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.*,
Respondents.

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

BRIEF IN OPPOSITION

ROBERT JOSEPH MUISE
Counsel of Record
THOMAS MORE LAW CENTER
24 FRANK LLOYD WRIGHT DRIVE
P.O. BOX 393
ANN ARBOR, MI 48106
(734) 827-2001

Counsel for Respondents

February 27, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Blank Page

QUESTIONS PRESENTED

This case does not meet the requirements for review based on the criteria for granting certiorari. The law on qualified immunity, First Amendment retaliation claims, and Fourth Amendment seizures is well established, and the Sixth Circuit's unanimous decision properly applied this well settled law to the facts presented. *See* Sup. Ct. R. 10 (noting, for example, that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). This is not the type of case that is ripe for this Court to review, as the Solicitor General's decision to not authorize review tacitly acknowledges.[1] Indeed, the Petitioners' claim of a conflict with this Court's precedent and the precedent of other circuits is illusory. In the final analysis, disturbing the Sixth Circuit's opinion will have the deleterious effect of eroding well-established constitutional protections afforded all law abiding citizens.

1. Whether it was clearly established in June 2002 that federal law enforcement officers who unreasonably seized, without probable cause, law-abiding citizens on account of the citizens'

---

[1] Because this is a case "in which the United States is interested," *see* 28 U.S.C. § 518(a), and the petition was filed without the authorization of the Solicitor General, it is not clear that this Court has jurisdiction to proceed. *See United States v. Providence Journal Co.*, 485 U.S. 693 (1988).

constitutionally protected speech could face civil liability for violating the First Amendment.

2. Whether it was clearly established in June 2002 that federal law enforcement officers who ordered, without probable cause, the prolonged seizure of law-abiding citizens after local law enforcement officers conducted a full *Terry* stop that revealed no criminal activity could face civil liability for violating the Fourth amendment.

RULE 29.6 DISCLOSURE

None of the Respondents in this action has a parent corporation or any stock owned by publicly held corporations.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

STATEMENT OF THE CASE

On June 10, 2002, Respondents, members of Center for Bio-Ethical Reform, Inc. ("CBR"), a pro-life advocacy group, were engaging in lawful, political speech on the public streets in Dayton, Ohio.[2] They were demonstrating against abortion by displaying large, color pictures depicting graphic images of aborted fetuses on the sides of box-body style trucks. Above each picture was captioned the word "Choice." The pictures also displayed CBR's website (abortionNo.org) and phone number. These large, eye-catching pictures are difficult to ignore.[3]

Respondents Harrington and Patch were each driving one of CBR's trucks, and Respondent Henkel was driving an escort security vehicle. The security vehicle is equipped similar to how other corporate security vehicles across the country are equipped. All of the vehicle's modifications are legal,[4] as the law enforcement officers acknowledged.

At about 4:00 p.m., Respondents drove to the private residence of two volunteers who offered to let them park their vehicles on their property for the night. Upon arriving at the residence, Respondents pulled to the side of the road so they could take a closer

---

[2] J.A. 199-203; J.A. 278, 284; J.A. 413-14, 416, 434-35; J.A. 305, 308, 310.

[3] J.A. 201; J.A. 205, 431-32; J.A. 206-07, 209, 514, 518.

[4] J.A. 202; J.A. 283; J.A. 311; J.A. 471; J.A. 211-12; J.A. 481.

look to determine whether the trucks could safely make it down the driveway.[5]

While the trucks were pulled over, Officer Clark of the Springboro Police Department arrived.[6] Clark exited his police cruiser and approached the truck driven by Respondent Patch, who was sitting in the driver's seat.[7] The large graphic pictures were plainly visible to Clark and to the motorists who were passing by. As Officer Clark acknowledged, these pictures are "pretty hard to miss."[8]

At the time of this initial stop, Respondent Patch was wearing protective clothing (vest and helmet) that the drivers of the trucks typically wear for safety reasons.[9] CBR members have been threatened with violence because of their speech activity. These threats have been reported to law enforcement, including the FBI.[10] Respondent Henkel, the driver of the security vehicle, did not wear the protective gear.[11]

---

[5] J.A. 285-86; J.A. 416-20, 441; J.A. 313-15.

[6] J.A. 420; J.A. 257-58.

[7] J.A. 420; J.A. 258.

[8] J.A. 263; *see also* J.A. 421.

[9] J.A. 418; *see also* J.A. 202; J.A. 281-283; J.A. 309; J.A. 208; J.A. 259-60.

[10] J.A. 202; J.A. 282-83.

[11] J.A. 418; J.A. 305.

During this initial contact, Officer Clark asked Patch if they were lost or needed assistance.[12] Patch told the officer that he was part of a group campaigning against abortion—directing the officer's attention to the pictures on the side of his truck; that they were just finishing for the day; and that they were trying to get down the driveway to park their vehicles for the evening.[13] Clark asked what was in the truck. Patch responded, "Nothing. The message is on the sides of the truck."[14] Clark realized that Respondents were displaying a message about abortion, and he departed without further investigation.[15] Clark did not record any license information, or the phone number or website for CBR, which were on the truck. He claimed to be concerned about the protective gear, but he never asked about it during this initial stop, nor did he observe any weapons.[16] Clark did not cite Respondents for any traffic violation because none was committed. In his deposition, Clark testified that he did not cite Respondents based on "officer discretion." However, when pressed on the issue, Clark admitted that there was no violation because Respondents were blocked

---

[12] J.A. 420-21; J.A. 260.

[13] J.A. 420-21; *see also* J.A. 260.

[14] J.A. 420-21; *see* J.A. 260.

[15] J.A. 421; J.A. 260-62.

[16] J.A. 260-62.

from turning into the driveway and therefore had a valid reason for momentarily stopping in the road.[17]

Believing this to be a routine contact with the local police, Respondents continued their efforts to get their vehicles down the driveway.[18] Because of obstructions, however, Respondent Harrington decided not to go any further.[19]

After his initial contact with Patch, Officer Clark contacted his lieutenant, who directed him to contact Detective Parker.[20] That day, Parker was the supervisor/decision maker for the Springboro Police Department.[21] Clark contacted Parker and told him what he saw.[22] He told Parker about the pictures.[23]

Parker called several local law enforcement agencies, inquiring about Respondents' activity.[24] He also contacted the FBI—the "boys from Dayton," as he

---

[17] J.A. 259.

[18] J.A. 287; J.A. 421.

[19] J.A. 286-87; J.A. 315-16.

[20] J.A. 262.

[21] J.A. 374-75.

[22] J.A. 263; J.A. 370, 381-82.

[23] J.A. 263.

[24] J.A. 370, 376, 382.

described them.[25] Parker spoke with Petitioner Morris, the senior agent in charge of the Dayton FBI office.[26] Parker informed Morris that Respondents were members of a group that opposes abortion.[27]

Morris did not have any information that Respondents were involved in criminal activity.[28] Nevertheless, Morris told Parker that he would come take a look, and he directed several of his agents to respond.[29] According to Morris, he wanted to "gather intelligence."[30] According to Parker, Morris directed the detention of Respondents so that he and "his boys" could talk with them.[31]

At least five FBI agents responded, including Morris, Petitioner Shaw, Burkey, Buzzard, and Howley.[32] Yet, no one from the FBI had any

---

[25] J.A. 376-77; J.A. 264.

[26] J.A. 376-78; J.A. 352, 354.

[27] J.A. 356.

[28] J.A. 361, 368; *see* J.A. 504.

[29] J.A. 477; J.A. 377-78, 387; J.A. 356, 358-59.

[30] J.A. 356.

[31] J.A. 388.

[32] J.A. 476; J.A. 353.

information that Respondents were involved in, or wanted for, any criminal activity.[33]

Parker drove to an area near the initial stop and met with Clark. This "staging area" was located near Pennyroyal on Deer Trail Drive.[34] Other Springboro officers responding were Officers Walsh, Peagler, and Kuhlman.[35]

According to the officers, the area north of Pennyroyal is within the jurisdiction of Clearcreek Township. Pennyroyal Road and the areas south of it, including Queensgate Road, are within Springboro's jurisdiction.[36] Morris testified that the FBI "had no jurisdiction to do any enforcement action" in this case.[37]

While the officers were meeting on Deer Trail, Respondents planned to drive the trucks to their alternate overnight location, a local church parking lot. The pastor of the church had given them permission to do so.[38]

---

[33] J.A. 482, 493-95; J.A. 361, 368; J.A. 248.

[34] J.A. 263; J.A. 217, 381-82.

[35] J.A. 502; J.A. 457; J.A. 371, 383; J.A. 445-47; J.A. 342.

[36] J.A. 455-56; J.A. 392-93.

[37] J.A. 356.

[38] J.A. 287; *see also* J.A. 315-16.

As the trucks pulled out and headed west along Pennyroyal, several police cruisers departed the staging area and descended upon Respondents.[39] The officers saw Respondents leave and were directed to stop them.[40] Moments later, additional police vehicles pulled up to the driveway and blocked Respondent Henkel's vehicle, preventing him from leaving.[41] Officers detained Henkel at the driveway, while the trucks driven by Respondents Harrington and Patch, unaware of the detention, proceeded west along Pennyroyal.

Detective Parker arrived at the Pennyroyal location, got out of his vehicle, and spoke with Mr. Ron Bowling, a CBR supporter and a police officer with the Centerville Police Department—a nearby police department. Bowling was off-duty, offering his assistance to CBR. Parker knew Bowling.[42] Other officers, including Sgt. Piper and Chief Herdt from the Clearcreek Township Police Department, knew Bowling socially and/or professionally.[43]

Respondent Henkel stood back from this conversation, believing that whatever confusion may have precipitated this overblown police response would

---

[39] J.A. 263-64; J.A. 505; J.A. 264-66; J.A. 383; J.A. 447.

[40] J.A. 383; J.A. 343.

[41] J.A. 317, 325; J.A. 383-84; J.A. 464.

[42] J.A. 318; J.A. 386; J.A. 359-60, 362; J.A. 344.

[43] J.A. 458-59; J.A. 335-36.

be cleared up quickly and he would be on his way.[44] That did not happen.

While detained at the Pennyroyal location, an officer directed Henkel to stay away from his vehicle and eventually requested to search it.[45] Henkel did not have authority to consent to a search of CBR's vehicle, which he told to the officers at the scene.[46] Nevertheless, the officer persisted. Believing that he had no alternative, Henkel told the officer that he "had nothing to hide" so "[d]o what you want."[47] Henkel was not told that he could refuse the search.[48]

CBR's vehicle and the personal items in it were searched a number of times during the detention.[49] The officers also took photographs.[50]

During his detention, Henkel surrendered his driver's license, as requested, and he was interrogated.[51] Special Agent Burkey conducted one

---

[44] J.A. 318.

[45] J.A. 319-20; *see also* J.A. 386.

[46] J.A. 320.

[47] J.A. 320.

[48] J.A. 245.

[49] J.A. 320-21; J.A. 245; J.A. 344-47.

[50] J.A. 466.

[51] J.A. 323-24.

such interrogation.[52] Burkey testified that Henkel was cooperative and that Bowling, who was similarly questioned, was cooperative and corroborated Henkel's answers.[53]

During the detention, Henkel asked the officers to explain to him why he was being detained.[54] They responded, "when you need to know, we'll let you know," or words to that effect.[55] Henkel wanted to leave, but was not free to do so.[56]

During Henkel's detention, passersby stared at what the police officers were doing, creating an unnerving situation for Henkel.[57]

While Henkel was being detained, several police cruisers put on their flashing lights and pulled over Respondents Harrington and Patch,[58] detaining them down the road from where Henkel was held.[59]

---

[52] J.A. 244-45; *see also* J.A. 214.

[53] J.A. 246-48; J.A. 214-15.

[54] J.A. 322-24.

[55] J.A. 322.

[56] J.A. 391, 408-09.

[57] J.A. 324.

[58] J.A. 288-89; J.A. 423; J.A. 504-05; J.A. 265-66; J.A. 447.

[59] J.A. 288-89; J.A. 423; J.A. 217.

Throughout, Harrington and Patch were kept separated and incommunicado from Henkel.[60]

Upon seeing the police cruisers, Harrington and Patch immediately pulled over into a residential subdivision on Queensgate Road.[61] Several police cruisers arrived and were parked to the front and rear of the trucks, preventing Respondents from leaving.[62] Moments after pulling them over, several officers exited their vehicles, unlatched their firearms, placed their hands over their weapons, and maneuvered in a tactical fashion toward Respondents, who were sitting in the trucks.[63] Harrington testified that his "heart about jumped through my mouth."[64] Patch "thought we're going to get shot."[65]

Harrington was approached by one of the officers. He was ordered to exit his vehicle and surrender his driver's license, which he did,[66] and he was interrogated.[67]

---

[60] J.A. 295; J.A. 329.

[61] J.A. 288; J.A. 423; J.A. 448.

[62] J.A. 302; J.A. 205, 423-24; J.A. 209, 508, 515; J.A. 460; J.A. 483.

[63] J.A. 289; *see also* J.A. 424, 437; J.A. 506; J.A. 448.

[64] J.A. 289.

[65] J.A. 424.

[66] J.A. 289.

[67] J.A. 506-07; J.A. 267.

Patch raised his hands over his head and slowly exited his vehicle. He was very nervous, and he feared that the officers would possibly shoot him.[68] Patch provided his license, as requested, and he too was interrogated.[69] Patch was feeling ill; he was light-headed with chest pains and felt faint, so he sat down on the curb.[70]

During the questioning, Harrington explained who he and the other Respondents were and what they were doing, including the purpose for the vests and helmets.[71] Sgt. Piper from Clearcreek Township arrived, listened to the questioning, observed what was taking place, and realized that Respondents were demonstrating against abortion.[72] The Springboro officers also realized that Respondents were expressing a message about abortion.[73]

After making this determination, Piper went to the Pennyroyal location and told this to Parker.[74] This was within the first 25 minutes of the three-hour detention.

---

[68] J.A. 424.

[69] J.A. 424-25; J.A. 448.

[70] J.A. 424, 440.

[71] J.A. 507, 516; J.A. 267.

[72] J.A. 460-62.

[73] J.A. 507; J.A. 460-61; J.A. 267; *see also* J.A. 394.

[74] J.A. 462-64.

Morris was with Parker at the Pennyroyal location at this time.[75]

After speaking with Parker, Piper then called his supervisor, Chief Herdt, who shortly arrived at the Pennyroyal location.[76] Clearcreek Officer Hubbard also arrived at this location.[77]

During the detention, the officers requested to inspect the trucks. Believing that they had no choice because of the number of armed and threatening officers present and the fact that the officers were blocking their trucks, Respondents told them that they could.[78] When one officer started searching Harrington's personal items he had in a small bag, Harrington asked if that was necessary.[79] The officer curtly responded, "You've given us permission," and continued.[80]

During the detention, Harrington repeatedly asked the officers to explain to him why they were being detained.[81] The typical response was, "I don't know the

---

[75] J.A. 358.

[76] J.A. 465.

[77] J.A. 319; J.A. 344-45.

[78] J.A. 292-93, 299-300, 303; *see* J.A. 428-49, 433.

[79] J.A. 293-94.

[80] J.A. 293-94.

[81] J.A. 290, 295; J.A. 511; J.A. 271.

answer to that, our supervisors will let you know," or words to that effect.[82] Harrington also made it known to the officers that he and Patch wanted to leave.[83] This message was relayed to officers at the Pennyroyal location, specifically to Parker, who responded "if you have to place him under arrest."[84] Yet, Respondents had committed no offense.[85] Patch also expressed to the officers that they were being detained against their will and that they wanted to leave.[86] The officers responded to the requests by telling Respondents that they were not free to go; they had to wait.[87] Although the local law enforcement officers determined within the first 15 to 25 minutes that Respondents were not involved in any criminal activity,[88] the detention continued for three hours.[89]

During the detention, the officers searched the trucks, which were mostly empty except for a few

---

[82] J.A. 290, 295.

[83] J.A. 290, 295; J.A. 511; *see also* J.A. 484-85, 495; J.A. 271, 273; J.A. 450.

[84] J.A. 511; *see also* J.A. 388, 393; *see also* J.A. 347.

[85] J.A. 511.

[86] J.A. 426-27; J.A. 408-09.

[87] J.A. 290, 295; *see also* J.A. 426-27; J.A. 511.

[88] J.A. 510; J.A. 460-63; J.A. 270-71, 275; J.A. 388, 390, 396; *see also* J.A. 349; J.A. 337-38.

[89] J.A. 296; J.A. 440; J.A. 319, 327.

small items, and photographed them.[90] The officers also directed Harrington and Patch to display the large signs that were attached to the sides of the trucks so that they too could be photographed. This required Respondents to roll up the heavy tarps that covered these signs, an exhausting task on that hot June day.[91] In fact, Respondents were directed do it twice.[92]

While the detention continued, people from nearby residences came out to watch what the officers were doing to Respondents. This was embarrassing to Respondents, particularly since it appeared to the onlookers that they were breaking the law and being treated as dangerous criminals. This was further troubling because the pictures on the trucks identify Respondents' organization through its website and telephone number.[93]

After Harrington and Patch had been detained for nearly two hours, FBI agents arrived at the Queensgate location.[94] As noted previously, Morris had been at the Pennyroyal location from the beginning of the detention, directing the actions of the FBI.

---

[90] J.A. 509-10; J.A. 270-71.

[91] J.A. 292-93, 296; J.A. 426-27; J.A. 509.

[92] J.A. 293; J.A. 426-27.

[93] J.A. 426, 430-31; *see also* J.A. 201.

[94] J.A. 290; J.A. 427; J.A. 513.

At the Queensgate location, Petitioner Shaw approached Respondent Harrington and a confrontation ensued.[95] When Harrington asked Shaw to explain why they were being held, the agent responded, "Don't talk to me unless I speak to you," or words to that effect.[96] Officer Clark recalls the FBI agent stating, "I'm going to ask you questions and I expect you to answer them, or something to that effect."[97] Shaw asked for Harrington's license.[98] Harrington once again surrendered it (he had already provided it to the local officers), and then again asked the agent why he and the other Respondents were being detained.[99] Shaw grabbed Harrington by the shoulder and led him behind one of the trucks.[100] Harrington told Respondent Patch to take a picture of this; however, the agent took the camera from Patch's hand, preventing him from doing so.[101] Harrington felt threatened by Shaw's actions and believed that the agent was going to physically harm him.[102] Shaw

---

[95] J.A. 290; J.A. 428; J.A. 484; *see* J.A. 450.

[96] J.A. 290.

[97] J.A. 273.

[98] J.A. 290; *see* J.A. 488-89.

[99] J.A. 290; *see* J.A. 485.

[100] J.A. 291; *see* J.A. 481-86 (admitting that he put his hands on Harrington).

[101] J.A. 291; J.A. 428, 443; *see also* J.A. 486.

[102] J.A. 291.

proceeded to interrogate Harrington about CBR's activities.[103] At one point, Shaw stated, "You're going to be here until we get done with you," "We're going to keep you as long as we want," or words to that effect.[104] Officer Peagler testified as follows: "The FBI told him you will stay here until this investigation is pretty much completed."[105] Shaw was not concerned about the length of the detention.[106]

Morris, upon hearing that Respondents were involved with the abortion issue, immediately presumed that they were engaging in anti-abortion violence (i.e., Respondents were "profiled" on account of their opposition to abortion).[107] However, he had no evidence to corroborate this claim. During the prolonged detention, the officers demanded photographs of Respondents' pro-life signs, yet these signs are not criminal contraband, they are political speech.[108] Certain officers made specific comments directed at Respondents' speech activity.[109] The Springboro officers' official record describes

---

[103] J.A. 291. An FBI 302 memorialized this interrogation. J.A. 213, 488-89.

[104] J.A. 428.

[105] J.A. 450.

[106] J.A. 485.

[107] J.A. 355-56, 361-62.

[108] J.A. 292-93; J.A. 426-27.

[109] J.A. 294-95; *see* J.A. 436-38, 442-43; J.A. 487.

Respondents as "anti-abortionists."[110] And the officers knew early in the detention that Respondents' purpose was to express a message in opposition to abortion.[111] However, at no time did any officer seek to release Respondents,[112] even though they each had a duty to protect Respondents' constitutional rights.[113] Nearly the entire police forces on duty for Springboro and Clearcreek Township were involved with the detention.[114] At least thirteen officers participated. Chief Kruithoff, the Springboro Chief of Police, was kept apprised of the situation.[115] No one was reprimanded for his or her actions.[116]

Clearcreek Township had jurisdiction over the traffic stop, and they determined within the first few minutes of the investigation that Respondents were not involved in any criminal activity. Nevertheless, they willingly participated in the three-hour detention.[117]

---

[110] J.A. 218.

[111] *See* J.A. 507; J.A. 460-61; J.A. 267.

[112] *See* J.A. 301; J.A. 426; J.A. 468, 472; J.A. 275; J.A. 406-07; J.A. 450, 452; J.A. 348; J.A. 338.

[113] J.A. 253; J.A. 403.

[114] *See* J.A. 498-99; J.A. 254; J.A. 334.

[115] J.A. 379-80, 398.

[116] J.A. 474; J.A. 402.

[117] J.A. 296; J.A. 440; J.A. 319, 327.

The day following the incident, Chief Herdt directed Sgt. Piper to prepare a report for the Clearcreek Township Police Department. He instructed Piper to exclude names and to minimize the Township's involvement.[118] When instructing Piper to do so, Herdt admits that he thought they would be sued.[119] By excluding names, the officers kept the police records out of the reach of the Ohio Public Records Act. Prior to filing this lawsuit, Respondent Harrington requested copies of the Clearcreek Township police records dealing with this incident. Chief Herdt responded to this request, stating that no such records existed.[120]

After the prolonged detention, Petitioners finally allowed Respondents to leave.[121] Up to that point, Respondents were not free to leave,[122] and the officers, including Petitioners, did not have probable cause to arrest Respondents.[123] The officers did not cite or otherwise charge Respondents for any offense—not even a simple traffic violation.[124] During the detention,

---

[118] J.A. 333-39; *see* J.A. 220.

[119] J.A. 339.

[120] J.A. 221, 332-33, 339-40.

[121] J.A. 486; J.A. 397-98.

[122] J.A. 511, 517; J.A. 480; J.A. 275; J.A. 398; J.A. 452; J.A. 338.

[123] J.A. 473-74; J.A. 493; J.A. 365; J.A. 249; *see also* J.A. 396; J.A. 338.

[124] J.A. 428; J.A. 515; J.A. 398; J.A. 470; J.A. 251; J.A. 451.

Respondents were criticized for their speech activity; they were told that they should use another method to get their message out.[125] Shaw was one who commented.[126]

Prior to the detention, none of the law enforcement officers, including Petitioners, had any information that Respondents were involved in criminal activity.[127] During the detention, the officers ran a check of Respondents' driver's licenses and vehicle registrations, searched Respondents, their vehicles, and their personal property, and questioned Respondents.[128] All of this took approximately 15 to 25 minutes to complete, and no evidence of criminal activity was found.[129] Nevertheless, the detention continued for three hours.[130] Many of the investigative steps were repeated during the detention. For example, Shaw testified that the helmets and vests were his primary concern, claiming it took him approximately 30 to 45 minutes to determine that they

---

[125] J.A. 294-95; *see* J.A. 436-38, 442-43; *see generally* J.A. 487.

[126] J.A. 487.

[127] *See* J.A. 500-01, 504; J.A. 255-56; J.A. 361, 368.

[128] J.A. 507-08; J.A. 268-69; J.A. 388-90.

[129] J.A. 510; J.A. 460-64; J.A. 270-71, 275; J.A. 388-90, 396; *see also* J.A. 349; J.A. 337-38.

[130] *See* J.A. 509; J.A. 484, 495; J.A. 271-72, 275; *see* J.A. 499-50; *see also* J.A. 322 (noting "a lot of standing around"); J.A. 512; *see also* J.A. 390-92; J.A. 345 (Officer Kuhlman stated that although he was a detective, he did not do any interviews.).

were used for personal protection.[131] However, the officers at the Queensgate location had already determined earlier in the day that the helmets and vests were used for this lawful purpose.[132] Officer Walsh testified that after completing everything that they knew to do for an investigative stop, they waited while Respondents remained in police custody.[133] Parker admitted that he waited "probably . . . an hour" for the FBI to do an interview that he could have done.[134]

Thus, the detention was unnecessarily prolonged on account of Petitioners, who had no basis for holding Respondents. Morris testified that the FBI "had no jurisdiction to do any enforcement action,"[135] noting that this was not the FBI's "show."[136] The FBI had no information that Respondents had any connection to domestic terrorism (and Parker was in direct contact with Morris).[137] The FBI never checked any unique intelligence sources or databases to determine whether

---

[131] *See* J.A. 485-86.

[132] *See* J.A. 395-96; J.A. 516; *see also* J.A. 291; J.A. 321; J.A. 469.

[133] J.A. 512.

[134] *See* J.A. 390-92; *see also* J.A. 345.

[135] *See* J.A. 356.

[136] *See* J.A. 356-57.

[137] *See* J.A. 368; J.A. 248; J.A. 504.

any such connection existed,[138] negating any claim that the FBI really seriously considered Respondents dangerous. In fact, the FBI agents did nothing more than any other basic law enforcement officer would do (i.e., check licenses, ask questions, conduct a search),[139] all of which were completed well before their arrival and all of which revealed no criminal activity. Indeed, there were no special skills, knowledge, training, or equipment necessary to evaluate what Respondents were doing. All that was required was a modicum of police competence—which was absent on June 10, 2002.

As a result of the officers' actions, Respondents will not return to the area with their pro-life message.[140]

REASONS FOR DENYING THE PETITION

When considering whether to grant review of this case and potentially disturb the ruling below, it is essential that this Court keep in mind the important constitutional rights at stake. As this Court previously acknowledged:

> *No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or*

---

[138] J.A. 494-95; *see also* J.A. 368; J.A. 248.

[139] J.A. 469; *see also* J.A. 511.

[140] J.A. 203; J.A. 280, 298; J.A. 439.

> *interference of others, unless by clear and unquestionable authority of law.*

Terry v. Ohio, 392 U.S. 1, 9 (1968) (citation omitted).

In this post-9/11 world, the following observations from Justices Stewart and Brennan ring true:

> *In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law [the Fourth Amendment] and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts.*

Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) (Stewart, J.).

> *We must not allow our zeal for effective law enforcement to blind us to the peril to our free society that lies in this Court's disregard of the protections afforded by the Fourth Amendment.*

Florida v. Royer, 460 U.S. 491, 513 (1983) (Brennan, J.).

No court of law in this country has ever approved a seizure of law-abiding citizens for the prolonged three-hour period involved here so that the officers could conduct a harassing, fishing expedition at the expense of the citizens' liberty interests, and this Court should not do so now.

In the final analysis, Petitioners' actions are the hallmark of a police state and should not be condoned in a free society in which Fourth Amendment protections are to be carefully and preciously guarded. Petitioners' actions are particularly heinous in this case because they were undertaken on account of Respondents' political viewpoint. Perhaps no other political advocacy group in this country would be subjected to similar mistreatment by law enforcement. Upsetting the circuit court decision below would essentially repeal the Fourth Amendment for any case the government categorizes as "terrorism," no matter how fanciful the categorization, thereby making a mockery of the Fourth Amendment.

I. This Court Lacks Jurisdiction to Review this Case Because It Is a Suit in which the United States Is Interested and the Solicitor General Has Not Authorized the Petition.

As an initial matter, it is not clear that this Court has jurisdiction to review this case in the first instance. As Petitioners' counsel noted in their application to this Court for an extension of time within which to file their petition, "[t]he Solicitor General . . . declined to authorize further review of the appellate court's adverse decision." Resp. App. at 4b.

In *United States v. Providence Journal Co.*, 485 U.S. 693 (1988), this Court held that in a suit "in which the United States is interested," the petition for a writ of certiorari must be authorized by the Solicitor General. Absent such authorization, this Court lacks jurisdiction to hear the case. *Id.*

As this Court noted, such a result is compelled not only by the plain language of 28 U.S.C. § 518(a), but also by the salutary policies promoted by § 518(a):

> Among the reasons for reserving litigation in this Court to the Attorney General and the Solicitor General, is the concern that the United States usually should speak with one voice before this Court, and with a voice that reflects not the parochial interests of a particular agency, but the common interests of the Government and therefore of all the people. Without the centralization of the decision whether to seek certiorari, this Court might well be deluged with petitions from every federal prosecutor, agency, or instrumentality, urging as the position of the United States, a variety of inconsistent positions shaped by the immediate demands of the case *sub judice,* rather than by longer term interests in the development of the law.

Id.

The statutory authority set forth in § 518(a) has been delegated by rule and tradition to the Solicitor General. 28 C.F.R. § 0.20 (1994). Accordingly, the Solicitor General is solely responsible for "[c]onducting, or assigning and supervising, all Supreme Court cases, including appeals, petitions for and in opposition to certiorari, briefs and arguments." *Id.*

The present case is clearly one "in which the United States is interested." *See* 28 U.S.C. § 518(a). This is evident by the arguments advanced by Petitioners.

For example, Petitioners claim that the Sixth Circuit's decision "will significantly hamper the ability of federal agents in the Sixth Circuit to investigate and combat terrorism." Pet. at 16. They argue that this decision "seriously undercuts the basic purpose of qualified immunity—to ensure that government actors carrying out crucial tasks such as investigation of terrorism are not deterred by fear of suit from vigorous pursuit of their duties." Pet. at 17. Petitioners claim that review should be granted "to protect the government's ability to investigate terrorism and other serious crimes." Pet. at 18. They argue that the "Sixth Circuit's decision discourages cooperation between local and federal authorities, and decreases the chances that the FBI's unique counter-terrorism and other expertise will be called into play in appropriate circumstances," noting "serious practical impact on important public safety concerns." Pet. at 27. Finally, Petitioners argue that this Court should "grant certiorari to clarify the rights and duties of federal law enforcement officers who enter an ongoing investigation by local authorities, and to ensure that federal agents have sufficient leeway to adequately investigate and attempt to prevent domestic terrorism and other serious crimes." Pet. at 35-36.

Thus, it cannot be gainsaid that this case is one in which the United States is interested. Therefore, the Solicitor General is required to authorize review. Absent such authorization, this Court must deny the petition for lack of jurisdiction. *See also F.E.C. v. NRA Political Victory Fund*, 513 U.S. 88 (1994) (holding that the FEC may not independently file a petition for writ of certiorari in the United States Supreme Court and

that the Solicitor General's after-the-fact authorization did not relate back so as to make the filing timely).

II. The Sixth Circuit's Qualified Immunity Analysis Was Correct.

Government officials are protected from personal liability only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As the facts and law of this case demonstrate without contradiction, Petitioners do not enjoy qualified immunity for their unlawful conduct. The Sixth Circuit reached this conclusion based on objective criteria, not subjective intent, as Petitioners suggest. This is not a case in which a claim of an illicit motive transforms a routine act into a constitutional tort. *See generally Crawford-El v. Britton*, 523 U.S. 574 (1998). This is a case in which Petitioners unlawfully detained Respondents (Fourth Amendment violation) on account of Respondents' political speech (First Amendment violation). There was no lawful basis for Petitioners to order the prolonged detention of Respondents after the local law enforcement officers conducted a full *Terry* stop that revealed no evidence of a crime. Should this Court be inclined to grant review, it should do so to affirm the decision below so as to protect our precious constitutional freedoms from government abuse.

Relying on "[l]ong-settled Supreme Court precedent," the Sixth Circuit analyzed both the First and Fourth Amendment claims consistent with this Court's prior decisions regarding qualified immunity. Pet. App. at 21a. As required by this Court's

precedent, the Sixth Circuit conducted a two-part inquiry: "We first consider whether 'the facts alleged show the [defendants'] conduct violated a constitutional right.' Next, we determine whether that right was 'clearly established' at the time of the alleged violation.'" Pet. App. at 22a. (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). As the case law makes plain, "This is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (internal citation omitted).

The Sixth Circuit applied the appropriate test "while viewing the facts in the light most favorable to" Respondents, as required. In doing so, the Sixth Circuit conducted a rigorous and thorough application of the well-established law and rightfully concluded that Petitioners did not enjoy qualified immunity for their actions. As the Sixth Circuit noted, "Qualified immunity does not protect those who knowingly violate the law." Pet. App. at 28a. (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

Indeed, a fair reading of the record reveals not only that Petitioners' actions were objectively unlawful, but that Petitioner Morris knew that the prolonged detention was unlawful. When questioned during his deposition about the FBI's actions, Morris claimed that the FBI "had no jurisdiction to do any enforcement action" in this case, that it was not the FBI's show, and that the FBI was merely there to "gather intelligence." Thus, he did everything he could to distance himself

from this unconstitutional stop—hardly the testimony of a resolute FBI agent seeking "to protect the government's ability to investigate terrorism and other serious crimes." *See* Pet. at 18.

III. Petitioners Do Not Enjoy Qualified Immunity for Unlawfully Detaining Respondents on Account of Their Protected Political Speech.

Accepting Petitioners' view of the law would allow the qualified immunity defense to swallow all First Amendment retaliation claims. Contrary to Petitioners' arguments, the Sixth Circuit did a thorough review of each element of the qualified immunity test and concluded that Petitioners violated a clearly established constitutional right of which a reasonable person would have known. Reviewing the objective evidence in support of Respondents' claim, as the Sixth Circuit did here, plainly reveals the illegality of Petitioners' actions.

It is clearly established that the First Amendment protects Respondents' right to use graphic pictures to publicly express their political message on the public streets of Ohio. *See, e.g., Hill v. Colorado*, 530 U.S. 703, 714-15 (2000) (recognizing that petitioners' "leafletting, sign displays, and oral communications are protected by the First Amendment"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (stating that "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values'") (citation omitted); *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988) (noting that "all

public streets are held in the public trust and are properly considered traditional public fora").

Several undisputed facts demonstrate the First Amendment violation that occurred in this case. First, the law enforcement officers, including Petitioners, knew very early in the detention that Respondents were expressing a political message in opposition to abortion. The initial *Terry* stop revealed this fact. Second, the police records for this incident describe Respondents as "anti-abortionists," which is a plain reference to Respondents' speech and its content. Third, Petitioner Morris, upon hearing that Respondents were "anti-abortion," immediately presumed that they were domestic terrorists, engaging in anti-abortion violence (i.e., Respondents were "profiled" on account of their opposition to abortion). This presumption prompted, and was in fact the reason for, the protracted and unlawful detention.[141] Fourth, during the detention, the law enforcement officers demanded photographs of Respondents' pro-life signs, yet these signs are not criminal contraband, they are political speech. And fifth, certain officers, including Petitioner Shaw, made derogatory comments directed at Respondents' speech activity.

As a result of the unconstitutional acts of the law enforcement officers, Respondents have been injured and chilled in the exercise of their free speech rights.

---

[141] Petitioners' citation to the Dr. Slepian murder and the Eric Rudolph bombing, Pet. at 5, n.1, further demonstrates that the FBI is seeking to cast Respondents as potential terrorists on account of their political viewpoint against abortion.

As this Court has long held, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) (stating "that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief") (citing *Elrod*). This chilling effect has caused irreparable harm. *See generally NAACP v. Button*, 371 U.S. 415, 433 (1963) (noting that First Amendment "freedoms are delicate and vulnerable, as well as supremely precious in our society").

Petitioners' claim that the Sixth Circuit's ruling regarding the standard for assessing whether the alleged government conduct would chill a person of ordinary firmness from speaking freely is in conflict with other circuit court rulings is illusory. *See* Pet. at 28-31. As an initial matter, despite the circuit court's ruling, it is not clear that this issue is necessarily relevant to the outcome in this case. As Respondents have shown, they were harmed (i.e., unlawfully detained) on account of their political speech. This injury has occurred, regardless of its impact (i.e., chilling effect) on any future political speech activity.

Nonetheless, the Sixth Circuit, citing this Court's decision in *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), asked whether Petitioners' actions injured Respondents "in a way 'likely [to] chill a person of ordinary firmness from' further participation in that activity." Pet. App. at 22a. The circuit court also noted that "[a] chilling effect sufficient under this prong is not born of *de*

minimis threats or inconsequential actions." Pet. App. at 24a. (internal quotations and citations omitted). Thus, the Sixth Circuit did not consider this factor to be a mere pushover.

In its analysis, the circuit court applied this objective standard to the facts of this case, stating:

> Deprivation of one's liberty of movement can hardly be classified "inconsequential;" indeed, the Founders endeavored scrupulously to protect this liberty in the Constitution. *See* U.S. const. amend. IV; U.S. const. amend. XIV. A two and one-half hour detention absent probable cause, accompanied by a search of both their vehicles and personal belongings, conducted in view of an ever-growing crowd of onlookers, would undoubtedly deter an average law-abiding citizen from similarly expressing controversial views on the streets of the greater Dayton area.

Pet. App. at 24a-25a.

Therefore, it is inaccurate to claim that the circuit court "analyz[ed] the 'chill' issue at a high level of abstraction," as Petitioners claim here.[142] Pet. at 28.

---

[142] The characterization of Respondents as "law-abiding citizens," is, in fact, accurate in this case. Moreover, to somehow lessen the impact of the law enforcement officers' actions on Respondents because they are "anti-abortion" is not only inaccurate, but it is offensive. Indeed, as the evidence shows, Respondent Patch, who happens to be a senior citizen, was feeling ill and light-headed

In the final analysis, Respondents were mistreated, indeed, they were punished, on account of their political message. Based on the objective evidence, Petitioners are not entitled to qualified immunity on the First Amendment claim. *See Dobosz v. Walsh*, 892 F.2d 1135 (2d Cir. 1989) (holding that "[b]ecause the proscription of retaliation for a plaintiff's exercise of First Amendment rights has long been established, we conclude that [defendant] is not entitled to qualified immunity with respect to [plaintiff's] First Amendment claim"). To conclude otherwise would erode precious First Amendment freedoms.

IV. Petitioners Do Not Enjoy Qualified Immunity for Unlawfully Detaining Respondents in Violation of the Fourth Amendment.

It is important to bear in mind that Petitioners acknowledge that they lacked probable cause to arrest or detain Respondents for any criminal violation. And there is no dispute that Respondents were not free to leave within the three-hour long detention; therefore, a "seizure" had occurred. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (holding that a "seizure" occurs when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave").

Thus, at best, the detention at issue was a *Terry* stop, which the Fourth Amendment requires to be brief

---

with chest pains and thought he was going to faint due to the stress created by the officers' actions. J.A. 424, 440.

and limited in nature because such stops are not supported by probable cause.[143] *United States v. Heath*, 259 F.3d 522, 528 (6th Cir. 2001) (noting that during a *Terry* stop, a law enforcement officer "may detain the suspect briefly to investigate the suspicious circumstances"); *United States v. Butler*, 223 F.3d 368, 374 (6th Cir. 2000) ("The brevity and limited nature of *Terry*-type stops have been repeatedly affirmed."). Moreover, even if a law enforcement officer possesses reasonable suspicion to briefly detain a person for investigation, "the passage of time can cause an investigative detention to ripen into a defective seizure that must be based upon probable cause." *Heath*, 259 F.3d at 530. Thus, as the case law makes plain, "reasonable suspicion" cannot justify the three-hour detention at issue here. *See, e.g., United States v. Richards*, 500 F.2d 1025, 1029 (9th Cir. 1974) ("[D]etention for over an hour cannot be considered a 'brief' or 'momentary' stop."). It was clearly established in June 2002 that unless the officers determine that there is probable cause to arrest during the brief stop, the detainee must be released. *See Butler*, 223 F.3d at 374 ("[U]nless the detainee's answers provide the officer with probable cause to arrest him, he must then be released."); *see also United States v. Davis*, 430 F.3d 345, 353 (6th Cir. 2005) ("Probable cause to believe that a traffic violation has occurred is unlike probable cause

---

[143] This "stop" was in fact an illegal arrest. *United States v. Richardson*, 949 F.2d 851, 856-57 (6th Cir. 1991) ("It does not take formal words of arrest or booking at a police station to complete an arrest. It takes simply the deprivation of liberty under the authority of law.") (citations omitted); *Centanni v. Eight Unknown Officers*, 15 F.3d 587, 590 (6th Cir. 1994) (noting that a deprivation of liberty without formal words is still an arrest).

to believe that a criminal violation has occurred and thus does not allow the police to detain a suspect indefinitely.").

In *United States v. Place*, 462 U.S. 696 (1983), this Court held that a 90-minute detention (half of the time involved here) of a suspected drug courier's luggage *to await the arrival of a trained narcotics dog* to sniff the luggage violated the Fourth Amendment. This Court acknowledged that the government's interest in deterring and preventing narcotics crimes was substantial; nonetheless, the investigatory detention was unreasonable in duration in violation of the Fourth Amendment. *Id.* at 709. In so finding, this Court stated, "[W]e have never approved a seizure of the person for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case." *Id.* at 709-10.

Similarly, neither the Sixth Circuit nor this Court has ever approved a seizure without probable case for the prolonged 180-minute period involved here so that law enforcement could "gather intelligence," and this Court should not do so now.[144]

Instructive here is the conclusions reached in *United States v. Winfrey*, 915 F.2d 212, 218 (6th Cir. 1990). In *Winfrey*, the Sixth Circuit noted that the

---

[144] Petitioners cite an unpublished Sixth Circuit opinion and a district court decision in support of their arguments. Pet. at 33-34. Neither case compares factually with the present case. And neither case provides support for the claim that the seizure in this case was lawful. Indeed, *United States v. Place* sufficiently put Petitioners on notice of the illegality of their actions.

length of the detention at issue—10 to 15 minutes—of a drug suspect *while awaiting the arrival of DEA* was permissible, but that it "tested the outer limits of a *Terry* stop." *Id.* at 218. In the concurring opinion, Circuit Judge Krupansky agreed with the outcome *based on a finding of probable cause*, but noted that the officers exceeded the scope of a *Terry* stop, stating, "[I]t stretches the boundaries of the *Terry* stop beyond their tolerable limits to conclude that the detention—an encounter less intrusive than full-scale arrest because supported by a lesser standard of suspicion—may encompass two searches and a compulsory delay of nearly half an hour." *Id.* (Krupansky, J., concurring).

Similarly, in this case it stretches the boundaries of a *Terry* stop beyond their tolerable limits to conclude that a detention *after* police had already checked Respondents' driver's licenses and vehicle registrations, interrogated Respondents, and searched Respondents and their vehicles and found no evidence of a crime, *but instead determined that Respondents were involved in political speech*, may encompass additional license checks, interrogation, and searches, and a compulsory delay in excess of two hours.

Indeed, it is not "diligently pursu[ing] a means of investigation that [is] likely to confirm or dispel [Petitioners'] suspicions quickly during which time it [is] necessary to detain" Respondents, *see United States v. Sharpe*, 470 U.S. 675, 686 (1985), to simply repeat the very same investigative steps that had previously produced no evidence of criminal activity in some vain hope that law enforcement will find *something* to justify the detention.

As the evidence reveals, Morris, the senior agent directing the actions for the FBI, was on scene from the very beginning of the detention. And according to the local officers, it was Morris who ordered the lengthy detention, even though Morris admits (1) that the FBI had no jurisdiction to do any enforcement action, (2) that this was not the FBI's "show," and (3) that the FBI's purpose was simply to "gather intelligence."

Morris testified as follows:

> Q. So is it fair to say then based on what you're saying is that you were in the role of an assistant or assisting in this investigation?
>
> A. Yes, because I had no jurisdiction to do any enforcement action, you know. I mean I wasn't—[Parker] indicated that they were out there and this was what was going on. I saw that as an opportunity to gather intelligence while they were—I mean because they were going to go out and identify these people and find out what they're up to, and we [the FBI] were going there to I guess assist them if they needed it but also to gather intelligence. That was our purpose.[145]
>
> Q. From your perspective though this wasn't a case where the FBI was overall in charge in directing the activities of the officers on the scene?

---

[145] J.A. 356.

A. No. No.

Q. I guess I'll put it in sort of more blunt terms. This wasn't necessarily the FBI's show?

A. No. It was not. I mean there were a number of law—uniformed law enforcement patrol officers and other people out there at the scene that I clearly had no control. I was not in any way controlling their actions and what they were doing.[146]

However, Clark, a Springboro officer, testified about a conversation between Parker and Morris as follows:

Q. And what do you remember from that conversation?

A. I remember Detective Parker describing to the FBI agent what I had observed. The FBI agent came back and stated do not allow anyone to leave. If they do, stop them.

Q. Do you remember those words specifically?

A. Yes.[147]

Furthermore, it is factually incorrect to claim that the scope and degree of this investigation was so

---

[146] J.A. 357.

[147] J.A. 264.

unique that it necessitated the three-hour long detention. As the evidence shows, the FBI agents did nothing more than any other basic law enforcement officer would do (*i.e.*, check licenses, ask questions, conduct a search), all of which were completed well before the arrival of additional agents—Morris was at the scene during the initial investigation—and all of which revealed no criminal activity.[148] And the FBI agents never checked any unique intelligence sources or databases to determine whether Respondents were involved in domestic-terrorism activities, negating any claim that the FBI really seriously considered Respondents a threat. At the end of the day, the "boys from Dayton" (i.e., FBI) were on a fishing expedition, which violated Respondents' constitutional rights.

In light of pre-existing law, the unlawfulness of a three-hour police detention to "gather intelligence" in the absence of probable cause is apparent. Accordingly, the Sixth Circuit properly rejected Petitioners' qualified immunity defense.

---

[148] Piper, a Clearcreek Officer, testified as follows:

> Q. Was there anything that the FBI agents did during this course of the investigation that you observed that would be any different than what you would do in a normal investigation of a suspected crime scene?
>
> A. No.

J.A. 469.

CONCLUSION

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

Respectfully submitted,

ROBERT JOSEPH MUISE
Counsel of Record
Thomas More Law Center
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, Michigan 48106

Blank Page