitutional because they allow arrests and detention for purposes of investigating a crime, including arrests by officers lacking any personal knowledge of the underlying evidence, all without any prior assessment of that evidence by a judicial officer.

This issue was thoroughly briefed and discussed at oral argument.[1] Yet the district court relied on cases from this Court that do not address, at all, a system that empowers police officers to unilaterally issue arrest warrants and bypass the review of a detached and neutral magistrate. *See Gilmore* v. *City of Minneapolis*, 837 F.3d 827, 832 (8th Cir. 2016); *Borgman* v. *Kedley*, 646 F.3d 518, 522–23 (8th Cir. 2011); *Baribeau* v. *City of Minneapolis*, 596 F.3d 465 (8th Cir. 2010). They are all cases in which individual defendants, arrested on the scene by officers who claimed to have probable cause in a circumstance recognized as an exception to the warrant requirement, argued that probable

[1] *See* Pls.' Br. in Support of Mot. for Partial Summary Judgment (ECF No. 85) at 21–28; Pls.' Opp'n to Defs.' Mot. for Summary Judgment (ECF No. 101) at 11–14; Pls.' Reply Br. in Support of Mot. for Partial Summary Judgment (ECF No. 107) at 2–11; Pls.' Supp. Br. Re: Legality of the St. Louis County Wanted System (ECF No. 123).

cause did not in fact support their arrests.

That is not this case. Furlow and Torres and Liner were not arrested by officers who had probable cause to believe they had committed crimes, and then taken before a magistrate. They were arrested by officers with no knowledge of the underlying facts, in response to an arrest order issued by another police officer with no judicial review or approval, so that the officer issuing the order could question them in custody. The easiest way to see the distinction is to imagine that the SLCPD called those arrest orders "warrants," rather than Wanteds. No municipality could appear before this Court and argue that it allows its police officers to unilaterally issue arrest warrants without seeking judicial approval. Calling the orders "Wanteds" does not make them constitutional.

To protect against unreasonable invasions of liberty and privacy, the Fourth Amendment requires that arrest warrants be issued not only based on probable cause, but with the imprimatur of a detached and neutral magistrate that such probable cause exists. *Johnson*, 333 U.S. at 13–14. The Supreme Court has been clear: "probable cause for the issuance of an arrest warrant must be determined by someone *independent* of police and prosecution." *Gerstein*, 420 U.S. at 118 (citing *Shadwick*, 407 U.S. at 348) (emphasis added).

While there are exceptions to the warrant requirement, they are all case-specific (not municipal-policy-level) exceptions: a police officer may make a warrantless arrest (1) in exigent circumstances in which there is no time to seek a warrant, *see Lange* v. *California*, 141 S. Ct. 2011, 2017 (2021); or (2) when the officer personally observes a crime being committed, *see, e.g.*, *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001); or (3) when the arresting officer *himself* has personal knowledge giving rise to probable cause, *see Devenpeck* v. *Alford*, 543 U.S. 146, 152–53 (2004). The district court did not find any of these exceptions are implicated here, nor did Appellees ever assert any of them. And even in these three unusual and limited circumstances, the officer must promptly seek a warrant thereafter by presenting the arrestee to a magistrate. *Gerstein*, 420 U.S. at 125; *Cty. of Riverside* v. *McLaughlin*, 500 U.S. 44, 56 (1991). The officers here made no such effort, simply relying on their own intuition.

The Wanteds System trenches on these Fourth Amendment principles in four overlapping but distinct ways:

First, by design, Wanteds substitute the SLCPD officer's personal assessment of the evidence for a magistrate's independent judgment. To be clear, this is not only a timing issue; under the Wanteds system, SLCPD

Officers are not required to seek a judicial determination of probable cause even *after* making an arrest on a Wanted. The Wanteds System has thus allowed an exception to the Supreme Court's articulated "preference for the use of arrest warrants when feasible"—namely, the warrantless arrest of a suspect by an officer who has probable cause to believe the suspect has committed a crime—to swallow the Fourth Amendment's rule that "the existence of probable cause be decided by a neutral and detached magistrate whenever possible." *Gerstein*, 420 U.S. at 112. By doing so, the Wanteds System has allowed the few exceptions to the warrant requirement to swallow the safeguard that the Fourth Amendment imposes on the police.

Ordinarily, a police officer seeking an arrest warrant must approach a judicial officer with specific and articulated reasons underlying his assertion that there is probable cause to arrest the suspect. *See* U.S. Const. amend. IV. The magistrate—"neutral and detached"—will scrutinize the evidence and determine whether probable cause indeed exists. *Johnson*, 333 U.S. at 14; *Terry* v. *Ohio*, 392 U.S. 1, 20–22 (1968). To preserve objectivity, this authority is deliberately vested with a neutral magistrate, rather than "the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson*, 333 U.S. at 13–14. In *Johnson*, the Supreme Court warned against the police

simply making an "assumption" that there is "evidence sufficient to support a magistrate's disinterested determination" of probable cause in order to "justify the officers" in proceeding without a warrant, for that unreviewed assumption "would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Johnson*, 333 U.S. at 14. And even where an individual is arrested without a warrant, the officer must bring them before the magistrate to seek a warrant within 24 hours, per the applicable Missouri statute. Mo. Rev. Stat. § 544.170(1). Warrantless arrests do not dispose of the Fourth Amendment's command for "a timely judicial determination of probable cause as a prerequisite to detention." *Gerstein*, 420 U.S. at 126.

SLCPD officers, however, have a choice. They can follow the law laid down by the Supreme Court and present their evidence of probable cause to a detached and neutral magistrate to obtain a warrant. Or they can just do it themselves, calling that warrant a "Wanted" and issuing a statewide order for the subject's arrest. Either way, the subject is placed under arrest and taken into custody by an officer who has no personal knowledge, brought to jail, booked, fingerprinted, photographed, and DNA swabbed. The relative paucity of actual warrants flowing from these Wanteds (2,500 warrants from

15,000 Wanteds) demonstrates the dangers of bypassing judicial review.

The cases of Furlow, Torres, and Liner make this clear. No exigencies or other circumstances existed to support their warrantless arrests; in fact, all three were arrested over a month after the Wanted was issued, giving the issuing officers plenty of time to seek a warrant before a judge. Notably, none of the officers sought warrants for any of the Plaintiff-Appellants even *after* they were arrested. Furlow, Torres, and Liner were taken into custody, questioned, and then released, based only on the unilateral "discretion of police officers." *Johnson*, 333 U.S. at 14.

Second, the SLCPD uses Wanteds, as a matter of policy, to *investigate* whether a crime has even been committed. This is undisputed: SLCPD officers testified that they use Wanteds as an investigatory tool to "have someone taken into custody to question them," (Hearing Tr. (ECF No. 120), at 69:23 – 70:7 (A_1459–60)), "to contact [an] individual," (A_1471 (Clements)), or "to gather additional evidence… to provide the most complete investigation that you can," (A_681 (Burk)). Yet the Supreme Court held nearly 100 years ago that "[a]n arrest may not be used as a pretext to search for evidence." *United States* v. *Lefkowitz*, 285 U.S. 452, 467 (1932). The Fourth Amendment prohibits the police from arresting someone solely to question them to see

whether a crime has been committed. *See Riverside*, 500 U.S. at 56. The district court recognized this in holding that there was a triable issue of fact regarding whether Officer Schlueter had probable cause to seek Liner's arrest regarding the supposedly stolen wheels, a crime that Officer Schlueter knew Liner could not have committed as soon as he knew the model of Liner's small car. (A_769 (Liner SLCPD Investigative Report).) But the problem is not confined to Liner: The Fourth Amendment prohibits officers from depriving persons of their liberty to question them in connection with an investigation; there is no conceivable limiting principle for granting law enforcement such immense power. Under our system of government, law enforcement's factual investigation must come *before* the person is taken off the street and held in custody, as this Court has held: barring exigency, "law enforcement officers have a duty to conduct a reasonably thorough investigation *prior to* arresting a suspect." *Kuehl* v. *Burtis*, 173 F.3d 646, 650 (8th Cir. 1999) (emphasis added); *U.S.* v. *Davis*, 174 F.3d 941, 948 (8th Cir. 1999) (suppressing evidence seized after arrest where "sole purpose" of arrest was to investigate whether suspect had committed an offense).

Third, the Wanteds policy also permits arbitrary 24-hour detentions with no intention or attempt to secure a probable cause assessment by a

detached and neutral magistrate. The district court's order did not address, at all, Plaintiffs' challenge to their detention.

The Supreme Court has held that a suspect arrested without a warrant may be held in custody for only a "brief period," and no longer than is needed "to take the administrative steps incident to arrest" that result in a warrant being issued. *Gerstein*, 420 U.S. at 114. Once those administrative steps are completed, if no warrant issues then the suspect must be released; he cannot be held in custody based solely on an officer's suspicion of guilt. *Wayland* v. *City of Springdale, Ark.*, 933 F.2d 668, 670 (8th Cir. 1991). While courts have allowed custodial interrogation while an officer is in the process of taking the administrative steps incident to arrest, *see, e.g., Warren* v. *City of Lincoln, Neb.*, 864 F.2d 1436, 1141–42 (8th Cir. 1989), here, it is undisputed that the sole purpose of the routine, 24-hour detention pursuant to a Wanted, without ever seeking a judicial determination of probable cause, is interrogation.

Appellees may argue in response, as they did before the district court, that the Supreme Court's decisions in *Gerstein* and *Riverside* "only require a judicial determination of probable cause for *extended* restraint," and that warrantless arrests without a magistrate judge's imprimatur are constitutionally permissible if the person is held for less than 48 hours. (Defs.'

Br. in Supp. of MSJ (ECF No. 78) at 19–20.) From that premise, Appellees conceded that Wanteds are used to question a suspect in custody to determine whether to even seek an arrest warrant from a magistrate, asserting that such custodial detention was permissible if brief. (*See* A_626 (Morrow); A_400 (Partin); A_487–88 (Walsh).)

If Appellees repeat that argument here, it will be (as it was in the district court) wrong as a matter of law. There is no "temporary arrest" exception to the warrant requirement, and the Fourth Amendment does not grant the police the power to make warrantless arrests as long as they believe the detention will be brief. Appellees' argument is foreclosed by this Court's decision in *Davis*. There, the district court suppressed evidence that was the product of the defendant's warrantless arrest and detention "for over two hours for the sole purpose of investigating whether she had committed a federal gun crime." 174 F.3d at 943. The district court found that the failure to present the defendant to a magistrate for a probable-cause determination violated the Fourth Amendment even though the initial warrantless arrest was supported by probable cause. *Id.* at 944. This Court then clarified that arrests made to investigate are improper:

> Although *Riverside* only explicitly stated that delays in probable cause determinations resulting from police efforts to justify the

> suspect's original arrest would be unreasonable, later cases have clarified that this principle applies with equal force to situations where the delay is based solely on police efforts to investigate additional crimes in which the suspect might have participated.

Id. at 945. This Court reiterated that a post-warrantless-arrest delay in seeking a probable cause determination before a magistrate may extend "only for as long as it takes to process the administrative steps incident to arrest." *Id.* at 944 (citing *Wayland*, 933 F.2d at 670); *see also Gerstein*, 420 U.S. at 113–14. While *Riverside* countenanced such a delay of up to 48 hours, this Court explained that *Riverside* "does not establish a per se rule that an individual may be detained for 48 hours by local authorities for any purpose whatsoever. Nor does it stand for the proposition that authorities may violate the Constitution as long as they do so for only a brief period of time." *Davis*, 174 F.3d at 946. In so holding, the Court found that the defendant's arrest for the "sole purpose" of questioning, with no process "ever initiated that would have culminated in [the arrestee] being presented to a magistrate to determine whether probable cause existed to arrest," was a violation of the Fourth Amendment. *Id.*; *see also United States* v. *Oropesa*, 316 F.3d 762, 768 (8th Cir. 2003) (declining to interpret Mo. Rev. Stat. § 544.170(1) as providing "any authority to arrest persons without a warrant and hold them in custody" for the maximum amount of time allowed by the statute).

Other courts are in accord. In *Llaguno* v. *Mingey*, the Seventh Circuit held that even where the police had probable cause to make an arrest, they could not delay bringing the suspect before a magistrate in hopes that they could "build a case against" the suspect "while he was in jail," because that would "inject an element alien to our system—imprisonment on suspicion, while the police look for evidence to confirm their suspicion." 763 F.2d 1560, 1568 (7th Cir. 1985). In *Robinson* v. *City of Chicago*, the court addressed the warrantless arrest and three-day detention of a suspected arsonist, pursuant to a then-existing Chicago Police Department policy that permitted arrests and detention to "continue the investigation" into a suspected crime. 638 F. Supp. 186, 186–188 (N.D. Ill. 1986), *rev'd* on standing grounds, 868 F.2d 959 (7th Cir. 1989). The district court held that the policy violated the Fourth Amendment because it permitted police officers to "circumvent" the requirement of a judicial determination of probable cause. *Id.* at 193.

Fourth, the Wanted System typically (if not uniformly) leads to arrest by an officer who has no personal knowledge of any probable cause at all. That is, it is only in the rarest of circumstances (if ever) that the arresting officer and the Wanted-issuing officer are the same person. Because the Wanted itself contains no details about the evidentiary basis for its issuance, the

arresting officer takes someone into custody with no idea what justifies doing so.

In that circumstance particularly, review by a detached and neutral magistrate is essential. The exceptions to the warrant requirement all turn on the arresting officer's firsthand knowledge. In *Gerstein*, the Supreme Court approved of warrantless arrests based on an officer's "on-the-scene assessment of probable cause," striking a "practical compromise" between the "protection against unfounded invasions of liberty and privacy" and the needs of law enforcement. 420 U.S. at 112–14. The Supreme Court has suggested, of course, that an officer with no personal knowledge may effect an arrest on a formal arrest warrant, but that is precisely because a magistrate has approved the issuance of that warrant: "officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause." *Whiteley* v. *Warden*, 401 U.S. 560, 568 (1971).

The Wanteds System, however, allows an officer's unchecked, unvalidated assessment of probable cause to be the basis for another officer's arrest of a suspect. The district court approved of this by analogizing to *United States* v. *Hensley*, in which the Supreme Court held that an officer may

effect a *Terry* stop in reliance on a flyer indicating that the person was wanted for arrest. *See* 469 U.S. 221, 232–33 (1985); *Terry*, 392 U.S. at 21–22; *Furlow*, 2018 WL 4853034, at *9–10 (A_171–72.) That analogy is misplaced. Critically, the Court in *Hensley* distinguished temporary police stops based on reasonable suspicion, a lower threshold of suspicion, from arrests, which this Court held must always be supported by probable cause. The Court specifically considered that the wanted flyer might well have been based only on the issuing officer's own reasonable suspicion, not a magistrate judge's assessment of probable cause, and concluded that one officer's reasonable suspicion, encapsulated in a wanted flyer, provided reasonable suspicion for another officer to "check identification," "to pose questions to the person," or to "detain the person briefly while attempting to obtain further information," for all of which acts "the intrusion on personal security is minimal." *Hensley*, 469 U.S. at 232. Neither the flyer-issuing officer nor the *Terry*-stopping officer in *Hensley* had probable cause—the case is about reasonable suspicion—and neither could take the person into custody, let alone in excess of 24 hours. That is why the only other district court to have considered the Wanteds System rejected an analogy to *Hensley* and held that arrest and custodial interrogation on a Wanted violated the Fourth Amendment. *See*

U.S. v. *Holloman*, No. 17 CR 218 CDP, 2018 WL 1166557, at *2 (E.D. Mo. Mar. 6, 2018).

* * * *

The SCLPD's Wanteds System allows police officers to decide, on their own, whether there is probable cause to arrest someone, without the review of a detached and neutral magistrate, and to do so as an interrogation tool and without any obligation to ever bring the person before a magistrate. Compounding this, the Wanteds System outsources the act of arresting the person to literally any officer who happens upon the subject, with no idea what probable cause supports the warrantless arrest. The Wanteds System is unconstitutional even if the Wanted-issuing officer had probable cause. In skipping over that fundamental issue, the district court erred.

II. THE DISTRICT COURT ERRED IN HOLDING THAT PROBABLE CAUSE SUPPORTED THE WANTEDS FOR FURLOW AND TORRES

Even assuming the district court was correct in concluding that Wanteds supported by probable cause are constitutional, there was no probable cause, or even arguable probable cause, underlying the Wanteds issued for Furlow and Torres's arrests, rendering these Wanteds unconstitutional.

Furlow's First Wanted: Officer Partin issued a Wanted for Furlow based merely on Virgin's allegation and the statement of a 16-year-old eyewitness who claimed not to have seen who began the argument between Furlow and Virgin, and whose credibility was never verified. (A_776–77 (Partin Investigative Report).) Officer Partin never spoke to the alleged eyewitness taxi driver. (A_441 (Partin).) The district court concluded that probable cause rested on Virgin's statement, the 16-year-old neighbor's claim that he saw Furlow take a phone from Virgin, and the fact that Furlow left the scene to take his daughter to school. *Furlow*, 2018 WL 4853034, at *7 (A_166–67). None of these facts provides "a reasonable ground for belief of guilt" or "demonstrates that a prudent person would believe that [Furlow] has committed or was committing a crime." *Id.* (quoting *Brinegar* v. *U.S.*, 334 U.S. 160, 175 (1949) and *Duhe* v. *City of Little Rock*, 902 F.3d 858 (8th Cir. 2018)). Partin's failure to question the taxi driver is telling, as "probable cause does not exist when a minimal further investigation would have exonerated the suspect." *Kuehl*, 173 F.3d at 650. Indeed, this Court has held that the unreasonable failure to interview an eyewitness negates a finding of probable cause. *Id.*

Furlow's Second Wanted: Officer Walsh issued a Wanted for Furlow solely because Furlow refused to return home to be questioned. *Id.* at 122:22-25 (Walsh). Exercising one's Fifth Amendment rights not to speak to the police is not probable cause to believe someone has committed a crime.

Torres's Wanted: Torres was arrested on a Wanted that was based on his ex-wife's fabricated statements and conflicting statements from his daughter, two days *after* the corresponding Missouri DSS investigation was closed. (A_242, 244, ¶¶ 22, 34.) Detective Clements let the Wanted sit for months, and never spoke with the DSS investigators about the case or their findings, which would have revealed that the child's report was not credible and that she admitted that "her mom told her what to say." (A_1628 (Missouri DSS Letter).) In fact, Clements was not even aware that the DSS case was closed until preparing for her deposition in the case below. (A_244, ¶¶ 32–35.) Her failure to minimally investigate runs afoul of *Kuehl*, which establishes that "law enforcement officers have a duty to conduct a reasonably thorough investigation prior to arresting a suspect," notwithstanding exigent circumstances (which did not exist here). 173 F.3d at 650 (collecting cases). There is no probable cause "when a 'minimal further investigation'"—

specifically, speaking with the DSS investigators—"would have exonerated the suspect." *Id.*

Given that these Wanteds lacked even arguable probable cause, the district court erred in finding them constitutional even under its erroneous view of the law.

III. THE DISTRICT COURT ERRED IN CONFERRING QUALIFIED IMMUNITY ON THE INDIVIDUAL POLICE OFFICERS

A defendant is not entitled to qualified immunity when they knew or should have known that their conduct violated a plaintiff's "clearly established" rights. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Individuals have a clearly established Fourth Amendment right not to be arrested pursuant to an order issued by a police officer without the review and approval of a detached and neutral magistrate—whether that order is called a warrant or a Wanted—and a right not to be held in custody after a warrantless arrest other than to "take the administrative steps incident to arrest." *Gerstein*, 420 U.S. at 114.

That the SLCPD calls its officers' arrest warrants "Wanteds" does not immunize the officers from liability for issuing those orders without the review of a magistrate, or from taking suspects into custody to question them. Indeed, the district court identified no material distinction between Wanteds

and warrants. While no appellate case has specifically applied the Fourth Amendment to an arrest warrant that is called a "Wanted," that level of specificity is not required to hold officers liable for trenching on the constitution; "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002) (citation omitted). The Fourth Amendment's warrant requirement applies with obvious clarity to Wanteds.

As this Court has held, the pertinent inquiry is "whether the state of the law at the time gave the official 'fair warning' that such conduct was unlawful in the situation he confronted." *Wright* v. *United States*, 813 F.3d 689, 695 (8th Cir. 2015) (quoting *Pelzer*, 536 U.S. at 741). Longstanding Supreme Court precedent dictates that arrest warrants must be "drawn by a neutral and detached magistrate" instead of being left to the judgment of the officer. *Giordenello* v. *United States,* 357 U.S. 480, 486 (1958) (quoting *Johnson*, 333 U.S. at 14). Cases from courts across the country have declared unlawful efforts to evade the warrant requirement.[2] Given this fair warning, no

[2] *See, e.g.*, *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 326–27 (1979) (Town Justice serving in law-enforcement role cannot sign off on warrant, because of a lack of "neutral and detached" posture); *Vance* v. *State of N.C.*, 432 F.2d 984, 987 (4th Cir. 1970) ("federal law requires that an application for a warrant be considered by a neutral and detached magistrate rather than by

reasonable officer could have concluded that issuing a Wanted in place of an arrest warrant was lawful.

The district court nevertheless concluded that the individual defendants were entitled to qualified immunity, because: Clements had probable cause to issue a Wanted for Torres; Walsh followed SLCPD policy to hold individuals accused of domestic violence for 24 hours; and Partin had at least arguable probable cause to issue Furlow's Wanted (without explicitly conferring qualified immunity on Partin). *Furlow*, 2018 WL 4853034, at *9–11 (A_169–76). But the court failed to consider the constitutional rights clearly established by *Gerstein* and its progeny that each of these officers violated.

If this Court agrees either that the Wanteds System is unconstitutional (for the reasons set forth in Point I) or that the Wanteds for Furlow and Torres were not supported by probable cause (for the reasons set forth in Point II), then the Court should further reverse the district court's conferral of qualified immunity on the individual officer defendants. *See, e.g.*, *Mitchell* v. *Shearrer*, No. 4:10-CV-819-CEJ, 2012 WL 918803, at *7 (E.D. Mo. Mar. 19, 2012)

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a policeman's fellow officers"); *accord Loupe* v. *O'Bannon*, 824 F.3d 534, 540 (5th Cir. 2016) (prosecutor not immune where prosecutor circumvents warrant requirement to order warrantless arrest); *Lacey* v. *Maricopa County*, 693 F.3d 896, 914 (9th Cir. 2012) (same).

(denying qualified immunity where a "reasonable officer would have known that conduct that unnecessarily delays a pretrial detainee's release could constitute a violation of the Fourth Amendment"). Moreover, defendants are not entitled to qualified immunity where they fail to conduct a "reasonably thorough investigation" before making a warrantless arrest, or fail to "reasonably interview witnesses readily available at the scene [or] investigate basic evidence" to support a finding of probable cause. *Kuehl*, 173 F.3d at 650–51 (citations omitted).

IV. THE DISTRICT COURT ERRED IN CONCLUDING THAT IMMUNITY FOR THE INDIVIDUAL DEFENDANTS PRECLUDED MUNICIPAL LIABILITY AS A MATTER OF LAW

The district court held that the conferral of qualified immunity to individual officer-Defendants meant that, as a matter of law, the "Plaintiffs cannot satisfy their burden of establishing municipal liability or liability of the governmental entity" pursuant to *Monell*. *See Furlow*, 2018 WL 4853034, at *11 (A_176–77). That was an error of law. Whether the County and its Police Chief (in his official capacity) are liable under *Monell* turns on whether the SLCPD's policy and practice of issuing Wanteds is itself unlawful and whether the Wanteds System harmed the plaintiffs. It does not require that an individual officer be liable or not immune.

The Supreme Court has squarely rejected the conflation of qualified immunity for individual defendants with *Monell* liability for a municipality. In *Owen* v. *City of Independence*, the Supreme Court reversed a grant of immunity to a municipality even where the law did not clearly establish the illegality of the municipality's actions. *See* 445 U.S. 622 (1980). The Supreme Court warned that it would be "uniquely amiss" if the "government itself" could "disavow liability" for the injuries its unlawful policy caused. *Id.* at 651. The municipality itself is thus liable for harm-causing unlawful acts, even if—at the time—its officers would not clearly have known those acts were unlawful.

In addition to articulating this bright-line rule, the Supreme Court has explained that fundamentally divergent policy considerations justified distinguishing qualified immunity from municipal liability. The qualified-immunity doctrine protects officers from damages claims for conduct that they did not know was unconstitutional, *see Harlow*, 457 U.S. at 818, but "[i]t hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby," *Owen*, 445 U.S. at 654. Moreover, under Section 1983, the "knowledge that a municipality will be liable for all of its injurious conduct, whether committed

in good faith or not," is necessary "to serve as a deterrent against future constitutional deprivations." *Id.* at 651.

Following the logic of *Owen*, this Court, too, has repeatedly and unequivocally rejected the reasoning offered by the district court. The most recent such decision is *Webb* v. *City of Maplewood*, 889 F.3d 483, 485 (8th Cir. 2018). There, Maplewood residents sued the municipality for a systematic, discriminatory program targeting poor, Black residents for traffic tickets and municipal citations that, if unpaid, triggered automatic arrest warrants. When the City moved to dismiss on immunity grounds, arguing that a lack of individual liability would preclude municipal liability, the district court rejected that argument, holding that "immunity doctrines that may protect individual actors do not protect the City from liability on plaintiffs' claims." *Webb* v. *City of Maplewood*, No. 4:16 CV 1703 CDP, 2017 WL 2418011, at *6 (E.D. Mo. June 5, 2017), *aff'd sub nom. Webb* v. *City of Maplewood*, 889 F.3d 483 (8th Cir. 2018). On appeal, the City argued to this Court that "if individual officials are immune from liability on the acts that allegedly constitute a municipality's policy or custom, there are no unlawful acts which may form an unlawful policy or custom in the first place, precluding municipal liability." Opening Brief of Appellant The City of Maplewood, *Webb* v. *City of*

Maplewood, 2017 WL 3327137, at *66 (8th Cir. July 31, 2017). This Court soundly rejected that argument, and held that "even if we accepted the City's premise that its officials all enjoy personal immunity from suit, it hardly follows that they did not engage in any unlawful acts." 889 F.3d at 486. While a municipality cannot be held liable without an unconstitutional act by a municipal employee, there is no requirement that the plaintiff establish that an employee who acted unconstitutionally is *personally liable*. *Id.* at 487. Even where the individual officers are entitled to qualified immunity, "[w]hether the challenged acts occurred, whether they were unlawful, and whether [a municipality] is liable for them under *Monell* . . . [remain] open questions." *Id.* at 486 (citing *Owen*, 445 U.S. at 657).

Webb rests on a long line of cases to the same effect. Nearly twenty years ago, this Court stated that "situations may arise where the combined actions of multiple officials or employees may give rise to a constitutional violation, supporting municipal liability, but where no one individual's actions are sufficient to establish personal liability for the violation." *Speer* v. *City of Wynne, Ark.*, 276 F.3d 980, 986 (8th Cir. 2002). And nearly forty years ago, this Court observed that a municipality may be held liable for an unconstitutional policy even where no official has been found personally liable

for actions pursuant to that policy. *Praprotnik* v. *City of St. Louis*, 798 F.2d 1168, 1172 n.3 (8th Cir. 1986), *rev'd on other grounds*, 485 U.S. 112 (1988). Individual immunity did not preclude municipal liability as a matter of law, even in cases where the municipality was ultimately found not to be liable on the merits. *See Stockley* v. *Joyce*, 963 F.3d 809, 823 (8th Cir. 2020); *Ivey* v. *Audrain Cty.*, 968 F.3d 845, 851 (8th Cir. 2020); *Nader* v. *City of Papillion*, 917 F.3d 1055, 1059 (8th Cir. 2019); *Evans* v. *City of Helena-West Helena, Ark.*, 912 F.3d 1145, 1146 (8th Cir. 2019).

The district court did not cite any of these cases, yet ran afoul of all of them. The Wanteds System is a policy that permits police officers to evade the most elementary requirements of the Fourth Amendment. St. Louis County and its police chief are liable for the harms caused by that System even if the individual officers are immune. Thus, even if this Court were to affirm the district court's grant of immunity to the individual Officer defendants, if the Court concludes either that the Wanteds System is unconstitutional (for the reasons set forth in Point I) or that the Wanteds for Furlow and Torres were not supported by probable cause (for the reasons set forth in Point II), the Court should reverse the grant of judgment in favor of the SLCPD and Chief Belmar and remand for further proceedings.

V. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT THREE, FOR WHICH NO JUDGMENT WAS SOUGHT

The Wanteds System affords no procedure by which a person may challenge the issuance of, or even seek to vacate, a Wanted. In Count Three of the operative complaint, Appellants pled that this lack of procedural safeguards deprives them of a liberty interest under the Fourteenth Amendment. No party sought summary judgment as to that Count, yet the district court granted summary judgment to Appellees on it. This was both procedural and substantive error.

Procedural Error: Appellees styled their Rule 56 motion as seeking summary judgment, without explicitly saying "partial" summary judgment. In their opposition brief, Appellants raised that despite the title of the moving brief, Appellees had not made any argument (or written a single word) about Count Three. Appellees did not protest, disagree, or even respond to this in their reply brief. At oral argument, there was no discussion of Count Three. Nevertheless, the district court granted summary judgment as to that count.

Before a district court may grant summary judgment *sua sponte*, the non-movant must first be "notified and afforded an opportunity to respond." *Am. Red Cross* v. *Cmty. Blood Ctr. of the Ozarks*, 257 F.3d 859, 863 (8th Cir.

2001); Fed. R. Civ. P. 56(f). Absent these protections, a *sua sponte* grant of summary judgment "constitutes reversible error." *Id.*; *see also Figg* v. *Russell*, 433 F.3d 593, 597 (8th Cir. 2006) ("Sua sponte orders of summary judgment will be upheld only when the party against whom judgment will be entered was given sufficient advance notice and an adequate opportunity to demonstrate why summary judgment should not be granted." (internal quotation marks omitted)).

The district court did precisely what *Red Cross* prohibits: it granted judgment on Count III without affording Appellants notice and an opportunity to respond to identify issues of law or genuine issues of material fact that would preclude the entry of judgment. This is not an instance in which Appellants failed to object to the entry of judgment. *E.g.*, *UnitedHealth Group Inc.* v. *Exec. Risk Specialty Ins. Co.*, 870 F.3d 856, 866–67 (8th Cir. 2017); *Figg*, 433 F.3d at 597. Rather, Appellants explicitly noted that Appellees were not seeking judgment on Count Three, Appellees did not disagree, and the Court nevertheless included Count Three in its decision with no notice to the parties that it was even considering doing so.

Substantive Error: The district court's ruling as to Count Three is also incorrect on the merits. Count Three alleges that Furlow and Torres were

deprived of the ability to live freely without the looming threat of being arrested on a Wanted, and without any procedural mechanisms to quash the pending Wanted. The district court's sole reason for rejecting that claim was that Furlow and Torres had no legitimate interests in protecting their freedom because they "were not free from the threat of arrest because there was probable cause to arrest" them. *Furlow*, 2018 WL 4853034, at *11 (A_176). Notwithstanding Appellants argument that probable cause did not exist to support the arrests, the court's reasoning, too, just assumes that Wanteds based on probable cause are constitutional. If this Court disagrees (for the reasons set forth in Point I), it should reverse the grant of summary judgment on Count Three.

Even if an individual Wanted could satisfy the Fourth Amendment where supported by probable cause, however, the Wanteds System itself would be unconstitutional because of its systemic effects; that is the claim in Count Three. The Supreme Court has cautioned that "safeguards," including judicial oversight, "must be provided against the dangers of the overzealous," to thereby "guard[] against the misuse of the law enforcement process." *Gerstein*, 420 U.S. at 118. Being detained on a Wanted is equal to being arrested: individuals are apprehended, transported to the police station or jail,

booked, photographed, DNA swabbed, fingerprinted, and jailed for 24 hours. (*E.g.*, A_16.) Identifying information is entered into the law enforcement database. Mugshots may even be publicly accessible online, as was true for Torres and Liner. (A_244, ¶ 36; A_249, ¶ 85.) Individuals are removed from their families, and may be compelled to miss work, lose pay, and have their daily lives uprooted. Other family members are affected, as well: Torres, for example, was forced to find emergency childcare for his eight-year-old son so that he was not sent to Child Protective Services while Torres was detained. (A_1623 (Torres SLCPD Investigative Report), A_16, ¶ 96.) The Supreme Court envisioned this very result in *Gerstein*, predicting that pretrial detention "may imperil the suspect's job, interrupt his source of income, and impair his family relationships." 420 U.S. at 114.

Despite the fact that a Wanted can impose such a severe deprivation of liberty and privacy, there are *no* safeguards protecting against their unrestrained use. There is no procedural ability to quash Wanteds or challenge their provenance. (A_260, ¶ 159.) Nor is there judicial oversight, which otherwise serves as a safeguard "against unfounded invasions of liberty and privacy." *Gerstein*, 420 U.S. at 112. Indeed, Furlow was forced to turn

himself in on a Wanted or otherwise live with the fear of a sudden and illegitimate arrest looming over him daily.

Appellants did not seek summary judgment as to the unconstitutionality of the lack of procedural safeguards, because discovery revealed that there are disputes of fact as to the impact of the Wanteds system. Appellants do not seek summary adjudication of that issue in this Court either. But if this Court concludes that the district court appropriately reached the merits of Count Three despite no party having asked it to do so and despite having provided no notice it intended to do so, this Court should reverse the grant of summary judgment as to Count Three and remand for a trial on that Count.

CONCLUSION

The judgment of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

/s/ Eric Alan Stone

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OCTOBER 7, 2021

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Eric Alan Stone, counsel for appellants Dwayne Furlow and Ralph Torres, certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), that the attached Opening Brief of Appellants is proportionately spaced, has a typeface of 14 points or more, and contains 11,564 words.

OCTOBER 7, 2021

/s/ Eric Alan Stone
ERIC ALAN STONE

CERTIFICATE OF SERVICE

I, Eric Alan Stone, counsel for appellants Dwayne Furlow and Ralph Torres, hereby certify that, on October 7, 2021, a copy of the attached Opening Brief of Appellants was filed with the Clerk and served on the parties through the Court's electronic filing system. I further certify that all parties required to be served have been served.

/s/ Eric Alan Stone
ERIC ALAN STONE

OCTOBER 7, 2021