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

SUPPLEMENTAL BRIEF OF RESPONDENTS

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

September 9, 2008

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

QUESTIONS PRESENTED

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' 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.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

INTRODUCTION

The Solicitor General's brief on behalf of the United States as amicus curiae does little to compel this Court to either accept review or to reverse the decision below. Moreover, unless this Court intends to remove all liability for federal officials who violate clearly established constitutional rights, its decision in *Pearson v. Callahan*, No. 07-751, should have little impact on the outcome of this case, negating the need to hold this petition pending that decision.

In the final analysis, the United State's claims of error are not well-founded and are based on a faulty understanding of the record. Accepting the United State's view would have the deleterious effect of eroding fundamental rights.

STATEMENT

There are only two petitioners in this case: Steven Morris and Tim Shaw. Petitioners were two of five federal agents involved in the unlawful detention. A third federal agent named in the lawsuit, Michael Burke, was dismissed by the court of appeals. None of the local law enforcement officers sought review in this Court.

A. Petitioners were on notice that Respondents were engaged in protected speech.

- On June 10, 2002, Respondents, members of CBR, a pro-life advocacy group, were demonstrating against abortion by displaying large, color pictures depicting images of aborted

fetuses on the sides of trucks. Above each picture was captioned the word "Choice." The pictures also displayed CBR's website (abortionNo.org) and phone number. These large pictures are difficult to ignore.[1]

- During the initial stop by Officer Clark, the large pictures were plainly visible to the officer and to the motorists who were passing by. As the officer acknowledged, these pictures are "pretty hard to miss."[2]

- During this stop, Patch told Clark that he was part of a group campaigning against abortion—directing the officer's attention to the pictures on the truck. Clark asked what was in the truck. Patch responded, "Nothing. The message is on the sides of the truck." Clark realized that Respondents were displaying a message about abortion.[3]

- After this contact, Clark contacted Detective Parker, the supervisor on duty,[4] and told him what he observed, including the abortion pictures.[5]

---

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

[2] J.A.263,421.

[3] J.A.260-62,420-21.

[4] J.A.262.

[5] J.A.263,370,381-82.

- Parker contacted the "boys from Dayton" and spoke directly with Morris, the senior FBI agent.[6] Parker informed Morris that Respondents were members of a group demonstrating against abortion.[7]

- Morris, upon hearing the report, presumed, without evidence, that Respondents were engaging in anti-abortion violence.[8]

B. Petitioners did not have a legal basis for detaining Respondents.

- Morris did not have any information that Respondents were involved in criminal activity.[9] Nevertheless, according to Parker, Morris directed the detention of Respondents so that he and "his boys" could talk with them.[10] Morris wanted to "gather intelligence."[11]

- Additional FBI agents were called, including Shaw.[12] None had any information that

---

[6] J.A.264,352,354,376-78.

[7] J.A.356.

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

[9] J.A.361,368,504.

[10] J.A.388.

[11] J.A.356.

[12] J.A.353,476.

Respondents were involved in criminal activity.[13]

- During the initial investigation, Harrington explained to the officers who he and the other Respondents were and what they were doing.[14] Sgt. Piper from Clearcreek Township arrived, listened to the questioning, observed what was taking place, and realized that Respondents were demonstrating against abortion.[15] The Springboro officers realized the same.[16]

- After this investigation, Piper went to Pennyroyal and reported his findings to Parker.[17] This was within the first 25 minutes of the detention. When Piper arrived at Pennyroyal, Morris was with Parker, having arrived as the trucks were being pulled over.[18] Consequently, Morris was present at the detention scene almost immediately. The United States' claim that "neither petitioner was at the scene until well after the initial stop of the individual respondents and, indeed, until well after their subsequent detention" is incorrect. U.S. Br. at 14.

---

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

[14] J.A.267,507,516.

[15] J.A.460-62.

[16] J.A.267,394,460-61.

[17] J.A.462-64.

[18] J.A.358.

- During the first 15 to 25 minutes, the officers ran a check of Respondents' driver's licenses and vehicle registrations, searched Respondents, their vehicles, and their personal property, and questioned Respondents, all of which revealed no criminal activity.[19]

- During the detention, Harrington repeatedly asked the officers to explain why they were being detained, making it known that they wanted to leave.[20] This message was relayed to officers at Pennyroyal. Parker responded, "[I]f you have to place him under arrest."[21] Although the officers determined within 15 to 25 minutes that Respondents were not involved in criminal activity[22]—a fact known by Petitioners—the detention continued for three hours.[23]

- After Respondents had been detained for nearly two hours, additional FBI agents, including Shaw, arrived at Queensgate.[24]

- At Queensgate, Shaw approached Harrington and a confrontation ensued.[25] When Harrington

---

[19] J.A.268-69,270-71,275,337-38,349,388-90,396,460-64,507-08,510.

[20] J.A.271,273,290,295,450,484-85,511.

[21] J.A.347,388,393.

[22] J.A.270-71,275,337-38,349,388,390,396,460-63.

[23] J.A.296,319,327,440.

[24] J.A.290,427,513.

[25] J.A.290,428,450,484.

asked Shaw to explain why they were being held, Shaw responded, "Don't talk to me unless I speak to you."[26] Clark recalls Shaw stating, "I'm going to ask you questions and I expect you to answer them, or something to that effect."[27] Shaw asked for Harrington's license.[28] Harrington once again surrendered it (he had already provided it to the officers), and then again asked Shaw why they were being detained.[29] Shaw grabbed Harrington by the shoulder and led him behind one of the trucks.[30] Harrington told Patch to take a picture of this; however, Shaw snatched the camera from Patch, preventing him from doing so.[31] Harrington felt threatened and believed that Shaw was going to physically harm him.[32] Shaw proceeded to interrogate Harrington about CBR's activities.[33] 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." Officer Peagler testified, "The FBI told him you will stay here until this

---

[26] J.A.290.

[27] J.A.273.

[28] J.A.290,488-89.

[29] J.A.290,485.

[30] J.A.291,481-86.

[31] J.A.291,428,443,486.

[32] J.A.291.

[33] J.A.213,291,488-89.

investigation is pretty much completed."[34] Shaw was not concerned about the length of the detention.[35]

- During the detention, Respondents were chastised for their speech activity and told that they should use another method to get their message out.[36] Shaw was one who commented.[37]

C. The court of appeals rejected Petitioners' request for a rehearing on the qualified immunity issue, including whether each defendants' conduct was evaluated individually.

- In its decision, the panel conducted a *de novo* review of the record, which was thoroughly developed as to each defendant.

- Upon its review of the petitions for rehearing, the panel concluded "that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied." Apx.1b-22b.

---

[34] J.A.428,450.

[35] J.A.485.

[36] J.A.294-95,436-38,442-43,487.

[37] J.A.487.

DISCUSSION

This Court Should Not Hold this Petition Pending Its Decision in *Pearson v. Callahan*; Rather, the Petition Should Be Denied.

For over two decades this Court has maintained that 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). This Court has also emphasized that "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been 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).

More recently, in *Saucier v. Katz*, 533 U.S. 194 (2001), this Court prescribed a two-step inquiry to follow when making a qualified immunity determination. Under this analysis, the court must "first consider whether 'the facts alleged show the [defendants'] conduct violated a constitutional right.' Next, [the court must] determine whether that right was 'clearly established' at the time of the alleged violation.'" Pet.App.22a (quoting *id.* at 201). Upon application of this methodology, the court of appeals found that Petitioners did not enjoy qualified immunity.

In *Pearson*, this Court directed the parties to brief "[w]hether the Court's decision in *Saucer* . . . should be

overruled." U.S. Br. at 11. The United States argued in its brief that "the Court need not reconsider *Saucier*'s general explication of qualified immunity principles, but that the Court may wish to revisit *Saucier*'s requirement that lower courts, in analyzing a qualified-immunity defense, must adhere to the specified order of decision." U.S. Br. at 11. The "order of decision" aspect of *Saucier*'s holding, however, will have no impact here since the court of appeals ultimately determined that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202.

Absent a complete reconsideration of the qualified immunity doctrine, which appears unlikely in light of the well-established principles upon which it rests, a decision in *Pearson* should not affect this case.

Additionally, there is no basis for this Court to summarily reverse the court of appeals' decision. *See* U.S. Br. at 12-13. In support of its argument, the United States relies on *Brosseau v. Haugen*, 543 U.S. 194 (2004), which held that it was not clearly established, in a particularized sense, that the officer violated the Fourth Amendment's deadly-force standards by shooting a suspect as he fled in a vehicle, given the risk it posed to others in the area.

In this case, however, it was clearly established, in a particularized sense, that Petitioners violated the Fourth Amendment by detaining Respondents without probable cause for over two hours after the local officers had conducted a thorough *Terry* stop that dispelled any reasonable suspicion that Respondents were involved in criminal activity. In fact, the initial

investigation revealed that Respondents were engaged in political speech—an activity that a reasonable officer would know is protected by the First Amendment. *See Hill v. Colorado*, 530 U.S. 703, 714-15 (2000).

Despite the novel factual circumstances of this case, *see Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances."), in light of pre-existing law the unlawfulness of Petitioners' actions was readily apparent.

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. *Id*. at 709.

Pre-existing law makes plain that the Fourth Amendment requires a *Terry* stop to be brief and limited in nature because such stops are not supported by probable cause. *United States v. Heath*, 259 F.3d 522, 528 (6th Cir. 2001); *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."). 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. Unless there is probable cause to arrest during the brief stop, the detainee must be released. *Butler*, 223 F.3d at 374. Thus, pre-existing law put Petitioners on notice that "reasonable suspicion" cannot justify the three-hour detention at issue here—a detention not based on probable cause that followed an investigation that revealed no evidence of criminal activity.

In *United States v. Sharpe*, 470 U.S. 675 (1985), this Court noted that the crucial inquiry regarding the length of a detention is "whether the police *diligently* pursued a means of investigation that was likely to confirm or dispel their suspicions *quickly*, during which time it was *necessary* to detain the defendant." *Id*. at 686 (emphasis added); *see also Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion) (stating that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"). Here, the purpose of the stop was effectuated within 15 to 25 minutes; yet, Respondents were not free to leave.

Prior to the detention, none of the law enforcement officers had any information that Respondents were involved in criminal activity. 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. All of this took approximately 15 to 25 minutes to complete and no evidence of criminal activity was found. Instead, the officers determined that Respondents were engaged in political speech.

These investigative steps were repeated by Petitioners, prolonging the detention for more than two hours. Petitioner Shaw testified that the helmets and vests were his primary concern, claiming it took him approximately 30 to 45 minutes to determine that they were used for personal protection.[38] However, the officers at the scene had already determined that the helmets and vests were used for this lawful purpose.[39] Officer Walsh testified that after completing everything that the officers knew to do for an investigative stop, they waited for the FBI while Respondents remained in police custody.[40] Parker admitted that he waited "probably . . . an hour" for the FBI to do an interview that he could have done.[41]

Thus, the detention was unnecessarily prolonged on account of Petitioners, who had no legal basis for holding Respondents. In fact, Petitioner Morris testified that the FBI "had no jurisdiction to do any enforcement action," noting that this was not the FBI's "show."[42] The FBI had *no* information that Respondents had any connection to domestic terrorism (and Parker was in direct contact with Morris throughout).[43] The FBI never checked any unique intelligence sources or databases to determine whether

---

[38] J.A.485-86.

[39] J.A.395-96,516;J.A.291,321,469.

[40] J.A.512.

[41] J.A.390-92;J.A.345.

[42] J.A.356-57.

[43] J.A.248,368,504.

any such connection existed,[44] negating any claim that Petitioners truly considered Respondents dangerous. Petitioners did nothing more than any other basic law enforcement officer would do (i.e., check licenses, ask questions, conduct a search),[45] all of which were completed well before their arrival and all of which revealed no criminal activity.[46] Accordingly, there were no special skills, knowledge, training, "expertise" or equipment necessary to evaluate what Respondents were doing.[47] *Compare* U.S. Br. at 20-21.

The United States' view on the First Amendment issue fares no better. Respondents' speech is plainly protected by the First Amendment. As the court of appeals noted, "The district court correctly found that Plaintiffs had 'engaged in protected activity,' (J.A. at 116), and Defendants do not argue otherwise." Pet.App.23a-24a.

The United States argues that the court of appeals "disregarded the objective component of its own test

---

[44] J.A.494-95;J.A.248,368.

[45] J.A.469;J.A.511.

[46] The United States mistakenly asserts that "the court of appeals' decision appears to be affirmatively based on the *unsupported* assumption" that the two investigations "were simply duplicative." U.S. Br. at 14 (emphasis added). The record *amply demonstrates* that the two investigations were in fact duplicative.

[47] Contrary to the United States' claim, "*petitioners* were sufficiently involved in the decision to detain the individual respondents that they can be held liable for" violating the Fourth Amendment. Moreover, "it would have been clear to reasonable officers in *petitioners*' position that their involvement gave rise to a Fourth Amendment violation." *Compare* U.S. Br. at 15.

for First Amendment retaliation claims, i.e., whether it would have been clear to a reasonable officer that a given defendant's participation in the detention 'would likely chill a person of ordinary firmness from continuing to engage in [the protected] activity.'" U.S. Br. at 16 (citation omitted). It further argues that the court "rested the qualified immunity determination on a subjective factor—i.e., motive—that is particularly susceptible to manipulation." U.S. Br. at 16. And it argues that the court's qualified-immunity inquiry proceeded at "a high level of generality" instead of "*taking into account the facts and circumstances of the case*, to determine whether the officer's conduct violated clearly established law." U.S. Br. at 18.

The United States is incorrect on all counts. As the court of appeals found, "Plaintiffs' allegations, if proven at trial, could be taken by a reasonable juror to support their claim that Defendants were motivated to detain them in part because of their constitutionally protected speech." Pet.App.26a. The court cited specific facts in the record, finding that "Plaintiffs here 'have put forward a number of specific, nonconclusory allegations and identified affirmative evidence that could support a jury verdict at trial.'" Pet.App.27a (citation omitted).

Regarding the effect of Petitioners' actions on Respondents' speech, the court noted that "[a] chilling effect sufficient under this prong is not born of *de minimis* threats or inconsequential actions." Pet.App.24a (internal quotations and citations omitted). Accordingly, the court applied an objective standard to the facts of the case, finding that:

> 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.24a-25a.

The court also considered preexisting law, noting that in *Dietrich v. Burrows*, 167 F.3d 1007 (6th Cir. 1999), it had "considered whether a group of police officers were entitled to qualified immunity when they executed an arrest absent probable cause allegedly in retaliation for the plaintiffs' prior speech." Pet.App.30a. The court observed that "'Supreme Court decisions rendered long before the actions at issue in th[at] case recognize that government actions may not retaliate against an individual for the exercise of protected First Amendment freedoms.'" Pet.App.30a (citations omitted)). Accordingly, the court held that '[t]he 'contours of the right' to be free from retaliation were thus abundantly clear on the day Defendants stopped and detained Plaintiffs." Pet.App.30a.

In sum, in light of the court's detailed analysis of Respondents' First Amendment claim, it is inaccurate

to argue that the court did not "*tak[e] into account the facts and circumstances of the case*." U.S. Br. at 18.

CONCLUSION

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

APPENDIX

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-3284

[Filed May 7, 2007]

CENTER FOR BIO-ETHICAL REFORM, INC., et al.,	)
Plaintiffs-Appellants,	)
v.	)
CITY OF SPRINGBORO, et al.,	)
Defendants-Appellees.	)

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING AND REHEARING EN BANC FOR FEDERAL DEFENDANTS-APPELLEES STEVEN MORRIS, MICHAEL BURKE, AND TIM SHAW

PETER D. KEISLER
Assistant Attorney General

GREGORY G. LOCKHART
United States Attorney

ROBERT M. LOEB
(202) 514-4332
EDWARD HIMMELFARB
(202) 514-3547
Attorneys, Appellate Staff
Civil Division, Room 7646
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Constitution:

Statutes:

Regulations:

Rules:

Federal Rules of Appellate Procedure:

Miscellaneous:

INTRODUCTION

This petition for rehearing and rehearing en banc is filed pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure on behalf of the federal defendants-appellees Steven Morris, Michael Burke, and Tim Shaw, all of whom are agents with the Federal Bureau of Investigation (FBI). The two groups of local police are also filing their own, separate petitions for rehearing and rehearing en banc. If the Court should grant either or both of those petitions, we respectfully request that the Court grant our petition as well.

The panel decision in this case wrongly forces FBI agents to defend themselves at trial for a prompt and responsible investigation of possible domestic terrorism at the direct request of local police. Here, local police found the plaintiffs, anti-abortion activists, driving "'panel trucks similar to the size that was used in the Oklahoma City bombing, * * * shortly after 9/11.'" Panel Op. at 6 (quoting JA 490). These trucks displayed large pictures of aborted fetuses, and the drivers were wearing Kevlar vests (one wore a helmet), had radio equipment, and carried mace. They were accompanied by a police-like black Crown Victoria, which had a dash-mounted video camera, a cage behind the driver's seat, a shotgun rack, communications equipment, amber lights in the back, and roof and truck antennas.

Fearing that these activists were planning terrorist acts, the police called in the FBI to investigate, since the FBI has principal jurisdiction over terrorism, both foreign and domestic. The FBI sent agents right away,

and they arrived as soon as they could drive to the scene. Once they arrived, they checked out the situation and released the activists promptly. Yet the panel is requiring two of the agents to stand trial on First and Fourth Amendment claims.

Although the 12 individual defendants in this case were from three different law-enforcement agencies (two local and one federal), had different investigative jurisdiction, and participated to different degrees in two different locations, the panel lumped all defendants together in its analysis. That approach not only ignored established principles of qualified immunity but negated the FBI's special federal responsibilities for terrorism and created serious disincentives to cooperation of local and federal authorities in investigating terrorism. If FBI agents will be held personally liable in damages for investigating possible terrorism at the request of local police (and if the police are going to be held personally liable for asking the FBI to investigate), law-enforcement officers will think twice before they ask for or provide help in investigating threats of terrorism.

Thus, this case involves a question of exceptional importance:

> Whether, in a challenge to a law-enforcement operation in which both local officers and agents of the FBI participate, a court may deny qualified immunity by holding all local and federal officials responsible for all actions taken by all other defendants, without considering the different roles played by local and federal

> defendants or the different actions taken by individual agents.

This Court should rehear the matter en banc to re-establish the principle that each defendant in a constitutional-tort case is entitled to have his actions evaluated separately in the qualified-immunity analysis.

STATEMENT OF THE CASE

1. The Center for Bio-Ethical Reform, Inc. (CBR) is a pro-life organization whose activities include a program called the "Reproductive Choice Campaign." This campaign involves employees and volunteers driving box trucks with "'large, colorful pictures depicting graphic images of first-term aborted fetuses'" on them on "'the streets and highways of major cities and towns throughout the United States.'" Panel Op. at 2 (quoting JA 75-76).

On June 10, 2002, plaintiff Mark Harrington, the executive director of the organization's Midwest operations, along with volunteer plaintiffs Quentin Patch and Dale Henkel, spent the day driving such trucks around counties in the Dayton, Ohio area. Harrington and Patch, who drove the box trucks, wore protective body armor, and Patch also wore a helmet. Henkel drove an escort vehicle resembling an unmarked police car; it was a black Crown Victoria equipped with a dash-mounted video camera, a cage behind the driver's seat, a shotgun rack, radio communications equipment, amber lights in the back, and roof and truck antennas. In addition, the trucks and the car all contained mace. Panel Op. at 2, 3.

When the plaintiffs were finished with their activities for the day, they attempted to park their vehicles at the farm of a supporter on Pennyroyal Road. The escort vehicle crossed the double yellow line to get around the trucks, and the three vehicles began the trip down a long driveway at the farm, but the first truck could not clear some tree branches and stopped. While this was happening, there was a multi-vehicle backup on Pennyroyal Road, and some of the vehicles on the road began to cross the double yellow line to get around the plaintiffs' vehicles. Shortly afterward, Defendant Nick Clark, a Springboro police officer, pulled into the driveway behind the second truck, put his lights on, and blocked the driveway. As he approached the second truck, he noticed that Patch, who was wearing a helmet and body armor, was radioing that the police had stopped him. Panel Op. at 3. Officer Clark described Patch as "extremely nervous"; Clark eventually became concerned for his own safety and left the scene. Id.

After Clark reported these events, other Springboro officers went to the scene, and Detective Tim Parker called Steven Morris, who was then the supervisory agent at the FBI's Dayton office, inquiring whether the FBI had been undertaking any operations "in the Springboro area off of Pennyroyal." Panel Op. at 3-4; JA 354-355. Detective Parker referred to Officer Clark's report of suspicious activities and mentioned that local police thought it was some sort of law-enforcement activity, given the vehicles and the assault gear. JA 355. He also mentioned the photos of fetuses on the trucks. Panel Op. at 4. Out of concern about "domestic terrorism targeting abortion doctors and clinics," id., and particularly in light of intelligence

that the FBI had received regarding tactics used by some anti-abortion groups to intimidate doctors, including "assassinations and vandalism," JA 356, 362, Morris told Parker "he would 'grab a couple of guys and . . . come by and . . . find out who these people were or what they were doing.'" Panel Op. at 4 (quoting JA 3 56). Morris himself set off for the Pennyroyal location, and at his request, the Dayton office sent out Agents Robert Buzzard, James Howley, Timothy Shaw, and Tymothy Burkey. Id.

The FBI's concerns about the situation were these:

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

Panel Op. at 6 (quoting deposition of Agent Shaw, JA 490).

Meanwhile, Harrington and Patch had backed the two trucks out of the driveway and had driven them down the road toward a church parking lot to park for the night, followed by two police cars. When

Harrington and Patch saw the lights, however, they turned into a subdivision on Queensgate Road. Henkel, in the escort car, was blocked by five police cars back at Pennyroyal. Panel Op. at 5. Some of the police were from Springboro, and others from Clearcreek. Id. at 4. During this time, the police were investigating the situation at both locations, and both the trucks and the escort car were searched with consent of the plaintiffs. The plaintiffs were not handcuffed, but they were not permitted to leave. Id.

FBI Agent Burkey reported to the scene at Pennyroyal, a thirty- or forty-minute drive away from the Dayton office. JA 243. There, Morris further advised him regarding that at both Pennyroyal and Queensgate, local police had stopped certain vehicles and had fielded complaints from neighbors, who were "very concerned because of the way these individuals were dressed, they felt they were acting suspicious and they had these panel trucks." JA 244.

Burkey's assignment was to stay at Pennyroyal and, with Buzzard, interview Henkel, who was with the security vehicle. JA 244-245. Henkel was cooperative; he explained what the trucks and the security vehicle were doing, as well as why the other drivers were wearing helmets and vests; and he consented to a search of the security vehicle, which revealed no evidence of criminal activity. JA 245. The interview lasted about fifteen or twenty minutes. Panel Op. at 4; JA 247.

Agent Shaw had already left the Dayton office when Morris contacted him. Morris told Shaw to meet up with Buzzard and proceed to a location on

Pennyroyal, where there were "some individuals with Kevlar helmets and vests." in order to investigate. JA 477. Shaw arrived about twenty minutes later. JA 478. Morris showed Shaw the escort car at Pennyroyal and instructed him to proceed to Queensgate to interview the individuals there with the Kevlar helmets and vests who been driving the two panel trucks. JA 479, 481. Shaw also learned that they were with an anti-abortion group. JA 481.

Together with Agent Howley, Shaw proceeded to Queensgate. JA 483. After speaking briefly with local police, Shaw approached Harrington and identified himself. Harrington was "visibly upset and very uncooperative," JA 484, but Shaw allowed Harrington to call his attorney on a cell phone to discuss the situation with him, and then he handed the phone to Shaw. Shaw spoke with the attorney and described the FBI's concerns about the vehicles, helmets, and vests; the attorney explained the reason for them. Harrington finished his conversation with the attorney, and he became "very cooperative after that point, provided documentation as to ownership of the vehicles, showed [Shaw] the Kevlar helmets and vests, allowed [Shaw] to make sure there were no weapons in the truck." Id.; see Panel Op. at 6. Shaw called the attorney back to let him know everything was resolved. JA 484. The conversations with Harrington and the attorney allayed Shaw's suspicions of criminal activity, and the plaintiffs were allowed to leave. Panel Op. at 6. Shaw spent about thirty or forty-five minutes at Queensgate in total. JA 484.

2. The plaintiffs sued in district court, alleging, among other things, violations of the First and Fourth

Amendments. The district court granted qualified immunity on those two claims to all of the defendants.

The panel affirmed in part and reversed in part, remanding for further proceedings. The panel held that summary judgment on the First Amendment retaliation claim was inappropriate, because the "Defendants'" motivation presented a genuine issue of material fact, and the panel could not definitively say that "Defendants" stopped and detained the plaintiffs without regard to their protected speech. Panel Op. at 10. With respect to qualified immunity, the panel concluded that the very same fact dispute required reversal of the district court's grant of summary judgment for "Defendants" on the retaliation claim. Id. at 12.

The panel also reversed the grant of qualified immunity as to the Fourth Amendment claim. Referring to Officer Clark's first contact with the plaintiffs, when he spoke to Patch but quickly left out of concern for his own safety, the panel stated that "Defendants 'seized' Plaintiffs within the meaning of the Fourth Amendment when they pulled Plaintiffs over to investigate the situation." Panel Op. at 14 & n. 11. While the panel recognized this stop was justified, it held that the detention ripened into an arrest without probable cause when it lasted too long. Id. at 14-15. Although the reason for the delay was to enable the FBI to arrive to investigate possible domestic terrorism, the panel treated the FBI's interest in the matter as essentially identical with that of the local police. Id. at 16 (delay was to enable FBI to conduct "effectively the same investigation" after suspicions of

local police had been dispelled). Thus, the panel found a substantive violation of the Fourth Amendment.

The panel denied qualified immunity to "Defendants" because, while "Defendants confronted novel factual circumstances," reasonable officers would have known that the detention had ripened into an arrest absent probable cause. Panel Op. at 18.

ARGUMENT

Qualified immunity is an individual defense for individual officers who are sued individually. Here, the defendants included six Springboro police officers, three Clearcreek police officers, and three agents of the Federal Bureau of Investigation. Under established principles of qualified immunity, the panel was required to analyze the involvement of local and federal officials separately and to examine each officer's participation individually. Contrary to these principles, the panel lumped together all 12 individual defendants into one amorphous mass, charging each defendant with all the actions of every other one. In so doing, the panel wrongly deprived FBI Agents Morris and Shaw of their "'entitlement not to stand trial.'" Saucier v. Katz, 533 U.S. 194, 200 (2001) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).[1]

1. It is well established that a defendant is entitled to qualified immunity despite the conclusion that a right has been violated, unless the plaintiff shows that

---

[1] FBI Agent Burke had no involvement in the events here, and the panel correctly affirmed his dismissal. Panel Op. at 12 n.10.

"the law clearly established that the [official's] conduct was unlawful in the circumstances of the case." Saucier, 533 U.S. at 201. Moreover, the determination whether a right was "clearly established" "must be undertaken in light of the specific context of the case, not as a broad proposition." Id.; see Wilson v. Layne, 526 U.S. 603, 615 (1999) (to determine whether a right is clearly established, it must be "defined at the appropriate level of specificity"). A right is clearly established if "in the light of preexisting law the unlawfulness [is] apparent." Wilson v. Layne, 526 U.S. at 615.

This inquiry requires a defendant-specific analysis. That is, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 202 (emphasis added); see Brosseau v. Haugen, 543 U.S. 194, 199 (2004) (per curiam) (it must be clear to a reasonable official "that his conduct was unlawful in the situation he confronted") (emphasis added); Anderson v. Creighton, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.") (emphasis added).

Both this Court and other circuits have understood the need to look at each defendant individually. See Ross v. Duggan, 402 F.3d 575, 590 n.7 (6th Cir. 2004) ("the existence of any actual constitutional violation on the subject facts would not justify imposition of liability against any individual defendant in his *personal* capacity, because each defendant would

unquestionably be shielded by qualified immunity") (underscoring added); Hank v. City of Cleveland, 7 Fed. Appx. 452, 457 (6th Cir. 2001) ("a plaintiff must establish with particularity that a defendant *himself* has violated some clearly established statutory or constitutional right in order to strip that person of the protection of qualified immunity"); Trulock v. Freeh, 275 F.3d 391, 402 (4th Cir. 2001), cert. denied, 537 U.S. 1045 (2002) (analyzing qualified immunity separately for different groups of defendants and noting that "liability is personal, based upon each defendant's own constitutional violations"); Pellegrino v. United States, 73 F.3d 934, 936 (9th Cir. 1996) (analyzing qualified immunity separately for two agents, because "Bivens liability is premised on direct personal involvement" and "in the absence of such proof," one official cannot "be held vicariously liable for the conduct of another").

This is equally true of supervisory liability. A supervisor is liable only for his own actions, and not, through respondeat superior, for the actions of a subordinate. See, e.g., Copeland v. Machulis, 57 F.3d 476, 481 (6th Cir. 1995) (plaintiff must show supervisor "was personally involved" in conduct); Hays v. Jefferson County, 668 F.2d 869, 872 (6th Cir.), cert. denied, 459 U.S. 833 (1982) ("must be a direct causal link between the acts of individual officers and the supervisory defendants").

2. The panel flatly ignored these established principles. In its discussion of the First and Fourth Amendment claims, the panel referred approximately 40 different times to "Defendants" collectively, without considering the individual actions of each of the 12

individual defendants from the two local police forces and the Federal Bureau of Investigation.[2] Panel Op. at 9-18.

By way of example, the panel stated: "[W]e evaluate the motivation for Defendants' actions" in light of the allegations that the plaintiffs' "speech motivated Defendants to stop and detain them." Panel Op. at 10 (emphasis added). Further: "Defendants 'seized' Plaintiffs within the meaning of the Fourth Amendment when they pulled Plaintiffs over to investigate the situation." Id. at 14 (emphasis added). Similarly: "Defendants' 'continued detention' of Plaintiffs over a period of three hours * * * operated to 'ripen[] the investigatory stop into an arrest.'" Id. at 15 (emphasis added). And: "Defendants pulled them over in a residential subdivision and on the side of an apparently busy street, effectively held them for three hours, and did so in front of neighbors and onlookers who had stopped to assess the situation." Id. (emphasis added). It is clear from the record that not all defendants did what the panel describes.

The two FBI defendants were not even at the scene until well after the initial traffic stop by Officer Clark at Pennyroyal (or even the secondary stop at Queensgate). After receiving Officer Clark's report, Detective

---

[2] The panel once referred individually to FBI Agent Michael Burke in affirming his dismissal, panel op. at 12 n. 10, several times to the two groups of local defendants, when referring to their separate arguments, id. at 10 n.8, 15 & nn. 12 & 13, 18 n.15, and occasionally to individual defendants when citing allegations against them.

Tim Parker called Agent Morris, a supervisory agent, and it was decided that the FBI should send agents to check out whether the plaintiffs, with their assault gear, were possibly planning domestic terrorism.[3] Panel Op. at 4. Agent Morris's only other involvement, according to the panel, was that he allegedly "profiled" the plaintiffs based on the photos of fetuses – as if he were somehow oblivious to the fact they were driving around in box trucks and a police-like car, with Kevlar vests, helmets, mace, and radio equipment. Id. at 10. Agent Shaw's involvement was limited to a short time at the scene, where he talked to Harrington and his lawyer, did a brief investigation, and let the plaintiffs go. Id. at 6.

None of these actions by the two FBI agents, considered individually, even comes close to a clearly established First or Fourth Amendment violation. There was absolutely no basis for the panel to force these agents to stand trial.

3. The panel's error was even more significant, because it lumped together local police officers, who conducted the initial traffic stop, and federal agents, whose responsibilities were quite different.

---

[3] Detective Parker testified that Agent Morris requested he prevent the plaintiffs from leaving, although Agent Morris did not recall such a request. Panel Op. at 4 & n.5. Even if this is correct, it hardly is sinister, as the panel seemed to believe. Id. at 16. If there was a reasonable basis for the FBI to investigate, it would have been foolish to send the plaintiffs off before the FBI arrived.

The FBI has responsibility for matters involving possible terrorism. 28 C.F.R. 0.85(*l*) (FBI authority regarding terrorism). This includes domestic terrorism, as defined in 18 U.S.C. 2331(5). See also Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations, Part III.B., http://www.usdoj.gov/ag/readingroom/generalcrimea.htm (last visited May 6, 2007). Cf. 18 U.S.C. 248 (abortion-clinic violence).

The panel wholly ignored these federal responsibilities when it treated the FBI's investigation here as if it merely duplicated the investigations by local police: "local law enforcement and the FBI conducted the same investigation and search of Plaintiffs." Panel Op. at 16; see id. (release of plaintiffs was delayed to enable FBI to conduct "effectively the same investigation" after "initial investigation conducted by local law enforcement had dispelled their suspicions"). The reality was this: Local law enforcement promptly called in the FBI to investigate possible federal crimes. FBI agents promptly drove to the scene. They promptly conducted an investigation of possible federal crimes. And they promptly released the plaintiffs. The panel's remarkable notion that the FBI should have turned around and gone home once local police, on their own, were reassured that there was no risk that federal crimes were about to be committed reflects neither the division of responsibility in our federal system nor the appropriate analysis under established principles of qualified immunity.

Finally, the panel's decision creates perverse disincentives to investigating possible terrorism. The decision holds local police personally responsible in damages for delays caused in asking the FBI to investigate, and it holds FBI agents personally responsible in damages for delays caused by having to drive to areas not located near their regional offices. Further, it discourages federal and state cooperation by holding all agents and police completely responsible for all the actions taken by everyone else.

The result reached by the panel not only is not mandated; it is affirmatively contrary to established case law. It should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the Court should rehear this case en banc and should affirm the judgment below.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

GREGORY G. LOCKHART
United States Attorney

ROBERT M. LOEB
(202) 514-4332
EDWARD HIMMELFARB
(202) 514-3547
Attorneys, Appellate Staff
Civil Division, Room 7646

Department of Justice
950 Pennsylvania Ave., N. W.
Washington, D.C. 20530-0001

* * *

[Certificate of Service and Addendum are omitted from this appendix]

APPENDIX 2

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-3284

[Filed August 10, 2007]

CENTER FOR BIO-ETHICAL REFORM, INC., ET AL.,	)
Plaintiff-Appellant,	)
v.	)
CITY OF SPRINGBORO, A MUNICIPAL ENTITY, ET AL.,	)
Defendants-Appellees.	)

BEFORE: MOORE and CLAY, Circuit Judges; and BELL,* District Judge.

ORDER

* Hon. Robert Holmes Bell, Chief United States District Judge for the Western District of Michigan, sitting by designation.

The court having received three petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk