No. 07-811

IN THE
Supreme Court of the United States

STEVEN MORRIS AND TIM SHAW,
Petitioners,

v.

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

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

REPLY BRIEF FOR THE PETITIONERS

ELAINE J. GOLDENBERG
Counsel of Record
SCOTT B. WILKENS
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

Counsel for Petitioners

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Although Respondents shower the Court with facts in an attempt to justify the Sixth Circuit's denial of qualified immunity, those facts simply do not bear on the three fundamental reasons why this Court should summarily reverse or grant full review – reasons that Respondents barely address. *First*, the Sixth Circuit failed to analyze each element of Respondents' First Amendment retaliation claim under the two-step test for qualified immunity set forth in *Saucier v. Katz*, 533 U.S. 194 (2001). In particular, disregarding this Court's precedents and the approach taken by other circuits, the court of appeals gave dispositive weight to allegations of bad motive, and did not examine whether it was clearly established that the agents' particular actions would have a chilling effect on protected speech. *Second*, in conflict with other circuits, the Sixth Circuit asked whether an average law-abiding citizen would be chilled by the agents' actions, rather than asking whether a person *similarly situated* to Respondents would be chilled. *Third*, the court of appeals disregarded this Court's precedents in holding that it was clearly established in June 2002 that the *Terry* stop at issue violated the Fourth Amendment. Unless corrected, the Sixth Circuit's errors of law will adversely impact Petitioners – who face a trial and the prospect of substantial personal liability – and will hamper the ability of law enforcement agencies to vigorously investigate potential terrorist threats in the Sixth Circuit.

I. This Court's Jurisdiction To Hear Petitions In Personal-Capacity Suits Against Government Officials Does Not Require The Solicitor General's Prior Authorization.

Respondents' lead argument is the astonishing claim that the Court lacks jurisdiction because the Solicitor General did not authorize the Petition. That is incorrect. The statutory provision Respondents cite – 28 U.S.C. § 518(a) – does not give the Solicitor General the power to bar the Court's doors to private litigants, including federal officials who have been sued in their personal capacity for money damages.[1]

As this Court has recognized, "officers sued in their personal capacity come to court as individuals," *Hafer v. Melo*, 502 U.S. 21, 27 (1991), and "[a] victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him," *Kentucky v. Graham*, 473 U.S. 159, 167-68 (1985). It is for this reason that the relevant Department of Justice regulation expressly acknowledges that government officials sued in their personal capacities can retain "private counsel," and provides that "any appeal" in such a personal-capacity suit is subject to the Solicitor General's "discretionary approval" *only* if the official is

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[1] Respondents originally brought suit against Petitioners in both their official and personal capacities. The district court granted summary judgment to Petitioners on the official capacity claims, and the Sixth Circuit affirmed that ruling. Pet.App.18a-19a. Only the personal-capacity claims against Petitioners are at issue before this Court.

represented by "Department of Justice attorneys." 28 C.F.R. § 50.15(a)(8)(iv).[2]

In keeping with these authorities, this Court has consistently assumed jurisdiction in circumstances identical to those here – where federal officials in personal-capacity suits have retained private counsel and sought certiorari after the Solicitor General has declined to authorize a petition. *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). The Court likewise has jurisdiction to hear this Petition by Agent Morris and Agent Shaw.

II. Respondents Do Not Refute Any Of The Reasons Set Forth In The Petition For Summarily Reversing Or Granting Review.

a. The Sixth Circuit Failed To Properly Analyze Petitioners' Qualified Immunity Defense To Respondents' First Amendment Retaliation Claim. The Sixth Circuit failed to consider whether it was clearly established in June 2002 that Petitioners' particular actions would have a chilling effect – an essential element of Respondents' First Amendment retaliation claim. Instead, the Sixth Circuit concluded that the alleged "retaliatory intent" of the local and federal law enforcement officers was "dispositive" of their qualified immunity defense.

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[2] In contrast, the only cases Respondents cite involve petitions brought by a federal agency or on behalf of the judicial branch. *See FEC v. NRA Political Victory Fund*, 513 U.S. 88, 90 (1994); *United States v. Providence Journal Co.*, 485 U.S. 693, 693 (1988).

Pet.App.30a-31a. As explained in the Petition, that approach collapses the two parts of the qualified immunity test and violates the dictates of *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998), and *Saucier v. Katz*, 533 U.S. 194 (2001), among other decisions. Pet. at 22-25.

In response, Respondents assert in a conclusory fashion that the Sixth Circuit was "rigorous" and "applied the appropriate test." Opp. at 26-28. That does not even begin to address – much less justify – the fundamental problems with the Sixth Circuit's approach, which undermines the very purpose of the qualified immunity doctrine, and will deter federal officers from acting with sufficient vigor in investigating terrorism and other serious crimes.

Respondents' only other tactic is to flood the Court with supposedly "undisputed facts" in an effort to show that the Sixth Circuit reached a good result. All of these facts, however, are completely beside the point.[3] The Sixth Circuit disobeyed this Court's

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[3] Although these "facts" are irrelevant to the disposition of the Petition, many of Respondents' "factual" assertions are erroneous and misleading. For instance, Respondents contend that upon hearing the word "anti-abortion," Petitioner Morris "immediately presumed that [Respondents] were domestic terrorists, engaging in anti-abortion violence," and that "[t]his presumption . . . was in fact the reason for" the *Terry* stop. Opp. at 29. In fact, Agent Morris' concerns about possible domestic terrorism were based largely on Respondents' highly suspicious behavior – including their use of body armor and helmets, box trucks, and a *faux* police vehicle. JA360. And although Respondents claim that Petitioner Morris was at the scene "from the beginning of the detention, directing the actions of the FBI," Opp. at 14, there were no such actions for Agent

dictates and departed from the approach taken by its sister Circuits. And if the Sixth Circuit had properly conducted the qualified immunity inquiry, it would have concluded that Agent Morris and Agent Shaw did not violate clearly established First Amendment law – because it was not clear that their actions as part of the FBI portion of the investigation, which involved getting to the scene and less than an hour-long inquiry, would have the requisite chilling effect.

b. The Sixth Circuit's Standard For Adjudicating A First Amendment Retaliation Claim Conflicts With That Of Other Circuits. In assessing whether Respondents made out a First Amendment retaliation claim, the Sixth Circuit asked whether an "average law-abiding citizen" would be chilled by the agents' actions, and did not take into account any of Respondents' characteristics, such as their willingness to risk grave bodily injury in order to propagate their anti-abortion message. Pet.App.25a. By contrast, other circuits ask whether "a *similarly situated* person of ordinary firmness" would be chilled, and thus engage in a fact-intensive inquiry that takes into account the particular characteristics of the plaintiff that may inform the firmness that such a person would display. Pet. at 28-29. As the Petition explains, the difference between these standards was likely outcome-determinative in this case. Pet. at 30-31.

Morris to direct until the last 30 to 45 minutes of the stop, when the FBI's investigatory agents arrived after a delay caused by traffic problems.

Respondents contend that the 2-2 circuit split identified is "illusory," but provide no support for that contention. Opp. at 30. Indeed, Respondents never dispute that the Sixth Circuit used a different standard than do the Fourth Circuit and the Second Circuit. *See* Pet. at 28-29 (citing *Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410 (4th Cir. 2006), *Blankenship v. Manchin*, 471 F.3d 523 (4th Cir. 2003), and *Gill v. Pidlypchak*, 389 F.3d 379 (2d Cir. 2004)). That split calls out for resolution by this Court.

Further, although Respondents claim that "it is not clear" that the standard employed by other circuits would have changed "the outcome in this case," their only justification is the plainly incorrect assertion that the plaintiff in a First Amendment retaliation case need not show that the alleged government conduct is likely to chill speech. Opp. at 30 (arguing that Respondents need only show an injury arising from the detention, "regardless of its impact (i.e., chilling effect) on any future political speech activity"). As *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), and this Court's subsequent cases make plain, and as the Sixth Circuit itself agreed here, a showing that the defendant's conduct injured the plaintiff in a way likely to chill speech is an *essential element* of a retaliation claim. Pet.App.22a-23a.

c. The Sixth Circuit Violated This Court's Precedents In Holding That Petitioners Violated Clearly Established Fourth Amendment Law. In holding that a *Terry* stop to investigate suspicions of domestic terrorism violated clearly established Fourth Amendment law, the Sixth Circuit ran afoul

of this Court's precedents by failing to analyze the Fourth Amendment right at a sufficient level of specificity and by failing to consider the particular circumstances that confronted Petitioners.[4]

Respondents do not deny that as of June 2002, both this Court and the Sixth Circuit had expressly declined to place an outside limit on the permissible duration of a *Terry* stop. Respondents also do not deny that at that time, a mere nine months after 9/11, no federal court had ruled on the permissible boundaries of a *Terry* stop in a case involving similar suspicions of terrorism.

Nevertheless, Respondents claim that *United States v. Place*, 462 U.S. 696 (1983), "sufficiently put Petitioners on notice of the illegality of their actions." Opp. at 34 & n.144. The Court's decision in *Place*, however, itself expressly "decline[d] to adopt any outside time limitation for a permissible *Terry* stop." 462 U.S. at 709. Moreover, in *Place*, the Court concluded that the stop in question was too long because the officers failed to act with diligence – an accusation that cannot be leveled at Agents Morris and Shaw.[5] And although Respondents cite *United*

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[4] The Sixth Circuit's decision rested solely on the length of the stop and not on any allegations of mistreatment of Respondents during the stop. Pet.App.38a-39a. Accordingly, Respondents' discussion of such alleged mistreatment (itself an inaccurate portrayal of the record, *see* Pet. at 9), is irrelevant. *See* Opp. at 8-16, 32, 35.

[5] Specifically, in *Place*, the Court held that the 90-minute seizure of an airline passenger's luggage in order to arrange for an inspection by a narcotics detection dog exceeded the permissible scope of a *Terry* stop because the officers failed to

States v. Richards, 500 F.2d 1025 (9th Cir. 1974), for the proposition that a *Terry* stop of over an hour is impermissible, *see* Opp. at 33, *Richards* says just the opposite: "Although appellant's eventual detention for over an hour cannot be considered a 'brief' or 'momentary' stop, *in the particular circumstances of this case we believe that this extended detention was reasonable.*" 500 F.2d at 1029 (emphasis added).

This Court has made it clear that a proper qualified immunity inquiry requires some particularity – that what must be clearly established is not a general principle of law, but rather a right specific enough that "a reasonable official would understand that *what he is doing* violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (emphasis added). Respondents do not even attempt to distinguish the cases cited by Petitioners showing that the permissible duration of a *Terry* stop *in circumstances analogous to those at issue here* was far from clearly established. Pet. at 33-34; Opp. at 34 n.144. The lack of any explanation whatsoever belies Respondents' bare assertion that cases such as *Jackson v. Wren*, 893 F.2d 1334 (6th Cir. 1990) (unpublished op.), and *United States v. Borrero*, 770 F. Supp. 1178 (D. Mich. 1991) – in

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"diligently pursue their investigation." 462 U.S. at 709. The officers knew well in advance when the passenger's flight was scheduled to arrive and thus "had ample time to arrange" for the drug detection dog, and thereby "minimize[] the intrusion into [the suspect's] Fourth Amendment interests." *Id.* By contrast, the magistrate in this case concluded that "[t]here is no evidence that the F.B.I. agents were dilatory in conducting their investigation." Pet.App.91a; *see also* Pet. at 34.

which a delay in the arrival of federal agents rendered even lengthy stops permissible – are inapposite. Opp. at 34 n.144.

A fair reading of those cases shows that the specific actions of Agents Morris and Shaw did not clearly violate the Fourth Amendment. FBI agents have jurisdiction over federal criminal inquiries, are trained to detect terrorists, and are kept apprised of the latest threats from terrorist groups. Local law enforcement officers contacted the FBI because of their belief that the FBI's expertise was needed to dispel suspicions of possible criminal activity and domestic terrorism.[6] It is undisputed that FBI Agents from the Dayton office, including Agent Shaw, proceeded to the scene as quickly as possible but were substantially delayed due to traffic problems. It is also undisputed that once the investigating FBI Agents arrived, they interviewed Respondents for only approximately 20-25 minutes. The FBI Agents acted diligently, used their specialized knowledge and expertise in their interviews of Respondents and (consented-to) search of the vehicles, and dispelled suspicions that Respondents may have been involved in domestic terrorism, thus ending the stop.

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[6] Indeed, the local police detective who called the FBI for assistance testified that "[o]bviously the FBI are more equipped to handle . . . anything to do with a group of people that have tactical gear, . . . whether it be a militia group or any kind of threat group or a hate group. Obviously they had more expertise than the City of Springboro did so I was looking to them to resolve the situation." JA392.

The FBI plays a critical role in protecting the United States from the threat of terrorism. Petitioners were fulfilling that role in responding to the concerns of local law enforcement and investigating whether Respondents posed a terrorist (or other criminal) threat.[7] In claiming that the FBI added no value to the investigation, Opp. at 38, Respondents – like the Sixth Circuit – are engaging in the kind of "unrealistic second guessing" that this Court has cautioned against. *United States v. Sharpe*, 470 U.S. 675, 686 (1985). The relevant question is whether the law was clearly established at the time Agent Morris and Agent Shaw acted – and that is a question that the Sixth Circuit did not answer in conformity with this Court's precedents.

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[7] Respondents repeatedly assert that according to Agent Morris "the FBI was merely there to 'gather intelligence'" and "had no jurisdiction." Opp. at 27, 36. Like the other "facts" that Respondents press, that is utterly irrelevant to the questions presented to this Court. It is also untrue. Agent Morris testified that the FBI was there to investigate as well as to gather intelligence about Respondents' possibly unlawful activities. JA357, 360. And when Agent Morris discussed the FBI's jurisdiction, he was being asked whether he was directing the activities of the local law enforcement officers at the scene while awaiting the arrival of the FBI Agents. He explained that although the FBI was not "overall in charge in directing the activities of the officers on the scene," he "was responsible for the FBI agents" who eventually arrived from the Dayton office. JA357.

CONCLUSION

The judgment of the Sixth Circuit should be summarily reversed, or, alternatively, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ELAINE J. GOLDENBERG
Counsel of Record
SCOTT B. WILKENS
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

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