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 E. AUTREY, J.)

REPLY BRIEF OF APPELLANTS

BAHER AZMY
OMAR FARAH
ANGELO GUISADO
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

BLAKE A. STRODE
MAUREEN HANLON
NATHANIEL R. CARROLL
ARCHCITY DEFENDERS
440 N. 4th Street, Suite 390
St. Louis, MO 63102

ERIC ALAN STONE
AMEYA S. ANANTH
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000
estone@paulweiss.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution, Statutes & Rules

Appellees' brief repeats the district court's error: both assert that as long as a police officer has probable cause he may issue an order to have a suspect arrested and detained for interrogation, even if that arrest is carried out months later by another officer who has no relevant knowledge. St. Louis County calls those orders "Wanteds," but Appellees never dispute that Wanteds are the functional equivalent of arrest warrants, issued without judicial approval. No case permits that, and Appellees cite none. Rather, the Fourth Amendment requires that arrest warrants be issued by a detached and neutral magistrate, not by the police officer himself.

Appellees rely instead on cases that hold that an officer may, himself, effect a warrantless arrest of a suspect where that officer, himself, has probable cause to believe the suspect has committed a crime, and on cases that allow that officer to interrogate that suspect during the brief steps incident to presenting the suspect to a magistrate. But those cases do not countenance the systematic outsourcing of thousands of non-exigent warrantless arrests, made weeks or months after the Wanted was issued, without a magistrate's involvement. The Wanteds System is unconstitutional. This Court should reverse the district court's decision.

ARGUMENT

I. THE WANTEDS SYSTEM IS UNCONSTITUTIONAL EVEN WHERE A WANTED IS BASED ON PROBABLE CAUSE

The core of Appellees' argument is that every Wanted is supported by probable cause, and that a warrantless arrest based on probable cause never violates the Fourth Amendment. *See, e.g.*, Br. of Appellees at 30. No case supports that broad proposition.

A. UNDER THE FOURTH AMENDMENT, WARRANTLESS ARRESTS ARE AN EXCEPTION, NOT THE RULE

The Fourth Amendment guarantees that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." That probable cause determination should ordinarily be made by a detached and neutral magistrate, not by the police themselves. To do otherwise would "reduce the Amendment to a nullity":

> Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

Johnson v. *United States*, 333 U.S. 10, 14 (1948). Appellees contend that *Johnson* is off-point because it addressed search warrants, rather than arrest

warrants, and because it pre-dates *Gerstein* v. *Pugh*, 420 U.S. 103 (1975) and *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991); Br. of Appellees at 29. But *Johnson*'s explanation that the Fourth Amendment begins with the assumption that probable cause will be assessed by a "neutral and detached magistrate" and not "the officer engaged in the often competitive enterprise of ferreting out crime," 333 U.S. 10 at 14, remains good law. Indeed, *Gerstein* extended this principle to arrest warrants: "To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible." 420 U.S. at 112 (emphasis added).

Gerstein of course recognized that the practicalities of police work must allow an officer to make a warrantless arrest based on his "on-the-scene assessment of probable cause," *id.* at 113 (emphasis added), because halting ongoing, street-level police work to get a warrant from a magistrate may not be possible. And *Riverside* likewise recognized the need for warrantless arrests "where there has been no opportunity for a prior judicial determination of probable cause," 500 U.S. at 52 (emphasis added). Both cases continue the common law tradition that an individual police officer may arrest

a suspect for a felony based on that officer's personal, first-hand knowledge of facts constituting probable cause that the person has committed a crime, *see, e.g.*, *United States* v. *Watson*, 423 U.S. 411, 422–23 (1976), or for a misdemeanor committed in the officer's presence, *see, e.g.*, *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 354 (2001), as long as the officer thereafter promptly brings the suspect before a magistrate for a judicial determination of probable cause, *see Gerstein*, 333 U.S. at 114; *Riverside*, 500 U.S. at 53. Those cases strike a balance: an officer who has probable cause may arrest a suspect without a warrant, but the officer himself must do the legwork to make that arrest (or, where officers work as a team, some member of the team must do that legwork, *see United States* v. *Robinson*, 664 F.3d 701, 703 (8th Cir. 2011)).

To be sure, where a police department has issued a bulletin based on reasonable suspicion that a person has committed a crime, an officer receiving that bulletin and encountering the person may conduct a limited *Terry* stop to briefly detain them and ask them questions. That is the holding of *United States* v. *Hensley*, 469 U.S. 221, 232 (1985). But as Appellants explained in their opening brief (at 38–39), to which Appellees offer no response at all, *Hensley* has never been extended to allow an officer, who himself has no probable cause, to arrest someone based on another officer's say-so. *Hensley*

itself addressed only reliance on a flyer to conduct a *Terry* stop: to "check identification," "to pose questions to the person," or "to detain the person briefly while attempting to obtain further information." 469 U.S. at 232.

Neither *Hensley* nor any case has ever countenanced a system in which officers can avoid judicial oversight and avoid doing the police legwork to effect an arrest, outsourcing that work to other officers. While Appellees trumpet that each such Wanted is supported by an officer's own "determination of probable cause," Br. of Appellees at 28 (emphasis added), that choice of verb proves too much: the determination of whether there is probable cause is supposed to be made by "someone independent of the police and prosecution." *Shadwick* v. *City of Tampa*, 407 U.S. 345, 348 (1972). No case has countenanced a system in which hundreds of officers issue thousands of orders for the arrests of thousands of citizens, all without consulting a judge before the arrest, thus allowing the personal-knowledge exception to the warrant requirement to swallow the rule.

But the vesting in police officers of the power to make probable cause determinations is not the only constitutional flaw in the Wanteds System. Under that System, the arrest itself is made by an officer who has no probable cause, simply because another officer (who believes he does have probable

cause) issued an arrest order. No case has ever held that where a police officer from one municipality has probable cause to believe that a suspect has committed a crime, that officer may issue a statewide order allowing any officer from any municipality to arrest that suspect days or weeks or months later, deliberately bypassing judicial review.

Finally, the undisputed record evidence is that St. Louis County Police Department (SLCPD) officers use Wanteds in order to further their investigation. Appellees and other SLCPD officers testified that they issue Wanteds and call for the arrest of suspects "to gather additional evidence," (App. 681 R. Doc. 87-13, at 10 (Burk)), or when "the officer cannot find this person or talk to him," Br. of Appellees at 10, 32–33. No case has ever held that a police officer may issue an order to have a suspect arrested and brought to the station house to be interrogated, so that the officer can confirm whether there really is probable cause to justify the arrest, releasing the suspect if it turns out that he did not.

In holding that any warrantless arrest is constitutional as long as it is supported by probable cause, the district court erred. A narrow Fourth Amendment exception to the warrant requirement—allowing an individual officer to personally arrest a suspect whom he personally has probable cause

to believe has committed a crime—cannot justify a system of thousands of warrantless arrests by officers with no personal knowledge, without judicial review prior to those arrests.

B. DECISIONS AND STATUTES PERMITTING ON-THE-SCENE, IN-PERSON ARRESTS DO NOT JUSTIFY THE WANTEDS SYSTEM

Lacking any precedent for the assertion that probable cause automatically renders any warrantless arrest constitutional, Appellees take out of context the first half of this sentence from this Court's decision in *White* v. *Jackson*: "A warrantless arrest does not violate 'the Fourth Amendment if it is supported by probable cause, and an officer is entitled to qualified immunity if there is at least 'arguable probable cause.'" 865 F.3d 1064, 1074 (8th Cir. 2017) (quoting *Borgman* v. *Kedley*, 646 F.3d 518, 522–23 (8th Cir. 2011) and *Walker* v. *City of Pine Bluff*, 414 F.3d 989, 992 (8th Cir. 2005)) (cited at Br. of Appellees at 24).

White is a straightforward application of the doctrine in *Gerstein* that an officer may arrest a person whom he sees committing a crime. The plaintiffs in *White* were arrested at the Ferguson protests, by officers who personally observed them committing alleged crimes. Indeed, the very next sentence of the decision confirms that the Court was talking about such on-

the-scene, in-person arrests: "'An officer has probable cause to make a warrantless arrest when the totality of the circumstances at the time of the arrest 'are sufficient to lead a reasonable person to believe that the defendant has committed or is committing an offense.'" *Id.* (quoting *Borgman*, 646 F.3d at 523 and *Fisher* v. *Wal–Mart Stores, Inc.*, 619 F.3d 811, 816 (8th Cir. 2010)) (emphasis added); *see also Gerstein*, 420 U.S. at 113 (finding a legal justification for warrantless arrests where they are made on an officer's "on-the-scene assessment of probable cause" (emphasis added)). And the precedents that this Court cited in *White* also addressed only on-the-scene, in-person arrests: *Borgman*, 646 F.3d at 522 (Borgman arrested in person at a riverboat casino); *Walker*, 414 F.3d at 992 (Walker arrested while, and for, watching police officers perform their duties); *Fisher*, 619 F.3d at 815 (Fisher arrested in person at Wal–Mart for allegedly passing false checks).

Appellees make the same mistake regarding Missouri's statutes, asserting that, "Missouri law allows police officers to arrest without a warrant when an officer has reasonable grounds to believe someone has violated any ordinance, or any law of this state over which such officer has jurisdiction. *See* §544.216 RSMo." Br. of Appellees at 25. What Section 544.216 actually says, with the words that Appellees omit, is that Missouri law enforcement officers

"may arrest on view, and without a warrant, any person the officer sees violating or who such officer has reasonable grounds to believe has violated any ordinance or law of this state, including a misdemeanor or infraction, over which such officer has jurisdiction." Mo. Stat. Ann. § 544.216 (West 2014) (emphases added). Section 544.216 says nothing about one officer issuing an order that allows another officer to effect an arrest. At most, it authorizes an individual officer to, himself, arrest an individual person whom he has probable to cause to arrest, a codification of the narrow *Gerstein* exception allowing for warrantless arrests based on an "on-the-scene assessment of probable cause," 420 U.S. at 113.

If Missouri were to pass a statute that codified the Wanteds System, allowing Missouri law enforcement personnel who have probable cause to issue orders for the arrest of the citizenry by other officers who lack probable cause, that statute would be unconstitutional for the reasons set forth above. Nothing about Section 544.216 as written, however, even addresses—much less authorizes—the Wanteds System.

C. THE DURATION OF DETENTION AND THE NEED TO DEVELOP MORE EVIDENCE DO NOT JUSTIFY WARRANTLESS ARRESTS

Appellees contend that a magistrate's review of probable cause is required only where the person is held in custody for more than 48 hours, and that under Missouri law a detention of up to 24 hours is permissible without judicial review. *See* Br. of Appellees at 28–29 (citing Mo. Stat. Ann. § 544.170.1). This Court has squarely rejected these arguments.

Short Duration to Investigate: In *United States* v. *Davis*, the Court held that a detention of less than three hours was unconstitutional where it was used to investigate the person's possible involvement in other crimes rather than to promptly bring the person before a judicial officer, *see* 174 F.3d 941, 945 (8th Cir. 1999). *Davis* also makes clear that the police may not delay bringing an arrested person before a magistrate judge in order to develop evidence "to justify the suspect's original arrest." *Id.* (citing *Riverside*, 500 U.S. at 56, *Willis* v. *City of Chicago*, 999 F.2d 284, 289 (7th Cir. 1993) (finding "unreasonably prolonged" a defendant's "custody without judicial scrutiny so that the police can undertake further investigatory steps that require the presence of the defendant"), and *Kanekoa* v. *City & Cnty. of Honolulu*, 879

F.2d 607, 612 (9th Cir. 1989) (the Fourth Amendment "does not permit the police to detain a suspect merely to investigate")).

24-Hour Hold: This Court has repeatedly held that Section 544.170.1 protects arrestees from being held longer than 24 hours, but does not license officers to arrest people for shorter periods: "We must again caution police officers and point out to the government that Missouri's twenty-hour hold statute does not provide any authority to arrest persons without a warrant and hold them in custody for twenty hours." *United States* v. *Oropesa*, 316 F.3d 762, 768 (8th Cir. 2003) (citing prior version of Section 544.170 in which the time limit was 20 hours, not 24).

* * * *

It is telling that Appellees defend the Wanteds System in part by making the 24-hour-hold argument that this Court has repeatedly rejected. That defense just confirms that there is no law to support the Wanteds System. St. Louis County has removed the role of the detached and neutral magistrate in the approval of orders to arrest its citizens, and replaced that constitutional protection with probable cause assessments made by non-detached, non-neutral police officers engaged in the competitive exercise of ferreting out crime. The arrest itself can be effectuated weeks or months later,

by any other officer from another municipality or law enforcement agency, who knows nothing about whether the person committed a crime other than the inference that the Wanted-issuing officer must have believed that he had probable cause. The person is then taken into custody, in order to be questioned by the issuing officer. Many times, the suspect is then released without ever being presented to a judge. Wanteds are, thus, functional arrest warrants, issued without the imprimatur of a detached and neutral magistrate.

The Wanteds System violates the Fourth Amendment even if, as Appellees insist, each individual Wanted is supported by probable cause. This Court should reverse the district court's grant of summary judgment, with instructions to enjoin further enforcement of the unconstitutional Wanteds System, and remand for a trial on damages under *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978).

II. THERE WAS NO PROBABLE CAUSE FOR THE WANTEDS ISSUED FOR FURLOW AND TORRES

The record is clear that Wanteds are not always issued based on probable cause; the Wanteds for Appellants Furlow and Torres and the testimony of SLCPD officers confirm this. (*E.g.*, App. 404 R. Doc. 87-3, at 17 (Partin); App. 69 R. Doc. 14-2, at 26 (Department of Justice's 2015 Investigation of Ferguson Police Department).) Indeed, the district court

recognized this when it held that there was a triable issue of fact as to whether probable cause supported the Wanted for (now-deceased) Plaintiff Liner. Br. of Appellants at 12, 18–19; (App. 189–91 R. Doc. 143, at 11–13).

Before turning to the scant evidence supporting Furlow's and Torres's Wanteds, however, Appellants note a fatal contradiction in Appellees' brief: Appellees contend that every Wanted is supported by probable cause, but they also admit that "the 24 hours" in which (Appellees contend) a suspect may be detained on a Wanted "can be used to build additional facts for obtaining a warrant." Br. of Appellees at 10. If all Wanteds are based on probable cause, there would be no need to build "additional facts" for obtaining a warrant. If Appellees are suggesting that the "probable cause" needed for a Wanted is somehow less than the "probable cause" needed for a warrant, then that would just further confirm the unconstitutionality of arrests on Wanteds.

Furlow's Wanteds: Appellees' brief confirms that Furlow's Wanteds were both issued out of retaliation. Appellees recount Officer Partin's threat to issue a Wanted if Furlow did not immediately return home to speak to Partin. While Appellees describe this as issuing a Wanted "in an attempt to get Mr. Furlow to return to the scene to speak with him," *id.* at 13, that just confirms the lack of probable cause: Officer Partin issued an order for

Furlow's arrest so that he could hear Furlow's side of a story. Likewise, Appellees admit that Officer Walsh issued Furlow's second Wanted because Furlow did not submit to questioning: "Officer Walsh requested that Mr. Furlow return home to be questioned regarding the allegations. Mr. Furlow said he had no interest in answering any questions. Officer Walsh informed Mr. Furlow that if he did not answer questions that Officer Walsh would issue a 'Wanted.'" *Id.* at 17 (citations omitted).

No magistrate judge would approve a warrant on either of those sets of facts, and the district court's conclusion that either constituted probable cause to arrest Furlow was error. The Supreme Court has "consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Florida* v. *Bostick*, 501 U.S. 429, 437 (1991). Furlow's second Wanted undermines Appellees' appeals to the limited duration of incarceration: Furlow was held for 24 hours, yet Officer Walsh did not question him during that time. (App. 509 R. Doc. 87-4, at 36 (Walsh).) And no charges were ever filed against Furlow on either Wanted. (App. 247 R. Doc. 86, at 9 ¶ 67.)

Torres's Wanted: Appellees acknowledge that Detective Clements issued a Wanted because she was unable to reach Torres or his attorney, *see*

Br. of Appellees at 21–22, which is an insufficient basis for probable cause. Appellees then go on offense, asserting that Appellants should have to explain what exonerating information Clements might have learned from conducting an investigation. *Id.* at 34. Appellants did exactly that in their opening brief, explaining that even a minimal investigation would have revealed that the Missouri Department of Social Services investigators had found the allegations against Torres to be fabricated and incredible. *See* Br. of Appellants at 42–43; (App. 244 R. Doc. 86, at 6 ¶¶ 32–35; App. 1628 R. Doc. 88-36, at 1 (Missouri DSS Letter)). Appellees also suggest that Clements's deficient investigation is excused by her having worked a 12-hour shift and having been unable to attend the forensic interview. Br. of Appellees at 34. But the Wanted for Torres's arrest remained open for months; Clements could have contacted the DSS at any time during that period, which would have exonerated Torres. Br. of Appellants at 42–43. There were also no exigent circumstances excusing her failure to carry out a "minimal further investigation." *Kuehl* v. *Burtis*, 173 F.3d 646, 650 (8th Cir. 1999) (citation omitted).

This Court has held that "the paradigmatic case" where arguable probable cause would *not* be found is where an officer "[1] had spoken with the

suspect for only twenty seconds, [2] ignored exculpatory evidence, and [3] disregarded an eyewitness account." *Johnson* v. *City of Minneapolis*, 901 F.3d 963, 971 (8th Cir. 2018) (quoting *Borgman*, 646 F.3d at 523). Not only does Clements's lack of investigation run afoul of *Kuehl*'s rule that "law enforcement officers have a duty to conduct a reasonably thorough investigation prior to arresting a suspect," 173 F.3d at 650, absent exigent circumstances, but no probable cause exists where minimal further investigation would have revealed exculpatory evidence. *Ross* v. *City of Jackson*, 897 F.3d 916, 922 (8th Cir. 2018).

Further, Torres—like Furlow—was seized and detained for exercising his Fifth Amendment right to remain silent and his Sixth Amendment right to have an attorney present for questioning. This cannot form the basis for probable cause. *See Bostick*, 501 U.S. at 437.

Torres's Wanted also recapitulates the harms of the entire Wanted System. Appellees assert that SLCPD officers "don't wait until 23 ½ hours go by" to apply for a warrant, Br. of Appellees at 10, but cannot dispute that Clements instructed the Justice Center to hold Torres for the full 24 hours, and that he was actually held for 25 hours after declining to answer questions and asking for his lawyer. Br. of Appellants at 12; (App. 242 R. Doc. 86, at 4

¶¶ 17–21). In fact, even after the Prosecuting Attorney's Office found that there was insufficient evidence to seek a warrant, Torres was not released immediately. (App. 242 R. Doc. 86, at 4 ¶¶ 19–20.)

Appellees have failed to show that these Wanteds were based on enough evidence to support a determination of probable cause. In holding otherwise, the district court erred.

III. THE INDIVIDUAL OFFICER-DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

Glossing over the clearly established law undermining the district court's erroneous grant of qualified immunity to Partin, Walsh, and Clements, *see* Br. of Appellants at 43–46, Appellees contend that the individual officers are entitled to qualified immunity due to the (alleged) arguable probable cause underlying the Wanteds for Furlow and Torres's arrests, *see* Br. of Appellees at 35–36.

As discussed *supra* in Point II, there was no probable cause for those arrests. The Wanted-issuing officers failed to interview witnesses and to investigate basic evidence prior to issuing Wanteds for Furlow and Torres's arrests. In the qualified-immunity context, at the summary judgment stage, the burden is on the "party asserting immunity" to "establish the relevant predicate facts." *White* v. *McKinley*, 519 F.3d 806, 813 (8th Cir. 2008).

Appellees offer little more than their own say-so that Partin, Walsh, and Clements conducted reasonable investigations. That is not enough to establish qualified immunity.

This Court's decision in *Kuehl* v. *Burtis* is instructive, *see* 173 F.3d 646. Like this case, *Kuehl* involved an officer who did not witness the alleged crime, conducted only a cursory investigation, disregarded contrary facts from eyewitnesses, and "made up [his] mind" about the suspect's guilt without properly interviewing the suspect. *Id.* at 648–49. This Court reiterated that "law enforcement officers have a duty to conduct a reasonably thorough investigation prior to arresting a suspect, at least in the absence of exigent circumstances and so long as 'law enforcement would not [be] unduly hampered . . . if the agents . . . wait[ ] to obtain more facts before seeking to arrest.'" *Id.* at 650 (citation omitted). Probable cause "does not exist when a 'minimal further investigation' would have exonerated the suspect." *Id.* (citation omitted). Individual officer-Defendants Partin, Walsh, and Clements faced no exigency, yet neglected to take even basic investigatory steps to corroborate the facts underlying their Wanteds. That failure voids any assertion of qualified immunity. *See id.*

But even accepting Appellees' view that there was probable cause to issue these Wanteds, the law is clearly established that a municipality may not outsource to its police officers the right to issue orders for the arrest of the public without the involvement of a detached and neutral magistrate. *See* Point I, *supra*; *Gerstein*, 420 U.S. at 118; Br. of Appellants at 43–46.

Where the officers knew or should have known that authorizing arrests on Wanteds violated Furlow and Torres's "clearly established" rights, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), and had a "fair warning" that their conduct was unlawful, *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002), the individual Officer Defendants are not entitled to qualified immunity. Here, no reasonable officer could believe that labeling a warrantless arrest as a "Wanted" would cloak the officer's actions in constitutional legitimacy. *See Wright* v. *United States*, 813 F.3d 689, 695 (8th Cir. 2015).

IV. THE SLCPD IS MUNICIPALLY LIABLE FOR THE WANTEDS SYSTEM

Even if individual officer-Defendants Partin, Walsh, and Clements were entitled to qualified immunity, the SLCPD would remain municipally liable for the constitutional harms inflicted by Wanteds System, and would remain a defendant against whom injunctive and monetary relief could (and should) be awarded. It is undisputed that the Wanteds System is an official municipal

policy of the SLCPD (*see* App. 255 R. Doc. 86, at 17 ¶ 121). An unconstitutional policy, *see supra* Point I, mandates injunctive relief to prevent the policy from perpetuating. *See Monell*, 436 U.S. at 690.

Appellees assert that a grant of qualified immunity to the individual officers precludes municipal liability because, as a "general rule," "in order for municipal liability to attach, individual liability first must be found on an underlying substantive claim." Br. of Appellees at 37 (quoting *McCoy* v. *City of Monticello*, 411 F.3d 920, 922 (8th Cir. 2005)). But Appellees ignore that this Court has explicitly rejected Appellees' reading of *McCoy* and the "general rule" that Appellees tout. In *Webb* v. *City of Maplewood*, this Court exhaustively reviewed its prior cases, including *McCoy*, and held that "despite our occasional use of overbroad language, our case law has been clear since *Praprotnik* [v. *City of St. Louis*, 798 F.2d 1168 (8th Cir. 1986)] that although there must be an unconstitutional act by a municipal employee before a municipality can be held liable, there need not be a finding that a municipal employee is liable in his or her individual capacity." 889 F.3d 483, 487 (8th Cir. 2018) (cleaned up). And as this Court further noted in *Webb*, "the Supreme Court had established that a city could still be held liable under *Monell* where

'the individual municipal officials were all immune.'" *Id.* (quoting *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 475 (1986)).

As a result, the current law in this Circuit is clear: "[E]ven if" an officer personally has "qualified immunity from suit and damages, that immunity does not foreclose an action against the [municipality] if the complaint adequately alleges an unconstitutional policy or custom." *Evans* v. *City of Helena-W. Helena*, 912 F.3d 1145, 1146 (8th Cir. 2019). Qualified immunity protects individual government employees from being held liable for damages for violating constitutional norms that they did not appreciate or could not reasonably have appreciated; municipalities that enact unconstitutional policies or engage in unconstitutional practices receive no such immunity. *See Owen* v. *City of Independence*, 445 U.S. 622 (1980); Br. of Appellants at 46–51.

In holding that its grant of qualified immunity to the individual defendants precluded liability against the municipal defendants, the district court made an error of law. Appellees' defense of that error is to cite a doctrine that this Court has repudiated. Irrespective of how it resolves the claims against the individual Appellees with respect to immunity, this Court should reverse the district court's grant of summary judgment to the municipal defendants. If the Wanteds System is unconstitutional, or if disputed facts

render that claim incapable of summary adjudication, Appellants' claim against the municipal defendants—St. Louis County and its police chief—should continue.

V. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT THREE

Count Three of the operative complaint alleged constitutional deprivations arising out of the lack of procedural safeguards in the Wanteds System, separate from the substantive flaws in that System. No party sought summary judgment on Count Three, but the district court entered judgment against Appellants anyway. That was error. A *sua sponte* grant of summary judgment is reversible error where, as here, the non-moving party is not given notice and an opportunity to respond. *See Am. Red Cross* v. *Cmty. Blood Ctr. of the Ozarks*, 257 F.3d 859, 863 (8th Cir. 2001); Fed. R. Civ. P. 56(f).

Appellees offer no opposition to this argument. Instead, they argue that because the district court found that (i) all Wanteds are supported by probable cause, and that (ii) all warrantless arrests are constitutional if supported by probable cause, there were no procedural aspects of the Wanteds System that are open to challenge. That syllogism does not follow. Appellants could show, for example, that even if Wanteds were permissible where supported by probable cause, Appellants (and the other people affected by Wanteds) must

have some procedural mechanism to challenge the issuance of a Wanted without surrendering into custody. The Wanteds System provides no protections against mistaken identity, arrest for a crime that has already been solved and to which someone else has already confessed, or a law enforcement officer's misuse of the System (innocent or otherwise). (*E.g.*, App. 260 R. Doc. 86, at 22 ¶ 159; App. 263 R. Doc. 86, at 25 ¶ 184.)

Those are the issues that Appellants would have litigated under Count III. The district court entered judgment against that claim even though the parties never briefed the relevant issues, marshalled the evidence, or asserted that the facts were undisputed. This Court should reverse the grant of summary judgment as to Count III.

VI. ACCREDITATION DOES NOT CURE THE UNCONSTITUTIONALITY OF THE WANTEDS SYSTEM

Appellees devote a significant portion of their brief to extolling the fact that the Commission on Accreditation of Law Enforcement Agencies (CALEA) accredited the SLCPD and reviewed its policies and procedures, and that SLCPD officers receive statewide training. Those facts have no legal significance, and afford no defense to a claim of a constitutional violation.

Appellees assert that under a nearly-forty-year-old decision from the Second Circuit, *Woe by Woe* v. *Cuomo*, 729 F.2d 96, 106 (2nd Cir. 1984),

CALEA accreditation is *prima facie* evidence that all of SLCPD's policies comply with the Constitution. Br. of Appellees at 30. The specific issue in *Woe* was whether mental health professionals in state institutions made treatment decisions within the range of professionally acceptable standards, and the Second Circuit held that accreditation by a professional organization was prima facie evidence that the decisions of these doctors and counselors were in line with the industry norm. 729 F.2d at 106.

But the Wanteds System cannot be defended on the grounds that other law enforcement agencies allow police officers to issue arrest orders, for two reasons: First, if the Wanteds System is unconstitutional then it does not matter whether it is prevalent. Second, it is not prevalent: the record discloses no comparable systems anywhere outside of Missouri, at federal or state or municipal levels. (Appellees do not disagree, and profess only that other municipalities in St. Louis County use Wanteds, *see* Br. of Appellees at 10.)

Moreover, the court in *Woe* specifically declined to adopt a rule that receiving accreditation from CALEA bestows a presumption of constitutionality onto the policy or practice at issue, 729 F.2d at 106, and subsequent cases have refused to so extend *Woe*. *See, e.g.*, *Neiberger* v. *Hawkins*, 239 F. Supp. 2d 1140, 1158 (D. Colo. 2002). Appellees have made no

factual showing that CALEA or Missouri Peace Officer Standards and Training (POST) reviewed (much less approved of) St. Louis County's Wanteds System, that Missouri POST has trained officers in using Wanteds, or that the CALEA standards even bear on the constitutional questions at issue in this case.

Appellees' attempt to find support in CALEA accreditation should be seen for what it is: an effort to point to literally anything to support the Wanteds System, because no constitutional provision or statute or judicial decision affords any such support at all. A municipality may not imbue its police officers with the power to issue orders by which other officers, at other times, and with no personal knowledge, can arrest someone and bring them in for questioning. That practice is unconstitutional whether the orders are called warrants or Wanteds, and whether the officer issuing the order does or does not have probable cause to think the suspect committed a crime. The Wanteds System is unconstitutional. CALEA accreditation does not change that.

CONCLUSION

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

Respectfully submitted,

/s/ Eric Alan Stone

ERIC ALAN STONE
AMEYA S. ANANTH
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000
estone@paulweiss.com

BAHER AZMY
OMAR FARAH
ANGELO GUISADO
CENTER FOR CONSTITUTIONAL
RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6464

BLAKE A. STRODE
MAUREEN HANLON
NATHANIEL R. CARROLL
ARCHCITY DEFENDERS
440 N. 4th Street, Suite 390
Saint Louis, MO 63102
(855) 724-2489

Attorneys for Plaintiffs-Appellants Dwayne Furlow and Ralph Torres

MARCH 18, 2022

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 Reply Brief of Appellants is proportionately spaced, has a typeface of 14 points or more, and contains 5,366 words.

MARCH 18, 2022

/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 March 18, 2022, the Reply Brief of Appellants was filed through the Court's electronic filing system. I certify that all participants in the case are registered users with the electronic filing system and that service will be accomplished by that system. I further certify that all parties required to be served have been served.

/s/ Eric Alan Stone
ERIC ALAN STONE

MARCH 18, 2022