No. 15-168

In the Supreme Court of the United States

RICHARD RYNEARSON, PETITIONER

v.

JUSTIN K. LANDS, BORDER PATROL AGENT, ET AL.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether respondents are entitled to qualified immunity in this *Bivens* action because no clearly established law established that their investigation of petitioner's immigration status, which kept petitioner at a U.S. Border Patrol highway checkpoint for about 34 minutes, violated the Fourth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is not published in the Federal Reporter but is reprinted at 601 Fed. Appx. 302. The opinions of the district court (Pet. App. 19a-49a) and magistrate judge (Pet. App. 50a-89a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 2015. A petition for rehearing was denied on May 4, 2015 (Pet. App. 90a-91a). The petition for writ of certiorari was filed on August 3, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This *Bivens* case concerns petitioner's experience at a highway immigration checkpoint located about 60 miles from the Mexican border. Pet. App. 20a. Petitioner's delay at the checkpoint, which would normally

have been very brief, lasted approximately 34 minutes due to delays following petitioner's use of what the court of appeals termed "unorthodox tactics" when refusing to cooperate with U.S. Border Patrol agents. See *id.* at 8a. Petitioner seeks monetary damages from respondents—two individual Border Patrol agents—based on his contention that the checkpoint delay violated his Fourth Amendment rights. The question presented is whether respondents are entitled to qualified immunity because petitioner failed to identify clearly established law showing that their conduct in the wake of "unorthodox tactics" by an "unusually uncooperative person" (*ibid.*) violated the Fourth Amendment.

1. On March 18, 2010, petitioner drove his two-door vehicle into a Border Patrol checkpoint on Highway 90 near Ulvade, Texas. Pet. App. 20a. Petitioner, an Air Force officer, entered the checkpoint in a line of traffic and approached Border Patrol Agent Justin Lands with his driver's side window "slightly cracked." *Ibid.* Because of the traffic noise, Agent Lands asked petitioner to lower his window so that he could hear him. *Ibid.* Petitioner lowered his window just "a little further." *Ibid.* At that point, Agent Lands directed petitioner to the secondary inspection area, noting to petitioner the heavy traffic behind him in the checkpoint lane. *Ibid.* This initial interaction lasted "mere seconds." *Ibid.*

Petitioner exited the line of traffic into the secondary inspection area but closed his window completely. Pet. App. 20a-21a. Agent Lands approached and asked petitioner to exit the vehicle. *Id.* at 21a. Petitioner refused through his fully closed window and demanded to know the reason for the request. *Ibid.*

Agent Lands explained that the noise from the highway and checkpoint made it difficult to hear petitioner; Agent Lands thus asked petitioner several times to lower his window. *Ibid.* "Despite numerous requests, [petitioner] adamantly refused to roll down the window." *Ibid.* Instead, from the relative quiet of his closed car, petitioner repeatedly asked Agent Lands if he was being detained and, if so, on what grounds. *Ibid.*

When Agent Lands asked petitioner for identification, petitioner placed two documents—a driver's license and military identification card—against the inside of his still-closed window. Pet. App. 21a. Agent Lands stated that he would need to inspect the documents to insure that they were valid, but petitioner refused to open his window. *Ibid.* Petitioner continued to ask whether he was being detained, and when Agent Lands again repeated that he was having difficulty hearing petitioner, petitioner responded from the quiet of his car that the agent could hear him. *Ibid.*

Petitioner made several calls from his mobile phone, including one to the San Antonio office of the Federal Bureau of Investigation (FBI). Pet. App. 22a. During his call to the FBI, petitioner explained that he was at a Border Patrol checkpoint, asserted that the Border Patrol agents had no reasonable suspicion to "search" his vehicle, and stated that he did not want to lower his window and felt threatened. *Ibid.* Petitioner told the FBI agent on the phone that "everything is being filmed from several different angles [from] inside the vehicle" and that he was going to "put[] it over the internet." See Video Pt. 1, at 7:55-

8:05.[1] Although the agent's response is not audible on petitioner's video, the video indicates that petitioner was not pleased by the response. Petitioner answered: "But they have no right to search my vehicle" and, after an apparent explanation from the FBI agent, petitioner added, "Why would I do that? * * * They're threatening. I mean, they have weapons." *Id.* at 8:15-8:35. Meanwhile, the video shows Border Patrol agents simply standing outside petitioner's vehicle. *Ibid.* None of the agents drew or brandished their weapons during the encounter or took threatening actions. After further responses from the FBI agent, petitioner states, "But they don't have reasonable suspicion"; and "Okay. So you're saying I have to give up my Fourth Amendment rights." *Id.* at 8:40-9:05. Petitioner ends the conversation with a sigh and a request for the agent's name. *Id.* at 9:25-9:55.

About ten minutes into the encounter, petitioner slightly lowered his window and told Agent Lands that, according to the FBI, reasonable suspicion is required before agents could conduct a search of a vehicle. Pet. App. 22a. Petitioner then continued to debate the legal standard to justify stopping a person at an immigration checkpoint. *Ibid.* Agent Lands asked petitioner if he was a United States citizen and petitioner responded "yes." *Ibid.*

When petitioner continued to challenge the reasons for his detention, Agent Lands summoned a supervi-

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[1] Petitioner posted his four-part video on the internet, and respondents included the video as an exhibit to their motion to dismiss. Pet. App. 2a. Part I of the video, which is available at https://www.youtube.com/watch?v=4BId1f8WG2s, bears the logo of "Veterans Against Police Abuse," an entity that lists petitioner as its founder. See http://www.veteransagainstpoliceabuse.org/.

sor to discuss the situation with petitioner. Pet. App. 22a-23a. As Agent Lands walked away, petitioner placed two passports against the closed driver's side window. *Id.* at 23a.

Supervisory Agent Raul Perez then arrived at petitioner's car. Pet. App. 23a. Agent Perez asked petitioner to hand him the passports and inquired into identity of petitioner's commanding officer. *Ibid.* Although petitioner had placed a military identification card against his car window, he refused to identify his commanding officer and accused Agent Perez of attempting to interfere with his employment. *Id.* at 23a; see *id.* at 21a. Agent Perez took possession of the passports, stated that he would validate the passport information, and left the secondary area. *Id.* at 23a. Agent Perez returned to tell petitioner that he would call Air Force officials. *Ibid.* Petitioner responded, "okay." *Ibid.*

The passports were returned to petitioner approximately thirteen minutes, at which point an agent informed petitioner that he was free to go. Pet. App. 23a; see *id.* at 23a-24a (summarizing discussion). The agent stated that he appreciated petitioner's cooperation and requested that, "next time, if you'd just be a little bit more cooperative," it would help to expedite the process. Video Pt. 4, at 3:55-4:10, https://www.youtube.com/watch?v=mZbCCBH7YM4. The agent explained, "I know you might be able to hear us just fine, but we have a lot of traffic out here" and the "highway noise" makes it difficult to hear. *Id.* at 4:05-4:15. "If you could roll down your window * * * at least enough so that we can communicate," the agent stated, it would help the Border Patrol agents, who are "trying to do this as expedient[ly] as possible" to

keep the traffic moving. *Id.* at 4:10-4:30. The agent also suggested that if petitioner had his identification handy and "if you want to just hand it to us and let us look at it, that would be fine," because the agents need "to inspect it to make sure it's not a counterfeit document," which cannot be done through a window. *Id.* at 4:30-4:54. The agent ended by telling petitioner, "You have a safe trip, Sir. Watch out for traffic. It's real busy." *Id.* at 4:55-5:05.

The entire stop lasted about 34 minutes. Pet. App. 24a. No search was conducted of petitioner's vehicle, which petitioner never exited. *Ibid.*

2. Petitioner subsequently filed this action which, as relevant here, asserted *Bivens* claims against Agents Lands and Perez in their individual capacities. The district court referred the matter to a magistrate judge, who recommended that the court grant respondents' motion to dismiss, or for sumary judgment on, the *Bivens* claims. Pet. App. 50a-89a.

The district court adopted the recommendation and granted the motion. Pet. App. 19a-49a. The court concluded that the stop, notwithstanding its duration, did not violate the Fourth Amendment. *Id.* at 32a-41a. The court concluded that petitioner's "own actions," including his "refus[al] to lower his window" and "combative" behavior during the stop, "impeded the agent's efforts to complete his investigation." *Id.* at 38a, 40a; see *id.* at 38a-41a. The court further concluded that petitioner's "abnormal behavior" gave rise to a "reasonable suspicion that [petitioner] was involved in some criminal activity." *Id.* at 41a.

3. a. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-18a. The court observed that the Fourth Amendment permits a

"routine immigration checkpoint stop conducted without reasonable suspicion," *id.* at 6a, and that the parties did not dispute the lawfulness of the initial stop, *id.* at 7a. The court also noted that "[n]either [petitioner] nor his car was searched." *Ibid.* Petitioner thus argued that respondents violated the Fourth Amendment by "being 'intentionally dilatory'" in their conduct of the stop. *Id.* at 6a-7a. The court, however, concluded that it need not decide whether petitioner "had some limited Fourth Amendment right to refuse to cooperate" with the Border Patrol agents, which, if it existed, might support petitioner's view that the stop's duration violated the Fourth Amendment. *Id.* at 8a. The majority instead concluded that respondents "were entitled to qualified immunity" because their conduct did not violate "any clearly established constitutional right." *Id.* at 8a-9a.

The court of appeals explained that the agents here "had difficulty determining how to respond to [petitioner's] unorthodox tactics" at the highway checkpoint. Pet. App. 8a. Petitioner's conduct, the court emphasized, was "unusual at least in [terms of] the facts described in any of the caselaw" it had identified. *Ibid.* The court added that it "ha[d] not discovered nor been shown any authority supporting [petitioner's] claim that the constitutional rights that he chose to stand on were clearly established." *Ibid.* Accordingly, the court concluded, respondents, "at worst, made reasonable but mistaken judgments when presented with an unusually uncooperative person" and, for that reason, were entitled to qualified immunity. *Ibid.*

b. Judge Elrod dissented. Pet. App. 10a-18a. She concluded that respondents had unreasonably extend-

ed petitioner's checkpoint stop after petitioner presented his passports for inspection. *Id.* at 16a. No reasonable officer, Judge Elrod concluded, would have taken so long to authenticate the passports or called petitioner's employer. *Id.* at 16a-17a.

ARGUMENT

The court of appeals correctly held that respondents are entitled to qualified immunity in this *Bivens* action. That decision does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. To defeat a claim of qualified immunity, a plaintiff must plead and ultimately prove that (i) the defendant committed "a violation of a constitutional right" and (ii) "the right at issue was 'clearly established' at the time of [the] defendant's alleged misconduct." *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009) (citation omitted). To determine whether a right was "clearly established," a court must first define the right at the appropriate level of specificity. That is because any constitutional right would be deemed "clearly established" if framed at a broad level of generality, thus depriving government officials of qualified immunity. See *Wilson* v. *Layne*, 526 U.S. 608, 614-615 (1999); *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987). Accordingly, a right must be established "in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official." *Reichle* v. *Howards*, 132 S. Ct. 2088, 2094 (2012) (quoting *Anderson*, 483 U.S. at 640).

Once the right is properly framed, a court must determine whether "every reasonable official would [have understood] that what he is doing violates that right." *Reichle*, 132 S. Ct. at 2093 (citation and inter-

nal quotation marks omitted; brackets in original). That standard is satisfied only if "existing precedent * * * ha[s] placed the * * * constitutional question confronted by the official beyond debate." *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2023 (2014) (citation and internal quotation marks omitted). In other words, "controlling authority" or at least "a robust 'consensus of cases of persuasive authority'" must establish that the official's conduct was unconstitutional. *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (quoting *Wilson*, 526 U.S. at 617). That authority must address circumstances sufficiently similar to those at issue so that it places the relevant constitutional question "beyond debate." *Carroll* v. *Carman*, 135 S. Ct. 348, 350, (2014) (per curiam) (quoting *al-Kidd*, 131 S. Ct. at 2083). Qualified immunity thereby "gives government officials breathing room to make reasonable but mistaken judgments" by "protect[ing] 'all but the plainly incompetent or those who knowingly violate the law.'" *al-Kidd,* 131 S. Ct. at 2085 (quoting *Malley* v. *Briggs,* 475 U.S. 335, 341(1986)).

The court of appeals correctly held that respondents are entitled to qualified immunity because petitioner failed to demonstrate that they violated any clearly established Fourth Amendment right. This Court has long recognized that "stops for brief questioning routinely conducted at permanent [Border Patrol] checkpoints are consistent with the Fourth Amendment." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 566 (1976). Moreover, "no particularized reason need exist to justify" referring a motorist to a secondary inspection area at such checkpoints for questioning. *Id.* at 563-564. Petitioner does not dispute these principles. In fact, petitioner now makes

clear that he no longer challenges the first 11 minutes of his 34-minute stop. Pet. 12. In doing so, petitioner abandons his challenge to the overall duration of the stop that the court of appeals rejected.

Petitioner now contends (Pet. 12) that the final 23 minutes of the stop was unconstitutional because, he asserts, that delay was "unrelated to any [of his] 'unorthodox tactics.'" But nothing supports the view that petitioner's unusual conduct during the initial portion of the stop should be deemed unrelated to the stop's overall duration. A fixed Border Patrol checkpoint's primary function is to monitor for immigration violations by stopping and questioning motorists in the vicinity of the border. In the normally "brief detention" that results, the vehicle's occupants are required to provide "a response to a brief question or two" and possibly to produce "a document evidencing a right to be in the United States." *Martinez-Fuerte*, 428 U.S. at 558 (citation omitted). But when a motorist exhibits unorthodox behavior by, for instance, repeatedly refusing to open his window when requested by agents attempting to speak with him and declining to hand over identification for inspection, officers may reasonably investigate such atypical behavior. See *United States* v. *Sharpe*, 470 U.S. 675, 685 (1985) (The reasonableness of an investigatory stop is judged using "common sense and ordinary human experience."). Such suspicious behavior can warrant a reasonably extended stop, particularly where, as here, a motorist's own actions undermine the speed at which agents can effectively discharge their duties.

Petitioner's focus (Pet. 23) on respondent's telephone call to confirm petitioner's military status is particularly anomalous because petitioner himself

showed his military identification in response to the stop. Having asserted his military employment to Border Patrol agents, petitioner cannot properly complain that the agents violated a clearly established constitutional right by verifying his assertion in the course of investigating his immigration status. See Pet. App. 40a ("Although [petitioner] relies on his military status to argue that the agents should have known that he was a United States citizen, he then tries to argue that it is a constitutional violation to contact a supervisor with knowledge of his military status to confirm his citizenship."). Indeed, petitioner identifies no decision basing a constitutional violation on similar conduct.

2. Petitioner asserts (Pet. 21) that the court of appeals' "h[e]ld[] that agents may pursue inquiries unrelated to immigration status during an immigration checkpoint detention" and contends (Pet. 21-27) that that purported holding conflicts with holdings in *United States* v. *Massie*, 65 F.3d 843 (10th Cir. 1995), and *United States* v. *Taylor*, 934 F.2d 218 (9th Cir. 1991), cert denied, 502 U.S. 1074 (1992). But the court of appeals did not hold that agents may delay an immigration stop with inquiries wholly unrelated to immigration status. To the contrary, the court stated that "[t]he purpose of [an immigration] stop is limited to ascertaining the occupants' citizenship status" and its "duration" is limited to the period "reasonably necessary" to pursue that inquiry. Pet. App. 6a (citation omitted).

Moreover, *Taylor* addressed (and upheld) a search that occurred after the border-enforcement functions of the stop had been fully resolved, 934 F.2d at 220, while *Massie* concluded that agents may pursue ques-

tions related to their immigration-enforcement and contraband-detection duties, 65 F.3d at 848. Neither decision conflicts with the decision of the court of appeals here, which did not decide whether respondents' conduct ultimately violated the Fourth Amendment. See Pet. App. 8a. The court instead held that respondents were entitled to qualified immunity because they confronted an "unusually uncooperative person" presenting circumstances for which no "clearly established" Fourth Amendment law yet existed. *Id.* at 8a-9a.

Petitioner separately contends (Pet. 27-31) that the court of appeals' decision conflicts with decisions of other courts of appeals rendered in contexts that do not involve immigration checkpoints. Petitioner argues (Pet. 27) that such decisions show that, even when a detainee causes a law-enforcement stop to be delayed to some extent, law-enforcement officers may violate the Fourth Amendment by further extending the stop beyond the period warranted by a reasonably diligent investigation. The court of appeals here did not conclude otherwise; it recognized that the "permissible duration of an immigration checkpoint stop" is "the time reasonably necessary to determine the citizenship status of the persons stopped." Pet. App. 6a (citation omitted). But respondents' investigation into petitioner's status was itself delayed by petitioner's conduct. Although the court assumed that respondents might have made "mistaken judgments" about how to pursue their investigation "when presented with an unusually uncooperative person," no clearly established law would have put the agents on notice that their conduct was unconstitutional. *Id.* at 8a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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