No. 07-811

In the Supreme Court of the United States

STEVEN MORRIS, ET AL., PETITIONERS

v.

CENTER FOR BIO-ETHICAL REFORM, INC., ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals misapplied qualified-immunity principles in reversing the entry of summary judgment for petitioners on respondents' First and Fourth Amendment claims.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and regulations:

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the Court may wish to hold the petition for a writ of certiorari pending its decision in *Pearson* v. *Callahan*, No. 07-751, and then dispose of the petition accordingly. Alternatively, the Court should grant the petition and summarily reverse the judgment of the court of appeals.

STATEMENT

1. Respondent Center for Bio-Ethical Reform, Inc. (CBR), is an anti-abortion organization. As part of its "Reproductive Choice Campaign," CBR employees and volunteers drove box trucks displaying graphic images of aborted fetuses through cities and towns. Respondents Mark Harrington, Quentin Patch, and Dale

Henkel were CBR employees or volunteers who participated in the program. Pet. App. 2a-3a; C.A. App. 75-76.

On Monday, June 10, 2002, Harrington and Patch were driving CBR box trucks around the Dayton, Ohio, area; Henkel was following the trucks in an escort vehicle. Harrington and Patch were wearing protective body armor; Patch was also wearing a helmet. The escort vehicle that Henkel was driving closely resembled an unmarked police car: it was a black Ford Crown Victoria with a shotgun rack, a video camera mounted on the dashboard, a cage between the front and back seats, amber lights in the back, and antennas on the roof and trunk. All of the vehicles were equipped with radios and mace. Pet. App. 3a-4a, 83a-84a; C.A. App. 285.

Around 4 p.m., the men decided to park the vehicles for the night. CBR had obtained permission to park at a farm off Pennyroyal Road in Springboro, a suburb of Dayton. Upon arriving at the farm, the men were concerned that the trucks would not fit down the driveway. Henkel drove around the trucks (crossing a double yellow line) and into the driveway in order to investigate; Harrington and Patch pulled over to the side of the road. After Henkel informed Harrington and Patch that the trucks could fit, they turned into the driveway, but Harrington's truck got stuck. Pet. App. 4a.

Officer Nick Clark of the Springboro Police was driving down Pennyroyal Road at the time and witnessed the foregoing events; he also saw that traffic had backed up behind the trucks. After the trucks turned into the driveway, Officer Clark pulled up behind the trucks and put his lights on. As Officer Clark approached the nearer of the two trucks, he saw that Patch was wearing a helmet and body armor and heard Patch radioing to the others that the police had stopped him. Patch told

Officer Clark that the men were anti-abortion campaigners and that the truck did not contain any cargo. But Officer Clark observed that Patch was "extremely nervous," and, out of concern for his own safety, he returned to his vehicle and pulled away. Pet. App. 5a-6a; C.A. App. 261.

Officer Clark then contacted Detective Tim Parker, who in turn contacted petitioner Steven Morris, a supervisory special agent in the Dayton office of the Federal Bureau of Investigation (FBI). Detective Parker informed Agent Morris of the initial encounter and of the pictures on the trucks, and, noting that the local police had thought the men were engaging in some sort of undercover law-enforcement activity, asked whether the FBI was conducting operations in the area. Agent Morris answered that it was not, and, expressing concern about the possibility of domestic terrorism, told Detective Parker that he would "grab a couple of guys" and go to the scene to investigate. Agent Morris directed several other FBI agents, including petitioner Tim Shaw, to proceed to the scene. According to Detective Parker, the FBI requested that he prevent the men from leaving; Agent Morris, however, could not remember "directing anybody" to "do one thing or the other." Pet. App. 6a-7a & n.5; C.A. App. 354-357.

While the FBI agents were on their way, a number of local law-enforcement officers arrived on the scene. When the men attempted to drive away, the local officers again stopped them (this time stopping the trucks and the escort vehicle in different locations) and detained them. The officers questioned the men and, with their consent, searched the vehicles. Agent Morris arrived at the scene after the men had been detained; the other FBI agents, including Agent Shaw, arrived later,

approximately two hours after the detention began. Those agents were delayed because they had to travel from downtown Dayton during heavy rush-hour traffic. Upon their arrival, the agents were briefed and given assignments by Agent Morris. Agent Shaw questioned Harrington; he later stated that he was unaware of the duration of the detention to that point. Although Harrington was initially hostile, he became cooperative after Agent Shaw allowed him to call his attorney. At most, Agent Shaw spent about 30 to 45 minutes at the location. All three men were allowed to leave between 7:30 and 8:00 p.m.; Harrington estimated that the entire detention lasted three hours. At no point were respondents handcuffed or physically restrained. Pet. App. 8a-14a, 17a, 40a, 91a; Pet. 7; C.A. App. 484.

Agent Shaw later described the FBI's justification for conducting the investigation as follows:

> The fact that people are driving around in panel trucks similar to the size that was used in the Oklahoma City bombing, this occurred shortly after 9/11. We have a number of domestic terrorist individuals and groups in the area. So the concern is, is why do you have helmets and Kevlar vest[s], why do you have a police vehicle or police-looking vehicle, what is the purpose of this[,] that was what our concern is. . . . [I]t was a public safety concern.

Pet. App. 14a (quoting C.A. App. 490).

2. Respondents brought suit in the United States District Court for the Southern District of Ohio against the City of Springboro, a neighboring township, and various local and federal law-enforcement officers, including petitioners. As is relevant here, respondents raised claims against petitioners in their individual capacities

under *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), contending that petitioners had violated their First and Fourth Amendment rights. Pet. 10; C.A. App. 73-91.

A magistrate judge recommended granting summary judgment to petitioners (and the other defendants). Pet. App. 64a-94a. The magistrate judge concluded that respondents could not make out a valid First Amendment retaliation claim against petitioners because, "while [the individual respondents] have shown that they engaged in protected activity, they have not shown a connection between the protected activity and the law enforcement actions." *Id.* at 86a. The magistrate judge specifically noted that "there is nothing in the record to support the conclusion that Agent Morris had [respondents] detained simply because they were pro-life advocates." *Id.* at 85a. Instead, the magistrate judge concluded, "Agent Morris did the prudent thing" when "he determined to conduct an immediate F.B.I. investigation" based on the information provided by Detective Parker. *Ibid.*

As to the Fourth Amendment claim against petitioners, the magistrate judge concluded that the duration of the detention did not render it unreasonable and that, at a minimum, it was not clearly established at the time that the detention was unreasonable in length. Pet. App. 92a-93a. The magistrate judge also found that "[t]here is no evidence that the F.B.I. agents were dilatory in conducting their investigation." *Id.* at 91a. The magistrate judge explained that "[t]he reason for the delay is that it took them considerable time to arrive at the scene" because they traveled from "downtown Dayton" in the midst of "heavy" rush-hour traffic, and that the FBI agents conducted their investigation expeditiously upon their arrival. *Ibid.*

3. The district court adopted the magistrate judge's report and recommendation and granted summary judgment to petitioners (and the other defendants). Pet. App. 51a-63a. As to the First Amendment claim, the district court determined that "there is no evidence that any adverse action was motivated by the exercise of constitutional rights"; instead, the court found, "there is no evidence but that [petitioners] were motivated out of a concern for public safety." *Id.* at 58a-59a. Moreover, the court concluded that, under the circumstances of this case, "a three hour detention would not chill a person of ordinary firmness from continuing in this particular activity." *Id.* at 59a. As to the Fourth Amendment claim, the court concluded that a three-hour detention "was not excessive in light of the scope" of the investigation, *id.* at 62a, and that, in any event, it was not clearly established that this "detention was unreasonable in length," *ibid.*

4. The court of appeals reversed in relevant part and remanded. Pet. App. 1a-50a.

a. The court of appeals held that, when the facts were viewed in the light most favorable to respondents, respondents had shown that the defendant officers' conduct was inconsistent with the First Amendment. Pet. App. 22a-28a. Applying the three-part test established in *Bloch* v. *Ribar*, 156 F.3d 673, 678 (6th Cir. 1998), the court reasoned that the individual respondents had engaged in protected activity, see Pet. App. 23a-24a; that the kind of detention at issue "would undoubtedly deter an average law-abiding citizen from similarly expressing controversial views," *id.* at 24a-25a; and that the allegations, if proven at trial, "could be taken by a reasonable jury to support their claim that [d]efendants were moti-

vated to detain them in part because of their constitutionally protected speech," *id.* at 26a.

The court of appeals further held that the individual respondents' First Amendment rights were clearly established at the time of the alleged conduct. Pet. App. 28a-31a. The court explained that "[t]he 'contours of the right' to be free from retaliation were * * * abundantly clear on the day [d]efendants stopped and detained [the individual respondents]," *id.* at 30a, and that "a reasonable officer, when faced with the circumstances of this case, would have known that detaining [respondents] *because of* their speech would violate their clearly established First Amendment rights," *ibid.*

b. The court of appeals held that the facts, as alleged, showed that the defendant officers' conduct was also inconsistent with the Fourth Amendment. Pet. App. 32a-44a. The court explained that, while "[t]he initial seizure was proper in light of the [d]efendants' reasonable and articulable suspicion that criminal activity was afoot," *id.* at 36a, "[t]he detention ultimately ripened into an 'arrest' absent probable cause," *id.* at 37a, because the "detention of [the individual respondents] far exceeded the limited purpose of the stop," *id.* at 38a. The court explained that, "[v]iewing the evidence in the light most favorable to [respondents], the detention lasted two and one-half hours after the local officers completed their investigation," and that "[d]efendants * * * held [respondents] substantially longer than necessary to dispel their suspicions that [respondents] were engaged in terrorist activity or plotting." *Id.* at 39a.

The court of appeals further held that the individual respondents' Fourth Amendment rights were clearly established. Pet. App. 44a-47a. While noting that the officers "confronted novel factual circumstances," the

court found that a reasonable officer would have understood that "detaining [respondents] over two hours after they dispelled any reasonable suspicions ripened the investigatory stop into an arrest absent probable cause." *Id.* at 45a.

5. Petitioners and other defendants filed petitions for rehearing en banc, which were denied. Pet. App. 95a-96a.

DISCUSSION

In *Saucier* v. *Katz*, 533 U.S. 194 (2001), this Court clarified the principles governing qualified-immunity analysis and reiterated that, in order to impose liability on an individual officer, it is "not enough" simply to determine that the officer's conduct violated a constitutional right; a court must also determine that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. In *Pearson* v. *Callahan*, No. 07-751 (to be argued Oct. 14, 2008), this Court, in granting review, requested briefing on the question "[w]hether the Court's decision in *Saucier* * * * should be overruled." 128 S. Ct. 1702, 1702-1703 (2008). In answering that question in *Pearson*, the Court may revisit the principles established by *Saucier*, including the rule that, in evaluating a claim of qualified immunity, lower courts must first determine whether an officer's conduct was unconstitutional *before* determining whether the conduct violated a clearly established right. Because the Court's decision in *Pearson* may shed light on the principles applicable in qualified-immunity analysis, the Court may wish to hold the petition in this case pending its decision in *Pearson*, and then dispose of the petition accordingly.

Alternatively, the Court should grant the petition and summarily reverse the judgment of the court of appeals. The court of appeals clearly misapplied qualified-immunity principles in reversing the entry of summary judgment for petitioners on respondents' First and Fourth Amendment claims. At the most basic level, the court of appeals erred by lumping together all of the individual defendants—including officers from three different federal and local law-enforcement agencies—in conducting its qualified-immunity analysis. As this Court and lower courts have repeatedly noted, a court must instead evaluate each defendant's conduct individually, to determine both whether that defendant violated a constitutional right and whether it would have been clear to a reasonable officer in *that defendant*'s position that his conduct was unlawful. The danger of an all-or-nothing approach to qualified immunity is particularly acute where, as here, officers from different law-enforcement agencies are working together to take advantage of each agency's respective expertise. A rule that would hold officers from one agency personally liable for the actions of officers of another would unnecessarily hinder cooperative efforts by law-enforcement agencies to combat terrorism or other criminal activity.

The court of appeals compounded that error by committing additional analytical errors with respect to each of respondents' claims. As to respondents' First Amendment claim, the court of appeals erroneously held that petitioners violated a "clearly established" right, and that qualified immunity was therefore not warranted, based solely on the existence of an allegation of retaliatory motive, without any analysis of the objective component of a First Amendment retaliation claim. And as to respondents' Fourth Amendment claim, the court of

appeals erroneously held that it would have been clear that the duration of the detention at issue was excessive. In the highly unusual factual circumstances they confronted, local law-enforcement officials acted reasonably in seeking assistance from the FBI to investigate a possible threat of domestic terrorism and in detaining respondents until the FBI arrived, and petitioners acted diligently in traveling to the scene and carrying out their investigation once there.

In sum, because the court of appeals' decision reflects "a clear misapprehension of the qualified immunity standard" in several different respects, *Brosseau* v. *Haugen*, 543 U.S. 194, 198 n.3 (2004) (per curiam), this case is an appropriate candidate for summary reversal.[1]

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[1] Respondents contend (Br. in Opp. 23-26) that this Court lacks jurisdiction over the petition because the Solicitor General did not authorize its filing. That contention lacks merit. Petitioners are federal officials sued in their individual capacities and, pursuant to procedures established by guideline, were represented by Department of Justice attorneys before the court of appeals. See 28 C.F.R. 50.15(a). The applicable guideline provides that, where (as here) the Solicitor General does not authorize certiorari, a private attorney may be provided to a federal defendant at the government's expense. See 28 C.F.R. 50.15(a)(11). The guideline further provides that a federal official sued in his individual capacity must be informed that, where the Solicitor General decides not to seek further review (and the Department of Justice decides not to provide a private attorney at government expense), the official "may pursue an appeal at his own expense." 28 C.F.R. 50.15(a)(8)(iv). It is neither highly unusual nor jurisdictionally problematic for federal officers to proceed in this Court with private representation in such circumstances. See, *e.g.*, *Groh* v. *Ramirez*, 540 U.S. 551 (2004); *Christopher* v. *Harbury*, 536 U.S. 403 (2002); *Hanlon* v. *Berger*, 526 U.S. 808 (1999).

A. The Court May Wish To Hold The Petition In This Case Pending Its Decision In *Pearson* v. *Callahan*

In *Saucier*, this Court reviewed the principles applicable in qualified-immunity analysis. See 533 U.S. at 200-207. In particular, the Court prescribed a two-step method that it stated lower courts "must" follow when a government officer is sued in his personal capacity and asserts a qualified-immunity defense. See *id.* at 200-201. Under that two-step method, a lower court must first determine whether, "[t]aken in the light most favorable to the party asserting the injury," the facts alleged "show the officer's conduct violated a constitutional right." *Id.* at 201. If the lower court concludes that an actual constitutional violation was adequately alleged or proved, it must next determine whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202.

In *Pearson*, this Court, in granting certiorari, directed the parties to brief "[w]hether the Court's decision in *Saucier* * * * should be overruled." 128 S. Ct. at 1702-1703. After the Court called for the government's views in this case, the government filed an amicus brief in *Pearson*. In that brief, the government argued that the Court need not reconsider *Saucier*'s general explication of qualified-immunity principles, but that the Court may wish to revisit *Saucier*'s requirement that lower courts, in analyzing a qualified-immunity defense, must adhere to the specified order of decision. See U.S. Br. at 22-33, *Pearson*, *supra* (No. 07-751).

Should the Court in *Pearson* revisit *Saucier* only to the extent that it imposed an order-of-decision requirement, it should not affect the outcome in this case, because, even after *Saucier*, this Court has invoked its summary-reversal procedure "to correct a clear misap-

prehension of the qualified immunity standard." *Brosseau*, 543 U.S. at 198 n.3. In *Brosseau*, the Court "express[ed] no view as to the correctness of the Court of Appeals' decision on the constitutional question itself," and instead summarily reversed on the ground that "the Court of Appeals was wrong on the issue of qualified immunity," *i.e.*, whether there was a violation of any clearly established right. *Id.* at 198. As explained below, for several reasons, the government believes that summary reversal on that basis would also be appropriate in this case.

Nonetheless, since the Court requested briefing in *Pearson* on the broad question whether *Saucier* "should be overruled," 128 S. Ct. at 1703, it is possible that the Court's reexamination of *Saucier* will not be limited to the order-of-decision requirement. In addition, it is possible that, in applying qualified-immunity principles to the claim at hand, the Court's decision in *Pearson* will shed light on those principles more generally. For those reasons, the Court may wish to hold the petition in this case pending its decision in *Pearson*, and then dispose of the petition accordingly. In the event that the decision in *Pearson* does more broadly address applicable qualified-immunity principles, the Court may wish to vacate the judgment below and remand for further consideration in light of that decision.

B. The Court Of Appeals Clearly Erred By Holding That Petitioners Were Not Entitled To Qualified Immunity On Respondents' First And Fourth Amendment Claims

Alternatively, summary reversal is warranted because, under settled qualified-immunity principles, the court of appeals seriously erred by holding that petition-

ers were not entitled to qualified immunity on respondents' First and Fourth Amendment claims.

1. Most fundamentally, the court of appeals erred by failing to evaluate each defendant's conduct on an individualized basis in conducting its qualified-immunity analysis. This Court has repeatedly noted that the qualified-immunity inquiry requires a defendant-specific analysis to determine both whether each defendant's conduct violated a constitutional right and whether it would have been clear to a reasonable officer in the defendant's position that *his* conduct was unlawful. See, *e.g.*, *Brosseau,* 543 U.S. at 199; *Saucier*, 533 U.S. at 202; *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). Consistent with those decisions, lower courts have stressed that the qualified-immunity doctrine requires an individualized inquiry. See, *e.g.*, *Cunningham* v. *Gates*, 229 F.3d 1271, 1287 (9th Cir. 2000); *Rouse* v. *Plantier*, 182 F.3d 192, 200 (3d Cir. 1999).

The court of appeals flatly disregarded that established principle in holding that petitioners were not entitled to qualified immunity. In its discussion of respondents' First and Fourth Amendment claims, the court referred approximately 40 times to "defendants" collectively. See Pet. App. 20a-47a. And while the court occasionally cited allegations against particular defendants, it made no effort to analyze the conduct of each individual defendant separately, with regard to either claim, under either prong of the qualified-immunity inquiry, and scarcely mentioned petitioners at all. See, *e.g.*, *id.* at 26a-27a, 38a-39a.

The court of appeals' error is magnified by the fact that it lumped together defendants from different agencies and jurisdictions—*i.e.*, officers from two local law-enforcement agencies and agents from the FBI—in con-

ducting its qualified-immunity analysis. Indeed, the court of appeals' decision appears to be affirmatively based on the unsupported assumption that the investigations of the local law-enforcement agencies and the FBI were simply duplicative—and that, in the face of reasonable suspicion of domestic terrorism, the FBI should simply have turned around and gone home once the local police completed their initial investigation. See, *e.g.*, Pet. App. 42a. Insofar as officers from one agency were effectively held liable for the actions of officers from another, the court of appeals' decision in this case threatens to deter law-enforcement agencies from working collaboratively to combat terrorism or other criminal activity. Because joint law-enforcement efforts are increasingly important in combating such activity, this aspect of the court's decision is particularly problematic.

Moreover, the court of appeals' error in lumping together the individual defendants was significant in this case both as a factual and as a legal matter. As a factual matter, petitioners' conduct stands apart from that of the other defendants in several material respects. For example, neither petitioner was at the scene until well after the initial stop of the individual respondents and, indeed, until well after their subsequent detention. Furthermore, Agent Shaw spent only a relatively short period of time at the scene—30 to 45 minutes (during which he was responsible for questioning Harrington)—and testified without contradiction that he was unaware of the duration of the detention before his arrival. See Pet. App. 13a-14a.

As a legal matter, the court of appeals plainly failed to analyze whether the conduct of *petitioners*—who were alerted by local authorities concerning a possible domestic terrorism threat—constituted retaliation in

violation of the First Amendment, much less whether it would have been clear to reasonable officers in *petitioners'* positions that their conduct violated respondents' First Amendment rights. And the court of appeals likewise plainly failed to analyze whether *petitioners* were sufficiently involved in the decision to detain the individual respondents that they can be held liable for any violation of the Fourth Amendment resulting from the duration of the detention, much less whether it would have been clear to reasonable officers in *petitioners'* positions that their involvement gave rise to a Fourth Amendment violation. The court of appeals' error is reason enough for this Court to "exercise [its] summary reversal procedure here." *Brosseau*, 543 U.S. at 198 n.3.

2. The court of appeals compounded its error in lumping together the individual defendants by committing additional analytical errors with respect to each of respondents' claims.

a. With regard to respondents' First Amendment claim, the court of appeals denied petitioners qualified immunity on the ground that the existence of conflicting evidence of the defendant officers' retaliatory intent, without more, was "dispositive" of the qualified-immunity defense. Pet. App. 30a-31a. That is incorrect.

Although the Court has frequently addressed the scope of the First Amendment protection against retaliation in the specific context of public employment, see, *e.g.*, *Garcetti* v. *Ceballos*, 547 U.S. 410, 417-420 (2006), it has not articulated a test for First Amendment retaliation claims more generally. To establish such a claim, the Sixth Circuit requires a plaintiff to show, first, that "the plaintiff was engaged in a constitutionally protected activity"; second, that "the defendant's adverse action caused the plaintiff to suffer an injury that would likely

chill a person of ordinary firmness from continuing to engage in that activity"; and third, that "the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights." *Bloch* v. *Ribar*, 156 F.3d 673, 678 (1998).

In determining whether it would have been clear to a reasonable officer that the officers' conduct violated the First Amendment under that test, the court of appeals considered only the third step, *i.e.*, whether the officers acted with a retaliatory motive. See, *e.g.*, Pet. App. 30a (concluding that "retaliatory intent proves dispositive of [d]efendants' claim to qualified immunity"). The court of appeals thus disregarded the objective component of its own test for First Amendment retaliation claims, *i.e.*, whether it would have been clear to a reasonable officer that a given defendant's participation in the detention "would likely chill a person of ordinary firmness from continuing to engage in [the protected] activity." *Bloch*, 156 F.3d at 678.

Indeed, not only did the court of appeals truncate its own retaliation inquiry, but it rested the qualified-immunity determination on a subjective factor—*i.e.*, motive—that is particularly susceptible to manipulation. This Court has observed that, "[b]ecause an official's state of mind is easy to allege and hard to disprove, insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials." *Crawford-El* v. *Britton*, 523 U.S. 574, 584-585 (1998) (internal quotation marks omitted). The Court has therefore emphasized the fact that, "at least with certain types of claims, proof of an improper motive is not sufficient to establish a constitutional violation." *Id.* at 593. This case well illustrates that concern, because the only specific evidence

cited by the court of appeals for the proposition that *petitioners* possessed a retaliatory motive was evidence that Agent Morris was aware of the content of respondents' speech. See Pet. App. 25a, 26a-27a.

If the court of appeals had considered the objective component of its test for First Amendment retaliation claims,[2] it is doubtful that it would be satisfied here. Even assuming that petitioners themselves were responsible for the entire detention (and they were not), it would not have been clear to a reasonable officer in petitioners' position that their conduct would chill persons like respondents—who were so committed to engaging in the underlying protected activity that they donned body armor, carried mace, and carefully coordinated their activities—from engaging in protest activity of the type at issue here. Cf. Pet. App. 59a (determining that, "when stopped for a traffic violation, and found to be in possession of police equipment, radio equipment, body armor and kevlar helmets, a three hour detention would not chill a person of ordinary firmness from * * * participation in the public debate on one of the most contentious issues in society today").

The court of appeals additionally erred by concluding that the defendant officers (including petitioners) were not entitled to qualified immunity because "[t]he 'contours of the right' to be free from retaliation were * * *

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[2] Petitioners correctly note (Pet. 28-31) that some lower courts have framed the objective component of the test in terms of the chilling effect on "a similarly situated person of ordinary firmness," rather than an "average" or "ordinary" person. This case, however, would not be a suitable vehicle in which to address any variation in the formulations used by the lower courts, because, as petitioners recognize (Pet. 26 n.6), the outcome at the second step of the qualified-immunity inquiry would be the same under any formulation.

abundantly clear on the day [d]efendants stopped and detained [the individual respondents]." Pet. App. 30a. In support of that conclusion, the court noted that it was clear that a First Amendment retaliation claim was applicable to cases involving "police action to seize a plaintiff's person." *Ibid.* (citing *Estate of Dietrich* v. *Burrows*, 167 F.3d 1007 (6th Cir. 1999)). This Court has repeatedly made clear, however, that the qualified-immunity inquiry does not proceed at such a high level of generality. Instead, it requires a court, *taking into account the facts and circumstances of the case*, to determine whether the officer's conduct violated clearly established law: *i.e.*, whether it would have been clear to a reasonable officer in the specific situation he confronted that his conduct was unlawful. See, *e.g.*, *Brosseau*, 543 U.S. at 199-200*;* *Saucier*, 533 U.S. at 201; *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999).

In this case, it does not follow from the fact that the Sixth Circuit had previously recognized that police conduct could give rise to a retaliation claim, that *petitioners'* conduct—in the "novel factual circumstances" they confronted, Pet. App. 45a—violated clearly established law. Indeed, the court of appeals identified no case, from any court, presenting even remotely similar factual circumstances. "Of course, in an obvious case," general legal standards "can 'clearly establish' the answer, even without a body of relevant case law." *Brosseau*, 543 U.S. at 199 (citing *Hope* v. *Pelzer*, 536 U.S. 730, 738 (2002)). Perhaps even more so than in *Brosseau*, however, "[t]he present case is far from the obvious one." *Ibid.*

b. With regard to respondents' Fourth Amendment claim, the court of appeals denied petitioners qualified immunity on the ground that, notwithstanding the fact that the officers "confronted novel factual circum-

stances," it would have been clear to reasonable officers that "detaining [the individual respondents] over two hours after they dispelled any reasonable suspicions ripened the investigatory stop into an arrest absent probable cause." Pet. App. 45a. That is also incorrect.

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court held that an officer may detain an individual on the basis of reasonable suspicion pending further investigation. In cases following *Terry*, the Court has repeatedly refused to impose a hard-and-fast limit on the permissible duration of a *Terry* stop. See, *e.g.*, *United States* v. *Sharpe*, 470 U.S. 675, 685 (1985); *United States* v. *Place*, 462 U.S. 696, 709-710 & n.10 (1983). Instead, the Court has consistently held that, in evaluating the reasonableness of the duration of a *Terry* stop, courts should primarily consider whether the police pursued their investigation diligently under the particular circumstances they faced. See, *e.g.*, *Sharpe*, 470 U.S. at 686; *Place*, 462 U.S. at 709; cf. *Florida* v. *Royer*, 460 U.S. 491, 500 (1983) (plurality opinion) (stating that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop").

Consistent with those principles, lower courts have routinely upheld *Terry* stops in which the duration of the stop was extended in order to await the arrival on the scene of other law-enforcement officers, where the presence of those officers was necessary to effectuate the purpose of the stop and where the officers acted diligently both in traveling to the scene and in carrying out their investigation. Thus, lower courts have specifically sustained detentions that were prolonged in order to await the arrival of drug-detection dogs. See, *e.g.*, *United States* v. *Leal*, 235 Fed. Appx. 937, 940-942 (3d Cir. 2007) (delay of one hour and 20 minutes), cert. de-

nied, 128 S. Ct. 1650 (2008); *United States* v. *Donnelly*, 475 F.3d 946, 953-954 (8th Cir.) (one hour), cert. denied, 127 S. Ct. 2954 (2007); *United States* v. *White*, 42 F.3d 457, 460 (8th Cir. 1994) (one hour and 20 minutes). And lower courts have also sustained detentions that were prolonged in order to await the arrival of other law-enforcement officials (including law-enforcement officials from other agencies). See, *e.g.*, *United States* v. *Maltais*, 403 F.3d 550, 557-558 (8th Cir. 2005) (delay of approximately two hours for arrival of agents from Border Patrol, Immigration and Customs Enforcement, and Bureau of Indian Affairs), cert. denied, 546 U.S. 1177 (2006); *United States* v. *Winfrey*, 915 F.2d 212, 217 (6th Cir. 1990) (10 to 15 minutes for arrival of agent from Drug Enforcement Agency), cert. denied, 498 U.S. 1039 (1991).

In analyzing the validity of the detention here, the court of appeals correctly recognized that "courts consider not only the length of the stop, but also whether the police diligently pursue their investigation." Pet. App. 37a (internal quotation marks omitted). The court erred, however, to the extent that it concluded that the local law-enforcement officials who initially conducted the stop should have terminated the detention once they completed their initial investigations, rather than detaining the individual respondents until the FBI agents arrived. See, *e.g.*, *id.* at 42a. As the court of appeals repeatedly noted, see, *e.g.*, *id.* at 36a-37a, 38a, the initial basis for the detention was that officers had reasonable suspicion that respondents were engaged in domestic terrorism. The FBI has specific responsibility for investigating matters related to terrorism (including domestic terrorism), see, *e.g.*, 28 C.F.R. 0.85(*l*), and, as the magistrate judge noted, it unquestionably has special

expertise in doing so. See Pet. App. 91a. It was therefore entirely reasonable for local law-enforcement officials to consult with the FBI, and to await their arrival on the scene, before releasing respondents.

Moreover, it is undisputed that the FBI agents, including petitioners, acted diligently both in traveling to the scene and in carrying out their investigation. Insofar as the agents were delayed in arriving at the scene, it was because they had to travel a considerable distance to the scene in "heavy" rush-hour traffic. Pet. App. 91a. Once they did arrive, Agent Shaw completed his portion of the investigation in no more than 30 to 45 minutes. See, *e.g.*, *id.* at 13a-14a, 17a, 19a; C.A. App. 478-481, 484. Because the local law-enforcement officials acted reasonably in asking the FBI further to investigate (and detaining respondents until the FBI arrived), the court of appeals erred by holding that the resulting delay rendered the detention invalid.

Regardless whether the conduct of some or all of the defendant officers was unlawful, however, the court of appeals plainly erred in holding that it would have been *clear* to a reasonable officer in the particular circumstances that petitioners confronted that their conduct was unlawful. In reaching that conclusion, the court of appeals relied on this Court's decision in *Place* and the court of appeals' decisions in *United States* v. *Butler*, 223 F.3d 368 (6th Cir. 2000), and *United States* v. *Heath*, 259 F.3d 522 (6th Cir. 2001). See Pet. App. 44a-46a. But those cases stand only for the general principles that the validity of a detention of a given duration turns on "whether the police diligently pursue their investigation," *Place*, 462 U.S. at 709, and that a "continued detention * * * beyond the scope and duration necessary to check out the suspicious circumstances that led to the

original stop" is improper, *Butler*, 223 F.3d at 376; accord *Heath*, 259 F.3d at 530. None of those cases addresses the specific question whether the duration of a detention is excessive where, as here, local law-enforcement officers ask the FBI further to investigate and simply detain suspects until the FBI arrives. None involves a situation in which the FBI (or another law-enforcement agency) acts reasonably and diligently in traveling to the scene and conducting its investigations. And none involves a situation in which the local officers reasonably fear that the suspects may be engaged in domestic terrorism.

Even assuming, therefore, that petitioners were involved in the decision to detain the individual respondents and that such detention violated respondents' Fourth Amendment rights, the court of appeals erred in concluding that the rights in question were clearly established. That error, especially when combined with the other errors discussed above, is sufficient to warrant summary reversal.

CONCLUSION

The Court may wish to hold the petition for a writ of certiorari pending its decision in *Pearson* v. *Callahan*, No. 07-751, and then dispose of the petition accordingly. Alternatively, the Court should grant the petition and summarily reverse the judgment of the court of appeals.

Respectfully submitted.

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