No. 14-932

IN THE

Supreme Court of the United States

CITY OF FARMINGTON HILLS, *et al.*,

Petitioners,

v.

DAVID MARSHALL AND CHANDRA MARSHALL,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Sixth Circuit erred in holding under Michigan state law that collateral estoppel did not bar the court from determining the validity of a release-dismissal agreement under the facts of this case.

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INTRODUCTION

Petitioners seek this Court's review of a fact-bound, unpublished Sixth Circuit opinion, solely for the purpose of error correction. Their primary contention is that the Sixth Circuit incorrectly applied Michigan's law of collateral estoppel, but "a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review." *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983); *see* Sup. Ct. R. 10.[1]

In any event, the Sixth Circuit correctly applied Michigan law to hold that collateral estoppel did not bar this litigation because the state criminal court did not analyze whether the release-dismissal agreement at issue was enforceable under this Court's opinion in *Town of Newton v. Rumery*, 480 U.S. 386 (1987), and respondent David Marshall was not given a full and fair opportunity in the state criminal proceedings to litigate this issue. Pet. App. 18-21. The court of appeals also correctly held that the release-dismissal agreement was unenforceable under *Rumery* because the City had not met its burden to show that Marshall had voluntarily agreed to an unconditional release-dismissal, that there was no evidence of prosecutorial misconduct, and that the agreement would not adversely affect the public interest. Pet. App. 8-18.

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[1] Petitioners are the City of Farmington Hills, Officer Michael Meister, Officer Jarrett, Sergeant Soderlund, Sergeant Cronin, and Chief William Dwyer. Respondents are David Marshall and Chandra Marshall. For ease of reference, unless otherwise noted, petitioners will be referred to as "the City," and respondents will be referred to as "Marshall."

STATEMENT OF THE CASE

A. Factual Background

In the very early hours of December 13, 2006, David Marshall, an African-American sergeant with the Detroit Police Department, was driving home from his work on the night shift and nearing his home when Farmington Hills police officer Michael Meister, who is white, pulled him over for allegedly running a red light. Pet. App. 2, 59. Marshall, who was still in his full police uniform, identified himself as a police officer and produced a police-department-issued identification card. Record, *Marshall v. City of Farmington Hills*, No. 2:08-cv-13257 (E.D. Mich.) ("R.") 40-3 at 640. Meister ordered Marshall to exit the vehicle and remove his service weapon, Pet. App. at 2, even though there was no law or requirement for a police officer to remove his service weapon during a traffic stop, R. 44-5 at 944-45; R. 81-2 at 2069-70. Marshall refused to remove his weapon and requested that Meister call a supervising officer to assist at the scene. Pet. App. 2. Meister grabbed Marshall and attempted to remove the weapon, but Marshall prevented him from doing so. R. 40-3 at 645-46. When Meister's back-up partner, Officer Jarrett, arrived at the scene, Marshall asked Meister why he had "put [his] hands on [him]" during the traffic stop, and Meister responded, "Because you're runnin' your mouth." R. 44-4 at 920 (transcript of patrol-car audio). Marshall again requested a supervisor and told Meister that he would be filing a complaint against him. *Id.* Meister then reached for Marshall's weapon again, and Marshall pushed his arm away. Pet. App. 2. Meister yelled, "That's it!" and Jarrett stunned Marshall several times with a TASER. *Id.* at 2, 59.

The officers removed Marshall's weapon, arrested him, transported him to the police station, and ordered him to strip to his underwear. *Id.* at 3. Marshall was charged with obstructing law enforcement. *Id.*

Later that same day, the Farmington Hills Police Department re-opened a child abuse investigation against Marshall for physically disciplining his son seven months before. *Id.* According to the lead detective on the case, the investigation had been closed for over four months with no action taken. *Id.* Marshall was charged with child abuse on January 5, 2007, three days before his arraignment on the obstructing charges was scheduled to take place. *Id.*

While the obstructing charges were still pending, Marshall went to trial and was acquitted on the child abuse charge. *Id.*

B. State-Court Proceedings and the Conditional Release-Dismissal Agreement

Shortly after the jury acquitted Marshall of the child-abuse charge, Marshall and the prosecution orally agreed to a conditional release-dismissal agreement regarding the obstructing charges on the record at a hearing before the state court judge in June 2007. *Id.* at 3-4. Marshall's attorney explained to the court that the dismissal agreement was "contingent upon an agreement as between the prosecutor and [the defense] as to the exact wording of a statement to be prepared for media purposes as well as a release of civil liability." R. 79-4 at 1967; *see* Pet. App. 3-4. He continued, "[A]s soon as the specifics of the media statement are hammered out and the mutual release of all claims, we will submit a written order reflecting the dismissal with prejudice." R. 79-4 at 1967; *see* Pet. App. 3-4. The prosecutor agreed that "the dismissal

with prejudice would obviously be conditioned upon the two issues as relates to the civil release and the press release." R. 79-4 at 1968; *see* Pet. App. 3-4. The court then stated, "[U]pon the conditions being met[,] the matter will be dismissed." R. 79-4 at 1969.

The parties, however, were not able to reach an agreement on the wording of a press statement. Pet. App. 4. The City's original draft of the press statement stated that the arrest was "a lawful traffic stop," that the Farmington Hills officers were "well trained, veteran officers," and that the "disposition of th[e] case in no way reflects negatively on their excellent work records or professional reputations." R. 81-5 at 2091; *see* Pet. App. 4. Marshall crossed out these statements and others in the draft, commenting "No way!" and "more neutral." R. 81-5 at 2091; *see* Pet. App. 4. In addition, Marshall's attorney verbally proposed several alterations to the press statement to the City's attorney, but these were rejected because the Chief of the Farmington Hills Police insisted that the press statement make clear that the City was not "letting Mr. Marshall off the hook." Pet. App. 4. The City submitted a revised press statement, which still defended the Farmington Hills officers' "excellent work records [and] professional reputations," and prohibited Marshall (or any party) from speaking with the media about the incident. R. 81-7 at 2095.

After reviewing the City's second draft press statement, Marshall and his attorney determined that further negotiations would be futile and requested a trial date on the obstruction charge. Pet. App. 5. The state court held a hearing on the motion on August 14, 2007. *Id.* The prosecutor admitted that the parties "never even got to [negotiations on] the civil release

because we never got over the mutual press release hurdle," but he argued that Marshall had not negotiated the wording of the press statement in good faith. R. 79-6 at 1982.

The state judge ruled from the bench, concluding that "[m]y read of this is that this case is over." *Id.* at 1984; Pet. App. 5. The judge stated that the press statement was moot because there was probably little interest in the story since the incident had occurred two months before. R. 79-6 at 1984-85; Pet. App. 5. The judge ruled that "the settlement placed on the record was voluntarily, understandingly freely made and so far as I'm concerned, this case is over. Everyone is bound by the agreement that was placed on the record." R. 79-6 at 1985; *see* Pet. App. 5. The judge did not address the City's assertion that Marshall had not negotiated in good faith, and she did not mention the second condition to the release-dismissal—agreement to the terms of the civil release. *See* R. 79-6 at 1983-85; *see* Pet. App. 5. The judge then issued a written order stating that "Plaintiff's Motion for Trial Date is hereby denied," and "[the criminal charges] are dismissed with prejudice." R. 69-5 at 1900. The judge's written order did not mention any agreement, settlement, or release of civil liability. *Id.*

C. Federal Proceedings and the State Court's *Nunc Pro Tunc* Order

On July 29, 2008, David Marshall and his wife, Chandra Marshall, filed suit in the Eastern District of Michigan alleging violations of 42 U.S.C. §§ 1983 and 1985, in addition to several state-law claims. Compl., *Marshall v. City of Farmington Hills*, No. 2:08-cv-13257 (E.D. Mich.), Dkt. 1 at 12-21. On March 1, 2010, the district court dismissed the suit, holding

that the plaintiffs were collaterally estopped from challenging the validity of the release-dismissal agreement. Pet. App. 68, 73-81.

The Sixth Circuit reversed, concluding that under Michigan law, collateral estoppel did not apply because the state court's ruling from the bench holding the release-dismissal agreement valid was only an oral pronouncement and was not included in the court's written order. *Id.* at 58, 63-67. The Sixth Circuit reasoned that to be an enforceable final judgment and to satisfy the first element of collateral estoppel under Michigan law, a ruling must be expressed in a written order. *Id.* at 63-65 (citing *Pierron v. Pierron*, No. 292817, 2011 WL 255147, at *3 (Mich. Ct. App. Jan. 27, 2011), and *Hall v. Fortino*, 405 N.W.2d 106, 108 (Mich. Ct. App. 1986)). The court held that because the first element of collateral estoppel—"the litigation of an issue to a valid and final judgment"—had not been satisfied, the court need not address the other requirements of collateral estoppel under Michigan law, including the requirement that the parties "had a full and fair opportunity to litigate the issue." *Id.* at 63, 66 (citing *Estes v. Titus*, 751 N.W.2d 493, 500 (Mich. 2008)). The court remanded the case to the district court to determine if the release-dismissal agreement was valid under the factors identified by this Court's opinion in *Rumery*, including whether the agreement was voluntary, whether there was evidence of prosecutorial misconduct, and whether the agreement would affect the public interest. *Id.* at 67.

After the case was remanded to the district court, the defendants again filed a motion to dismiss based on the release-dismissal agreement. *Id.* at 31. The day before the May 1, 2013, hearing on the motion, the

state court, on the defendants' request, entered a written order *nunc pro tunc* purporting to incorporate the oral statements made during the August 2007 hearing. *Id.* at 31 & n.1; 52-53. The order dismissed the criminal charges against Marshall "for the reason that the parties in this matter have entered into, and placed on the record, a release-dismissal agreement, also known as a settlement agreement, that was voluntarily, understandingly and freely made and binds all parties thereto." *Id.* at 52-53. Based on this *nunc pro tunc* order, the district court again held that collateral estoppel barred the Marshalls' claims and dismissed the case. *Id.* at 30, 36-38, 50.

The Sixth Circuit again reversed. *Id.* at 2, 22. In a 2-1 opinion, the court first held that the release-dismissal agreement was unenforceable under *Rumery* because the defendants had not met their burden to show that Marshall had entered the agreement voluntarily, that there was no evidence of prosecutorial misconduct, and that the agreement would not adversely affect the public interest. *Id.* at 8-18. Separately, in Part IV of the opinion, the court of appeals concluded that, notwithstanding the state court's belated, *nunc pro tunc* issuance of a written judgment, Michigan's law of collateral estoppel would not bar the litigation because the state court had not determined issues and facts essential to the judgment and Marshall had not had a full and fair opportunity to litigate the validity of the release-dismissal agreement. *Id.* at 18-21.[2] Specifically, the state court had

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[2] Part IV of the Sixth Circuit's opinion is reproduced in Petitioners' Appendix at 18-21. The City's Appendix, however, omits the Roman numeral heading of this critical section. Part IV be-

(*Footnote continued*)

not addressed whether the release-dismissal agreement could validly preclude a civil rights action, and it did not mention or discuss the *Rumery* framework. *See id.* at 19-21. The court explained that the state court's cursory conclusion of "voluntariness" would not suffice under federal law: Marshall "was bound by an agreement into which he did not wish to enter, and thus his participation cannot be said to be 'an informed and voluntary decision.'" *Id.* at 9-10, 19-21. Moreover, the Sixth Circuit reasoned that the state court had not addressed the two remaining *Rumery* factors—prosecutorial misconduct and public interest—at all. *Id.* at 19-20. The court could not "apply collateral estoppel to a question of law or fact that was neither litigated nor determined." *Id.* at 20 (citing *Montana v. United States*, 440 U.S. 147, 164 n.11 (1979)).

The City filed a petition for rehearing en banc, which was denied without any judge requesting a vote on the suggestion for rehearing en banc. *Id.* at 56.

REASONS FOR DENYING THE WRIT

I. The City Seeks Error Correction of an Unpublished Decision That Turns on State-Law Questions.

The City does not challenge the Sixth Circuit's articulation of applicable law, and it rightly does not suggest that this case presents an issue as to which the circuit courts disagree. It seeks only error correction of a fact-bound, unpublished decision that turns on Michigan law.

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gins with the first full paragraph on page 18, starting, "As a final matter . . . ."

The City's primary contention is that the Sixth Circuit erred in finding that collateral estoppel did not bar the litigation because "Congress has directed federal courts to look to *state* law in deciding what effect to give state-court judgments." Pet. 4-5. The City's argument is misleading and incorrect. Part IV of the Sixth Circuit's opinion specifically analyzes Michigan's *state law* of collateral estoppel. Pet. App. 18-21. The City does not claim that the Sixth Circuit did not correctly state Michigan law. The City simply disagrees with the Sixth Circuit's *application* of Michigan law. *See* Pet. 4-15. "[S]tanding alone, a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review." *Haring*, 462 U.S. at 314 n.8. Yet the petition is precisely that—a challenge to the court's application of Michigan state law.

To be sure, Part III of the opinion below analyzed the question whether the release-dismissal "agreement" precluded the Marshalls' claims by looking to this Court's decision in *Town of Newton v. Rumery*, 480 U.S. 386 (1987): "We therefore review [each] release-dismissal[] on a case-by-case basis" to ensure that: "(1) it was entered into voluntarily; (2) there is no evidence of prosecutorial misconduct; and (3) enforcing the agreement 'will not adversely affect relevant public interests.'" Pet. App. 8-9. The "burden of proof in this analysis 'falls upon the party in the § 1983 action who seeks to invoke the agreement as a defense.'" *Id.* at 9. The City does not challenge the Sixth Circuit's articulation of the *Rumery* framework. *See* Pet. 13, 15-17 (applying *Rumery* factors and con-

ceding that the burden is on the party invoking the release agreement).[3]

Two pages at the end of the petition offer a merits analysis of the *Rumery* factors as applied to the facts of this case. *See* Pet. 15-17. However, the City's question presented does not challenge the Sixth Circuit's *Rumery* analysis. Therefore, the merits of the court's application of *Rumery* is not only an intrinsically fact-bound issue unworthy of this Court's review, it is also irrelevant to the issue the City asks this Court to resolve.

II. The Idiosyncratic Facts of This Case Make the Case a Poor Vehicle for Review.

Review is unwarranted also because the sui generis facts surrounding both the oral, conditional agreement to enter into a release-dismissal agreement and the state court's order purporting to enforce the release-dismissal agreement render the case a poor vehicle to establish or clarify the law either on the application of *Rumery* or on principles of collateral estoppel.

First, although the state court *nunc pro tunc* order purported to hold the parties to a release-dismissal agreement, Pet. App. 52, they never in fact entered into one. Rather, the June 2007 "agreement on the record" to which the court orally purported to bind the parties at the August 2007 hearing, R. 79-6 at 1984-85, was expressly contingent on the parties agreeing on the "exact wording" of a press statement

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[3] The Sixth Circuit has long followed this reading of *Rumery*. *See Coughlen v. Coots*, 5 F.3d 970, 973-74 & n.1 (6th Cir. 1993) (citing other circuits' cases so holding).

and a release of civil liability, R. 79-4 at 1967. *See* Pet. App. 3-4, 9-10. The parties never agreed to the wording of a press statement and never even discussed the terms of the civil release. R. 79-6 at 1982; *see* Pet. App. 4-5, 9-10. Importantly, the oral "agreement" from the June 2007 hearing was only a conditional agreement to dismiss the criminal charges if those other two documents could be agreed upon; the civil release was a condition precedent to the agreement to dismiss, not part of that agreement itself. Accordingly, the "agreement" referenced by the state court at the August 2007 hearing did not release any civil claims and could not bar the subsequent civil lawsuit.

Second, the state court's order was of questionable validity. The entirety of the state court judge's August 2007 oral ruling was that the "settlement placed on the record" was voluntary, "this case is over," and "[e]veryone is bound by the agreement that was placed on the record." R. 79-6 at 1985; *see* Pet. App. 5. The judge never elaborated on what she believed the "settlement" or "agreement" to be. Because, as discussed, the "agreement" itself did not contain a release of civil claims, an order binding the parties to "the agreement" likewise could not bar a subsequent civil suit. Moreover, the court's August 2007 written order dismissing the criminal charges did not mention "the agreement," much less a civil release. *See* R. 69-5 at 1900. Therefore—as the Sixth Circuit held in its first opinion—there was no final judgment barring a civil suit at all in 2007. Pet. App. 63-67.

Now conceding the invalidity of the 2007 order, the City does not seek collateral estoppel based on the facts as they existed when Marshall filed his federal lawsuit. Instead, it seeks to assert collateral estoppel

based on a final judgment entered *nunc pro tunc* almost five years later. The City cites no case law in its petition supporting the validity under state or federal law of applying the *nunc pro tunc* order retroactively to bar a civil-rights suit filed before the order was in reality entered.[4]

In light of these unusual facts, this Court, before it could reach even the substantive state-law analysis, would have to wade through a morass of procedural state-law issues. In these circumstances, this Court's review is wholly unjustified.

III. The Sixth Circuit Correctly Applied Michigan State Law of Collateral Estoppel.

This Court should decline the City's request for a fact-specific review of this case in which no question of law is presented. Beyond that, there is no error to correct. The Sixth Circuit correctly applied Michigan's

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[4] The only case cited by the district court (and Sixth Circuit dissent) regarding the validity of the *nunc pro tunc* order, *Sleboede v. Sleboede*, 184 N.W.2d 923 (Mich. 1971), does not involve a civil rights suit, and if anything, suggests that the *nunc pro tunc* order was improper here. Pet. App. 37 (district court opinion) (citing *Sleboede*, 184 N.W.2d at 925-26 & n.6); *see id.* at 25 (Batchelder, J., dissenting) (same). In *Sleboede*, the Michigan Supreme Court held that a *nunc pro tunc* order could *not* be used to incorporate the provisions of a property settlement into a prior divorce judgment because "an order Nunc pro tunc may not be utilized to supply previously Omitted action." *Sleboede*, 184 N.W.2d at 925. In this case, where the state court's August 2007 oral statements held the press-statement condition moot, held the parties bound by the June 2007 "agreement" without elaboration, and dismissed the criminal charges, the April 2013 *nunc pro tunc* order, which for the first time mentioned a release-dismissal agreement, certainly—and improperly—"suppl[ied] previously Omitted action." *Id.*

law of collateral estoppel, and a Michigan court would have allowed a civil rights suit to proceed under these circumstances.

Under Michigan law, "[c]ollateral estoppel requires that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, [and] (2) the same parties had a full and fair opportunity to litigate the issue." Pet. App. 19 (citing *Estes*, 751 N.W.2d at 500). Collateral estoppel does not apply if the basis of the prior judgment cannot be "clearly, definitely, and unequivocally ascertained." *Ditmore v. Michalik*, 625 N.W.2d 462, 467 (Mich. Ct. App. 2001). Importantly, for collateral estoppel to apply, the same ultimate issues and legal standards must be involved in both actions. *See Barrow v. Pritchard*, 597 N.W.2d 853, 857 (Mich. Ct. App. 1999) (legal standards applied in first case must be "sufficiently similar in substance" to support collateral estoppel in second case); *Knoblauch v. Kenyon*, 415 N.W.2d 286, 288 (Mich. Ct. App. 1987) (judgment holding no ineffective assistance of counsel in prior criminal proceeding would bar a second action for legal malpractice because the legal standards in both actions were "equivalent"). Therefore, under Michigan law, for collateral estoppel to bar a later federal action litigating the validity of a release-dismissal agreement, the earlier decision would have had to apply the same legal standards as the later federal action—that is, the legal standards provided by this Court in *Rumery*.

The Sixth Circuit correctly determined that Michigan collateral-estoppel requirements were not satisfied where the state court simply declared the release-dismissal agreement valid without discussing its rea-

soning or the three requirements of *Rumery*. Pet. App. 18-20; *see Ditmore*, 625 N.W.2d at 467; *Barrow*, 597 N.W.2d at 857. Under *Rumery*, for an agreement releasing § 1983 claims in exchange for dismissal of criminal charges to be valid, the defendant must have entered the agreement voluntarily, there must be no evidence of prosecutorial misconduct, and the agreement must not be contrary to the public interest. *Rumery*, 480 U.S. at 398; *Coughlen v. Coots*, 5 F.3d 970, 973 (6th Cir. 1993).

Although the state-court judge stated orally and later in her *nunc pro tunc* order that Marshall had entered into the agreement voluntarily and that all parties were bound by the agreement, that conclusion was insufficient under *Rumery*.[5] The state court did not consider whether, under the standards of *Rumery*, Marshall could be bound by an *unconditional* release-dismissal when he had voluntarily agreed only to a *conditional* release-dismissal and the conditions had not been fulfilled. The state court never determined whether Marshall had negotiated the press statement in good faith or whether a lack of good faith negotiations could excuse the fulfillment of the conditions precedent under the heightened voluntariness re-

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[5] The state-court order likewise would not have sufficed to establish the validity of the agreement as to Michigan state-law claims. To uphold a release of civil rights claims pleaded under Michigan law, courts must "rigorously scrutinize[]" the agreement under the three factors identified by *Rumery*. *Stamps v. City of Taylor*, 54 N.W.2d 603, 628, 635 (Mich. Ct. App. 1996). It is not enough for a court to determine that a release agreement is "applicable and unambiguous." *Id.* at 628, 635 (reversing and remanding "to make the specific evaluations" required by *Rumery*).

quirements of *Rumery*. And the state court failed altogether to address the prosecutorial-misconduct and public-interest prongs of *Rumery*. Because the basis of the state court's validity decision is unclear and because the state court did not apply the same legal standards as the federal action, the *nunc pro tunc* order does not trigger collateral estoppel under Michigan law. *Ditmore*, 625 N.W.2d at 467; *Barrow*, 597 N.W.2d at 857.

In addition to the state court's failure to apply the required law, the Sixth Circuit held that collateral estoppel additionally would not apply under Michigan law because Marshall did not have a full and fair opportunity to litigate the validity of the release-dismissal agreement. Pet. App. 20-21. The Sixth Circuit concluded that "the [state] judge's perfunctory handling of the matter was alarming," and did "not appear to possess the heralds of attention commensurate with this matter." *Id.* at 17. The court of appeals further recognized that forcing defendants to appeal the dismissal of their criminal charges to preserve their civil suits would not constitute the feasible appellate review required for collateral estoppel. *Id*. at 21. Because both state and federal law indicate that a "[r]edetermination of issues [is] warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation," the court of appeals properly found that collateral estoppel does not bar this action. *Id.* at 20 (quoting *Montana*, 440 U.S. at 164 n.11).

IV. The Sixth Circuit Correctly Concluded That the Agreement Was Unenforceable Under *Rumery*.

Petitioners do not seek review of the Sixth Circuit's *Rumery* analysis. However, the Sixth Circuit's holding that the release-dismissal agreement was unenforceable under federal law was correct and, for that additional reason, review of the collateral estoppel question is unwarranted.

The Sixth Circuit held that "[w]e are aware of no case in light of *Rumery* in which a state criminal court may prevent a federal court from exercising its duty to adjudicate the validity of a release-dismissal agreement *under federal law*." Pet. App. 18 (citing *Rumery*, 480 U.S. at 392, for the proposition that the question of whether a release-dismissal agreement is valid is a question of federal law). Although such agreements are not per se invalid, they must be scrutinized because "[t]he coercive power of criminal process may be twisted to serve the end of suppressing complaints against official abuse, to the detriment not only of the victim of such abuse, but also of society as a whole." *Rumery*, 480 U.S. at 400 (O'Connor, J., concurring in part and concurring in the judgment); *Coughlen*, 5 F.3d at 973.

The Sixth Circuit thoroughly analyzed the three factors identified by this Court in *Rumery* and determined that the release-dismissal agreement was unenforceable under federal law. First, the court determined that the defendants had not met their burden to show that the agreement was entered into voluntarily because the conditions precedent to the agreement undisputedly had not been fulfilled: "Marshall was bound by an agreement into which he did not

wish to enter, and thus his participation cannot be said to be 'an informed and voluntary decision.'" Pet. App. 10 (quoting *Rumery*, 480 U.S. at 393). In addition, there were genuine issues of material fact under state contract law as to whether Marshall waived the contractual conditions precedent by failing to negotiate the press release in good faith or whether further negotiations would be "an exercise in futility." *Id.* at 10-12.

Second, the court determined that the City had not met its burden to show there was no prosecutorial misconduct. Under Sixth Circuit precedent, evidence of prosecutorial misconduct may be found not only through direct prosecutorial misconduct but also through "'substantial evidence of *police* misconduct,'" such as filing unfounded criminal charges as bargaining chips following an excessive use of force. *Id.* at 15 (quoting *Coughlen*, 5 F.3d at 974). Substantial evidence of police misconduct is relevant to the *Rumery* inquiry because it can be "probative of the motives of the prosecutor for seeking such an agreement." *Coughlen*, 5 F.3d at 974. The court of appeals held that there were five instances of police and prosecutorial misconduct that precluded a finding of no prosecutorial misconduct: (1) the re-opening of the child abuse investigation on the day of Marshall's arrest; (2) tasering of a uniformed police officer and needlessly forcing the officer to strip to his underwear at the station;[6] (3) surveillance of the Marshalls' house while

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[6] Petitioners contend that the Sixth Circuit's statement that Marshall was forced to "strip to his underwear" is "misleading." Pet. 16. It is not. When Marshall was taken to the stationhouse, Officer Meister ordered Sergeant Marshall to take off his department-issued equipment belt. R. 40-5 at 692-94. Marshall had

(*Footnote continued*)

the obstruction charges were pending; (4) the questionable merits of the obstruction charge against Marshall; and (5) the City's negotiation tactics on the press release that insisted on insulating the Farmington Hills officers from any appearance of wrongdoing and preventing Marshall from speaking to the press about the incident. Pet. App. 15; *see id.* at 3 & n.1; R. 81-17 at 2181-82. The court of appeals did not err in finding these facts suggested that the City was twisting the criminal process to suppress, and retaliate for, complaints against the police department. Pet. App. 15-16 (quoting *Coughlen*, 5 F.3d at 974).

Third, the Sixth Circuit concluded that "'the public's interests in vindicating constitutional rights and in deterring police misconduct' outweighs the general prosecutorial interest in this matter." *Id.* at 18 (quoting *Coughlen*, 5 F.3d at 975). Unlike in *Rumery*, where the release-dismissal agreement spared a key witness the "public scrutiny and embarrassment she would have endured" from testifying in both criminal and civil actions, the agreement in this case included no independent prosecutorial benefits. *Compare Rumery*, 480 U.S. at 398, *with* Pet. App. 38-50 (district

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already given Meister all of the items that were still on his belt (chemical spray, magazines, and radio), but he told Meister that he could not remove the belt itself without taking his pants off. *Id.*; R. 44-5 at 953-54. Meister told him to remove the belt anyway. R. 40-5 at 692-94. It was reasonable for the Sixth Circuit to view these facts as another attempt by Meister to humiliate Marshall because Meister was the original officer that responded to the scene, and a prisoner would not normally have been required to take off a belt in those circumstances—where Marshall was placed in an interview room to await the arrival of a Detroit Police Department supervisor and was not placed in a holding cell. *see* R. 40-5 at 693; R. 44-5 at 954.

court opinion discussing validity of release-dismissal agreement without mentioning public-interest prong). Here, the City's only interest was clearing its docket of a questionable obstruction charge and leveraging that questionable charge for a release of civil charges. *See* Pet. App. 17 ("The major evil of these agreements is not that charges are sometimes dropped against people who probably should be prosecuted. Much more important, these agreements suppress complaints against police misconduct which should be thoroughly aired in a free society." (quoting *Dixon v. District of Columbia*, 394 F.2d 966, 969 (D.C. Cir. 1968))). Moreover, "although the possibility of abuse is 'clearly mitigated if the release-dismissal agreement is executed under judicial supervision,'" *id.* (quoting *Rumery*, 480 U.S. at 402), the Sixth Circuit reasoned that the state court "judge's perfunctory handling of the matter" failed to show the required degree of attention to the issues presented in this case, *id.*

In their brief discussion of the Sixth Circuit's *Rumery* analysis, Petitioners disagree only as to conclusions drawn on the specific facts. The lack of disagreement on the law as well as the Sixth Circuit's correct application of the law provide additional reasons to deny the petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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