Supreme Court, U.S.
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No. ____

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

PETITION FOR WRIT OF CERTIORARI

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December 18, 2007

QUESTIONS PRESENTED

1. Whether, in rejecting federal law enforcement officers' qualified immunity defense to a First Amendment retaliation claim, the Sixth Circuit ruled in conflict with this Court's precedents by holding that a factual dispute as to the officers' motive was dispositive of qualified immunity without considering whether it was clearly established that the officers' actions would chill speech.

2. Whether, in assessing a First Amendment retaliation claim, a court should consider whether a person of ordinary firmness "similarly situated" to the plaintiff would be chilled by the government conduct, as some Courts of Appeals have held, or whether a court should consider only whether an "average law abiding citizen" would be chilled, as the Sixth Circuit held in this case.

3. Whether a federal law enforcement officer who participates in a *Terry* stop may be held personally liable for money damages if a reasonable officer could have believed that his individual actions comported with the Fourth Amendment.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed are the following:

Plaintiffs-Appellants: Center for Bio-Ethical Reform, Inc., Mark Harrington, Quentin Patch, and Dale Henkel.

Defendants-Appellees: the City of Springboro and Clearcreek Township, as municipal entities; Springboro Police Chief Jeffrey Kruithoff; Clearcreek Township Police Chief Peter Herdt; FBI Supervisory Special Agent Steven Morris; FBI Special Agents Michael Burke and Tim Shaw, in their official capacities; and Kruithoff, Herdt, Morris, Burke, Shaw, Clearcreek Township Officers Jeff Piper and Brian Hubbard, and Springboro Officers Tim Parker, Lisa Walsh, Randy Peagler, Nick Clark, and Eric Kuhlman, in their individual capacities.

Only Defendants-Appellees FBI Supervisory Special Agent Steven Morris and FBI Special Agent Tim Shaw are Petitioners in this Court.

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The opinion of United States Court of Appeals for the Sixth Circuit reversing the grant of summary judgment for Petitioners is reported at 477 F.3d 807. Pet.App.1a-50a. The Sixth Circuit's order denying rehearing is unreported. Pet.App.95a-96a. The opinion of the District Court (S.D. Ohio) adopting the report of the Chief Magistrate Judge is unreported. Pet.App.51a-63a. The report of the Chief Magistrate Judge is unreported. Pet.App.64a-94a.

JURISDICTION

The Sixth Circuit entered its judgment on February 20, 2007, and denied a timely petition for rehearing on August 10, 2007. On November 6, 2007, Justice Stevens granted Petitioners' application for a 40-day extension of the time to file a petition for writ of certiorari. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves application of the First Amendment and the Fourth Amendment. The pertinent provisions are reproduced at Pet.App.97a.

STATEMENT OF THE CASE

A. Respondents' Conduct and the Investigation by Local Law Enforcement and the FBI.

Respondent Center for Bio-Ethical Reform, Inc. ("CBR") is a non-profit corporation engaged in "educational campaigns," including the "Reproductive Choice Campaign." To publicize CBR's anti-abortion message, CBR employees and

volunteers drive box trucks along "the streets and highways of major cities and towns throughout the United States." Pet.App.2a. The sides of these trucks display "large colorful pictures depicting graphic images of first-term aborted fetuses." Pet.App.2a.

On June 10, 2002, Respondent Mark Harrington, executive director of CBR's Midwest operations, and Respondents Quentin Patch and Dale Henkel, CBR volunteers, carried out such a campaign in and around Dayton, Ohio. Harrington and Patch each drove a box truck displaying graphic anti-abortion images. They were both wearing body armor, and Patch also wore a kevlar helmet. Henkel accompanied the trucks in a black Crown Victoria equipped to look like a police car, with tinted windows, a dashboard-mounted video camera, a cage behind the driver's seat, a shotgun rack, a spotlight, rear amber lights, antennae on the roof and trunk, and reinforced bumpers. All three vehicles were outfitted with mace and with radios that allowed the drivers to communicate with each other.

At approximately four p.m., Respondents ceased their activities for the day and headed to a farm where CBR had permission to park the vehicles for the night. When Harrington reached the farm's driveway, he became concerned that the trucks would not fit down it. Harrington and Patch stopped their trucks near the top of a hill on Pennroyal Road, and Henkel stopped behind them in the escort vehicle. Six to eight cars backed up behind Henkel. To investigate whether the trucks would be able to navigate the driveway, Henkel drove the escort

vehicle across a double yellow line to get around the trucks. The cars that were backed up behind Henkel also began to drive around the trucks. After Henkel gave the all clear, Harrington drove into the driveway and Patch began to follow him in the second truck.

A City of Springboro police officer was driving down Pennroyal Road when he observed the traffic problems caused by the CBR vehicles. Accordingly, the officer decided to stop Patch's truck as it pulled into the driveway. As the officer approached the truck on foot, he observed Patch wearing body armor and a kevlar helmet. He also noticed Patch watching the officer closely in the side view mirror, and heard Patch repeat into his radio that "the police are approaching me." The officer asked Patch a few questions, during which time Patch "look[ed] around a lot," hesitated, and perspired heavily. In response to the officer's questions, Patch said he was campaigning against abortion and indicated the pictures on the side of the truck. Fearing for his safety in light of Patch's body armor, helmet, and "extremely nervous" and unusual behavior, the officer retreated to his vehicle and pulled into nearby Deer Creek Trail. Pet.App.5a-6a; J.A.258-61. Patch continued down the driveway to a point where Harrington had stopped because of low-hanging branches.

Once at Deer Creek Trail, the Springboro officer contacted his superiors. Two other Springboro officers arrived at Deer Creek Trail shortly thereafter, and one of them, Tim Parker, called Steven Morris, Supervisory Special Agent in the

FBI's Dayton Office, to ask whether there were any FBI or other federal SWAT operations happening in the area. Parker described the encounter with Patch and also mentioned his concern that a doctor lived in the area. Morris confirmed that no federal exercises were taking place and, concerned about possible "domestic terrorism," stated that he would "grab a couple of guys and . . . come by and . . . find out who these people were or what they were doing." Pet.App.7a.

In taking this action, Agent Morris was acting well within his authority. The FBI has responsibility for matters involving possible domestic terrorism. *See* 28 C.F.R. § 0.85(*l*); 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 (Mar. 21, 1989), *available at* http:www.usdoj.gov/ag/readingroom/generalcrimea.htm. For this reason, the FBI has investigative expertise in domestic terrorism that cannot be matched by local police officers – after all, a domestic terrorism investigation requires background knowledge and a general approach and mode of questioning very different from that required for a routine stop. Local authorities have no jurisdiction or experience in determining whether suspects may have committed a federal crime.

In addition, Agent Morris was aware, based on FBI intelligence reports, that anti-abortion groups sometimes employ violent tactics in violation of federal law, *see* 18 U.S.C. § 248 (1994 FACE Act), and knew that a doctor who performed abortions had

recently been assassinated in his home.[1] Morris was also aware of other domestic terrorism threats that the FBI was handling in the Dayton area, as well as larger terrorism concerns sparked by 9/11, which had happened only months earlier, and by the Oklahoma City bombing. Pet.App.55a-56a; 84a-85a; J.A.355-56, 361. In light of all of this, Respondents' actions raised very serious concerns:

> 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.

Pet.App.14a.

Agent Morris headed directly to the scene from Cincinnati. En route, he contacted his office in Dayton and asked FBI Special Agents Tim Shaw, Tim Burkey, Robert Buzzard, and James Howley to meet him at the scene. Agent Morris specifically

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[1] Dr. Barnett Slepian was murdered on October 24, 1998, while standing in the kitchen of his home. David Staba, *Life Term for Killer of Buffalo-Area Abortion Provider*, N.Y. Times, June 20, 2007, at B7. Earlier in 1998, Eric Rudolph bombed an abortion clinic in Birmingham, killing an off-duty police officer who worked as a clinic security guard. Mr. Rudolph was also responsible for the 1996 Centennial Olympic Park bombing. Shaila Dewan, *Victims Have Say as Birmingham Bomber is Sentenced*, N.Y. Times, July 19, 2005, at A14.

requested Agent Burkey because "of his expertise or his knowledge of the [FBI's] Domestic Terrorism Program." The other agents had "general investigative expertise." J.A.353-54. While Agent Morris was on his way, several additional local police officers arrived at Deer Creek Trail.

Meanwhile, Respondents had covered up the pictures on the trucks with tarps and had identified a local church parking lot where they could leave the trucks overnight. Harrington and Patch left the farm in the two box trucks and headed toward the church. When local law enforcement officers at Deer Creek Trail realized that Respondents were departing, the officers moved to intercept them. Before Henkel could exit the farm's driveway in the escort vehicle, several police cars blocked his way.

FBI Agent Morris arrived at the farm just as local law enforcement officers were pulling in to stop Henkel. Meanwhile, several other local police cars followed the two box trucks and stopped them on nearby Queensgate Road. The two investigative stops – of the escort vehicle just off Pennroyal Road and of the trucks on Queensgate Road – occurred sometime after 5:00 p.m.

Pennroyal Investigative Stop. After stopping the escort vehicle, local police questioned Henkel and checked his driver's license and vehicle registration. They also questioned Ron Bowling, a CBR volunteer who had met Respondents at the farm. Finally, after obtaining permission from the farm's owners, local officers searched the outbuildings of the farm to

determine whether Respondents had hidden anything there.

Once the local police had completed their standard inquiries, they waited for the FBI agents to arrive from Dayton and conduct an investigation into possible domestic terrorism. Meanwhile, Agent Morris also waited at the scene for the arrival of the four FBI agents he had summoned. Those agents left the Dayton area promptly, but had to travel a distance to reach the scene, and rush hour traffic further delayed their arrival. Pet.App.17a, 91a.

When FBI Agents Shaw, Buzzard, Burkey and Howley reached Pennroyal Road, Agent Morris briefed them on what had occurred and directed Burkey and Buzzard to interview Henkel and to ask his consent to search the escort vehicle. Henkel eventually gave consent and the FBI interviewed him and conducted the search, finding Kevlar helmets and vests, among other items. J.A.214; J.A.245. Agent Morris also directed Agent Burkey to interview Ron Bowling, and sent Agent Shaw to the Queensgate Road location to carry out the FBI investigation there.

Queensgate Investigative Stop. No FBI agents were present when local police officers stopped Harrington and Patch on Queensgate Road, and Agent Shaw did not arrive until approximately thirty minutes before Harrington and Patch were allowed to depart in their trucks. The local officers conducted driver's license and registration checks, interviews, and, by consent, a search of the trucks.

Local officers also photographed the pictures on the sides of the trucks.

During the local police investigation, Harrington and Patch were "very evasive" when asked whether they had any body armor or kevlar helmets. They denied having any such gear, even though a local officer had earlier observed Patch wearing it. Patch was "agitated and nervous . . . sweating, shaking, very aloof in his answers, [and] somewhat hostile." When asked if he had weapons, Patch said he had a knife and reached down to open his fanny pack. The local officers had to instruct Patch several times to keep his hands away from the fanny pack. The officers searched the fanny pack with Patch's consent and found a pocket knife and pepper spray. J.A.508; J.A.268. Once the local police finished their initial investigation, which took approximately thirty minutes, they waited for the FBI to arrive.

When Agent Shaw got to the Queensgate location, he spoke to the local police about what they had learned so far. Agent Shaw did not know, did not inquire, and was not told how long the stop had lasted to that point. J.A.485. Agent Shaw next sought to interview Harrington, who was visibly upset and very uncooperative. Concerned that the situation might get out of hand, Agent Shaw ushered Harrington between the two trucks and tried to calm him down. Harrington made a cell phone call to his attorney, Mr. Cunningham, who is CBR's founder. Harrington then handed the phone to Agent Shaw, who proceeded to discuss with Cunningham Respondents' suspicious behavior. Cunningham explained that CBR uses tactical gear to protect its

volunteers from snipers and other violence. After the phone call, Harrington became very cooperative, providing documentation for the vehicles, displaying the body armor and helmets and explaining their purpose, and allowing Agent Shaw to check the trucks for weapons.[2] J.A.484-88.

Conclusion of the Investigative Stops. Agent Shaw's conversations with Cunningham and Harrington, along with the FBI's other investigative activities, resolved the FBI's suspicions of possible domestic terrorism. At approximately eight p.m., roughly thirty minutes after the FBI investigation began, Respondents were allowed to leave the Queensgate and Pennroyal Road locations. To ensure that Respondents did not encounter any further difficulties, Agent Shaw asked a local police officer to escort them to the church parking lot.

According to Respondents, the whole incident – including all of the actions taken by the local officers, the time spent waiting for the FBI agents to get to the scene, and the FBI's own brief investigation – lasted approximately three hours. At no time were Respondents physically restrained or handcuffed. Respondents claim that as a result of this incident they will no longer conduct their activities in the area of the stop. Pet.App.14a, 44a.

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[2] Harrington claims that during this time, "one of the plain clothes men" who arrived with Agent Shaw had a conversation with Harrington "about these pictures and how [CBR] should . . . get [its] message out a different way." J.A.294. Harrington did not know if the plain clothes man was with the FBI, J.A.295, and Shaw testified that he had no such conversation with Harrington, J.A.487.

B. Proceedings Below.

Respondents brought suit under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and 42 U.S.C. § 1983, asserting violations of their First and Fourth Amendment rights against FBI Agents Morris and Shaw and numerous Springboro and Clearcreek Township law enforcement officers, in their individual capacities. *See* 28 U.S.C. § 1331. After discovery, Petitioners Morris and Shaw and the other defendants filed motions for summary judgment asserting qualified immunity.

1. *Chief Magistrate Judge's Recommendation.* On August 7, 2005, Judge Merz, the Chief Magistrate Judge in the Southern District of Ohio, recommended that summary judgment be granted to Petitioners and the other defendants on their qualified immunity defense. Pet.App.94a.

In addressing Respondents' First Amendment retaliation claims, Judge Merz followed the order of analysis set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), and considered first whether the facts, when viewed in the light most favorable to Respondents, made out a constitutional violation. Pet.App.81a-86a. He held that to establish their claims Respondents had to show that (1) they were engaged in protected speech; (2) an adverse action was taken against them that would deter a person of ordinary firmness from continuing to engage in that protected activity; and (3) the adverse action was motivated in part by the protected speech. Pet.App.82a.

Judge Merz concluded that under this test, "[t]he record developed in discovery plainly refutes [Respondents'] First Amendment claims." Pet.App.83a. He explained that the law enforcement officers were aware not only that Respondents were engaged in anti-abortion activities, but also that Patch was wearing full body armor and a Kevlar helmet; that Patch and those with him were equipped with a two-way radio and were concerned that the police were approaching them; and that the box trucks were accompanied by a car equipped to look like a police cruiser. Judge Merz further noted that FBI Agent Morris knew that abortion opponents sometimes attempt to threaten or intimidate doctors who perform abortions; that such doctors have been assassinated by abortion opponents; that a doctor lived in the vicinity of the stop; and that no law enforcement agencies were conducting area training operations that could explain Respondents' use of combat gear. Pet.App.83a-84a.

The Magistrate Judge concluded that Agent Morris, acting just nine months after the 9/11 attacks, "did the prudent thing: he determined to conduct an immediate F.B.I. investigation with several agents, including the Dayton Office's Domestic Terrorism specialist." Pet.App.84a-85a. Because Judge Merz concluded that Respondents had not shown a connection between their protected activity and the law enforcement actions, he did not proceed to the second step of the qualified immunity analysis: whether Respondents' First Amendment right against retaliation was clearly established under the circumstances. Pet.App.86a.

Turning to Respondents' Fourth Amendment unlawful seizure claim, the Magistrate Judge rejected the argument that the detention ripened into an unlawful arrest once local officials completed their initial inquiries: "[a]lthough local law enforcement officers were prudent to check whether there were any warrants, weapons, or contraband, the real reason [Respondents] were detained after the initial stop was so that the F.B.I. could investigate" any possibility of "domestic terrorism." Pet.App.90a-91a. Noting Respondent's admission that they were released within twenty to twenty-five minutes of the arrival of the FBI agents at the Queensgate location, the Magistrate Judge found "no evidence that the F.B.I. agents were dilatory in conducting their investigation," and stated that "[t]he reason for the delay is that it took [the FBI agents] considerable time to arrive." Pet.App.91a.

The Magistrate Judge concluded that the detention was reasonable because it lasted "only so long as it took the appropriate investigating agency, the F.B.I., to arrive on the scene and conduct a 20 to 25 minute investigation." Pet.App.92a. The Magistrate Judge further concluded that even if Respondents had made out a Fourth Amendment violation, the unlawfulness of the defendants' actions was not clearly established. Noting "how much deference the Supreme Court is prepared to give to necessary police investigations," the Magistrate Judge held that "[i]n light of the fact that the Supreme Court has placed no outside time limit on a *Terry* stop, it cannot be said that it was clearly

established on June 10, 2002, that this detention was unreasonable." Pet.App.93a.

2. *District Court's Grant of Summary Judgment.* On December 30, 2005, Judge Thomas M. Rose adopted the Magistrate Judge's report and recommendations and granted summary judgment to Petitioners and the other defendants on the issue of qualified immunity. With respect to Respondents' First Amendment retaliation claim, the district court found "no evidence that any adverse action was motivated by the exercise of constitutional rights." Pet.App.58a-59a. The court further held "as a matter of law that, when stopped for a traffic violation, and found to be in possession of police equipment, radio equipment, body armor and Kevlar helmets, a three hour detention would not chill a person of ordinary firmness from continuing . . . in the public debate on one of the most contentious issues in society today." In addition, the court concluded that even if Respondents had made out a constitutional violation, the law was not clearly established that the various law enforcement officers, in deciding whether to investigate, were prohibited from taking into account prior violent acts by abortion opponents. Pet.App.59a-60a.

Moving on to Respondents' Fourth Amendment claim, the district court held that the detention of Respondents was within the permissible scope of a *Terry* stop under the circumstances, which included Respondents' activity resembling the impersonation of a police officer, Respondents' use of body armor and Kevlar helmets, and law enforcement's suspicions of domestic terrorism based in part on the

knowledge that a doctor lived in the vicinity of the stop. The court also held that it was not clearly established on June 10, 2002, that the detention was unreasonable in length. Pet.App.62a.

3. *Sixth Circuit's Denial of Qualified Immunity.* On February 20, 2007, the Sixth Circuit reversed the district court's grant of summary judgment, agreeing with Respondents that the various law enforcement officers were not entitled to qualified immunity. Pet.App.1a-2a. At no point in its analysis did the Sixth Circuit specifically address the alleged actions of Petitioners and whether those actions amounted to a constitutional violation. Indeed, not only did the court fail to analyze separately the actions taken by FBI Agents Morris and Shaw, but it also repeatedly lumped together the FBI agents and the local officers without considering the differences in their knowledge and behavior.

The court held that "summary judgment was inappropriate" on Respondents' First Amendment retaliation claim because the law enforcement officers' "retaliatory intent proves dispositive of [their] claim to qualified immunity." Pet.App.30a. The court did not find that Petitioners or any of the defendants in fact retaliated, but instead concluded that "we cannot definitively say that Defendants stopped and detained Plaintiffs without regard to their protected expression." Pet.App.26a. In the court's view, this constituted a factual dispute that precluded a ruling for defendants under either of the two steps in the *Saucier* qualified immunity analysis. Pet.App.25a-28a, 30a-31a.

The court also stated that, under the first step of *Saucier*, "[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 on-lookers, 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.

Turning to Respondents' Fourth Amendment claims, the court held under the first step of *Saucier* that "[v]iewing the evidence in the light most favorable to Plaintiffs, the otherwise unobjectionable *Terry* stop ripened into an unconstitutional seizure in light of the undue and unjustifiable length of the stop." Pet.App.34a. Although the "initial seizure was proper in light of the Defendants' reasonable and articulable suspicion that criminal activity was afoot . . . the lengthy detention of Plaintiffs far exceeded the limited purpose of the stop." In the court's view, the public's "compelling interest in detecting would-be terrorists . . . was served when local law enforcement determined Plaintiffs did not pose a threat."[3] Pet.App.39a-40a. The court assumed that the FBI conducted "effectively the same investigation" as "the initial investigation conducted by local law enforcement," despite the FBI's undisputed responsibility for and expertise in investigating terrorism. Pet.App.42a.

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[3] The court also concluded that the evidence submitted at summary judgment adequately established that Respondents had consented to searches of their vehicles and belongings. That ruling is not at issue here. Pet.App.43a-44a.

Finally, under the second step of *Saucier*, the court held that the contours of Respondents' Fourth Amendment rights were sufficiently clear that a reasonable officer would understand that "detaining Plaintiffs for over two and a half hours after they dispelled any reasonable suspicion ripened the investigatory stop into an arrest absent probable cause." The court conceded that the defendants "confronted novel factual circumstances," but concluded that "the unlawfulness of [the defendants'] conduct should have been apparent." Pet.App.45a.

REASONS FOR GRANTING THE WRIT

Shortly after 9/11, Agents Morris and Shaw investigated whether body-armor-clad drivers of box trucks operating in suspicious circumstances posed a threat of terrorism. On that basis, the Sixth Circuit held that they must stand trial in their personal capacities, and face personal monetary liability, for alleged violations of Respondents' First and Fourth Amendment rights. The court of appeals' approach to the important qualified immunity questions presented here conflicts with the precedents of this Court and with decisions of other Circuits, and will significantly hamper the ability of federal agents in the Sixth Circuit to investigate and combat terrorism and other crimes.

First, the Sixth Circuit treated a factual dispute about the FBI agents' motive as dispositive of their qualified immunity defense to Respondents' First Amendment retaliation claim. In doing so, the court essentially abdicated the duty to examine whether it was clearly established that the agents' actions

violated the Constitution regardless of whether they in fact possessed a malign motive. The Sixth Circuit failed to determine whether it was clearly established that the actions of Agents Shaw and Morris – as distinct from the actions of the many local officers on the scene – would chill a person of ordinary firmness from engaging in further speech. This approach runs afoul of this Court's precedents in a variety of ways, and 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.

Second, in assessing whether Respondents had made out a First Amendment claim at all, the Sixth Circuit looked only to whether an "average law-abiding citizen" would be chilled by the agents' actions. In contrast, the Second and Fourth Circuits conduct a more specific inquiry, asking whether a person of ordinary firmness "similarly situated" to the plaintiff would be chilled. In this case, the difference between the two standards may be outcome-determinative – a person similarly situated to Respondents, who chose to engage in a highly controversial activity that they knew ran the risk of bodily injury or death, would hardly be chilled by even a lengthy *Terry* stop. This Court should resolve the split and clarify which version of the standard the lower courts should employ.

Third, the Sixth Circuit brought itself into conflict with this Court's precedents in holding that Agents Morris and Shaw violated clearly established Fourth Amendment law. Again, the court failed to analyze

the specific actions taken by the agents, and also failed to consider the asserted constitutional right at the appropriate degree of specificity. Had it done so, the court could not have concluded that at the time of the stop reasonable agents would have known that their diligent investigation violated Respondents' Fourth Amendment rights.

Under the undisputed facts presented here, this Court should grant summary reversal, or in the alternative should grant review to protect the government's ability to investigate terrorism and other serious crimes, and to clarify that government officials alleged to have acted with retaliatory intent are entitled to a complete and particularized qualified immunity analysis.

I. The Sixth Circuit's Decision Conflicts With This Court's Precedents and The Decisions of Other Circuits In Treating Allegations of A Motive to Retaliate Against Protected Speech As Dispositive of the Issue of Qualified Immunity.

a. *Framework for qualified immunity analysis in motive cases.* As this Court has previously recognized, constitutional tort claims in which official motive is an essential element present a special problem in qualified immunity analysis, and it is dangerous indeed to make motive the dispositive factor. *See Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 (1982); *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998). A malign motive is "easy to allege and hard to disprove." *Crawford-El*, 523 U.S. at 585; *see also Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) ("In times of political passion, dishonest or vindictive

motives are readily attributed . . . and as readily believed."). That principal is well illustrated by this case, in which the Sixth Circuit, analyzing whether the plaintiffs' First Amendment retaliation claim could survive summary judgment, found sufficient the thinnest possible motive evidence – essentially, nothing more than evidence that the FBI Agents were aware of the existence and nature of the speech in question. Pet.App.26a-27a (stating that a local officer "mentioned the pictures on the trucks" to Morris, and noting that "claims involving proof of a defendant's intent seldom lend themselves to summary disposition" (internal quotation marks omitted)).[4] Thus, to the extent that motive is the focus of the analysis, any person that was engaged in expressive activity at the time of an encounter with government agents can not only readily allege a constitutional tort claim, but can subject the agents to the rigors of a trial and to possible personal monetary liability. *See Harlow*, 457 U.S. at 816-17; *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (noting that qualified immunity is "effectively lost if a case is erroneously permitted to go to trial").

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[4] In addition, while the Sixth Circuit accepted that public safety concerns – as opposed to a retaliatory motive – reasonably accounted for the stop of the CBR trucks and escort vehicle given the odd behavior and unusual military-style gear of Respondents, it discounted the possibility that such concerns could account for the length of the stop. In so doing, the Sixth Circuit ignored the undisputed evidence about the amount of time it took the FBI investigators – acting diligently – to arrive on the scene, and the brief nature of the FBI investigation itself, which employed the FBI's special expertise in domestic terrorism. Pet.App.74a, 91a.

This possibility presents a special threat to the government's ability to investigate and prevent terrorism. By definition, terrorism is violence committed in furtherance of political or other ideological goals, and terrorism investigations will therefore often involve scrutiny of people advocating a particular political viewpoint. Under such circumstances, and despite the current climate of threat, if FBI agents and other government officers are too readily open to suit on the ground that their alleged concern for public safety is nothing more than a pretext for retaliating against expression of a controversial viewpoint, then those officers may be deterred from acting with sufficient vigor. That kind of deterrence is precisely what the qualified immunity doctrine is intended to prevent. *See, e.g.*, *Harlow*, 457 U.S. at 814 (explaining the danger that fear of suit will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties" (internal quotation marks omitted; alteration in original)); *see also Anderson v. Creighton*, 483 U.S. 635, 638-46 (1987). And although qualified immunity serves an important role in ensuring vigorous investigation of all types of crimes, this Court has recognized that where the nation's security is at risk it is especially important to prevent government actors from "err[ing] always on the side of caution." *Davis v. Scherer*, 468 U.S. 183, 196 (1984); *see Hunter v. Bryant*, 502 U.S. 224, 229 (1991).

For these reasons, this Court has been careful to explain that an allegation of retaliatory motive is not dispositive of the qualified immunity analysis. That

analysis entails a two-part inquiry. First, a court must consider whether "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right." *Saucier*, 533 U.S. at 201. If so, "the next sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition . . . ." *Id.* That is because the immunity inquiry is highly concrete and particularized. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640; *see also Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

In *Crawford-El*, this Court made clear that this second, "more particularized, and hence more relevant" step of the inquiry, *Anderson*, 583 U.S. at 640, fully applies to cases in which the asserted constitutional violation turns on the official's motive. *Crawford-El*, 523 U.S. at 592. Thus, even where there have been sufficient allegations of bad intent to make out the motive element of the claim, it is vital to ask whether it should have been clear to a reasonable officer under the circumstances that his conduct met *every* element of the claim, including the more objective elements. *See id.* After all, "even when the official conduct is motivated, in part, by hostility to the plaintiff," it is "unfair[]" to "impos[e] liability on a defendant who could not . . . fairly be said to know that the law forbade" his actions. *Id.* at 591 (internal quotation marks omitted). Accordingly,

"the substantive legal doctrine on which the plaintiff relies may facilitate summary judgment" because an examination of the non-motive elements of the claim may reveal "doubt as to the illegality of the defendant's particular conduct." *Id.* at 592-93; *see also, e.g.*, *Hartman v. Moore*, 547 U.S. 250, 259-66 (2006).

b. *Sixth Circuit's decision violates these principles.* The Sixth Circuit's decision here flies in the face of these principles. The Sixth Circuit stated that in order to establish a retaliation claim a plaintiff would have to show not only retaliatory motive and causation, but also that "defendant's action injured plaintiff in a way likely [to] chill a person of ordinary firmness from further participation in that activity." Pet.App.22a. But it then took the view that "retaliatory intent *proves dispositive of* Defendants' claim to qualified immunity," simply because there was a dispute of fact as to motive. Pet.App.30a-31a (emphasis added). The court did not consider whether at the time of the incident in question it was *clearly established* that a person of ordinary firmness would be chilled by what Agents Morris and Shaw individually did. *See Crawford-El*, 523 U.S. at 593-94; *see generally Anderson*, 483 U.S. at 641; *see also* Pet.App.47a n.16. To the extent the Sixth Circuit considered the "chill" issue at all, it seems to have considered only whether the plaintiffs had alleged the violation of a constitutional right (the first step in the qualified immunity analysis). Pet.App.24a-25a. Other than that, the court decided in the most general possible terms that "government actions may

not retaliate against an individual for the exercise of protected First Amendment freedoms." Pet.App.30a.

This approach is deeply flawed – in conflict with this Court's precedents – in a number of different ways. *First*, it breaks *Crawford-El*'s promise that qualified immunity can protect government actors even in cases involving allegations of bad motive. In contrast to other Circuits that have considered similar questions, the Sixth Circuit utterly failed to consider whether the objective "chill" element of the claim was clearly established – a question that is fully subject to resolution at the summary judgment stage. *See, e.g.*, *Perez v. Ellington*, 421 F.3d 1128, 1132 (10th Cir. 2005) (in assessing qualified immunity with respect to a retaliation claim, analyzing whether the conduct alleged "is so egregious that an official would be on clear notice that his actions would deter the ordinary person from continuing" in the protected activity). By conflating the question of qualified immunity with the question of substantive motive, the Sixth Circuit effectively required qualified immunity in motive cases to be resolved at trial in every instance, even though "[i]mmunity ordinarily should be decided by the court long before trial." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam).

Second, the Sixth Circuit's decision violates the command of *Saucier v. Katz*, 533 U.S. 194 (2001), which holds that "the second step" of the qualified immunity analysis, asking whether the law is clearly established, cannot be collapsed into the first step just because "a constitutional violation could be found based on the allegations." *Id.* at 200-09. The

Sixth Circuit's decision collapses the two halves of the inquiry in just this way, treating its substantive "chill" analysis under the first step of *Saucier* as definitive of the whole inquiry. The court thus failed to accord Agents Morris and Shaw the full protections of this Court's precedents, which dictate qualified immunity for those who make reasonable mistakes – indeed, for "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Finally, the Sixth Circuit failed to conduct the particularized inquiry that this Court's precedents demand. Because it did not properly analyze the objective elements of the claim under the second step of *Saucier*, the Sixth Circuit did not address the specific conduct of Agents Morris and Shaw or determine whether the summary judgment evidence established that they *individually* acted in an objectively unreasonable manner, in violation of the plaintiffs' First Amendment rights, so as to chill a person of ordinary firmness. In failing to separately consider the actions of Agent Morris and the actions of Agent Shaw, and in lumping both agents together with the various local officers also sued by CBR, *see* Pet.App.28a-31a (treating all "Defendants" in an undifferentiated fashion), the Sixth Circuit ran afoul of this Court's dictates. *See Anderson*, 483 U.S. at 640 (officials are immune unless a "reasonable official would understand that what he is doing violates that right"); *Crawford-El*, 523 U.S. at 600 (among the "issues that bear upon the qualified immunity defense" are "the actions that the official actually took"). The Sixth Circuit also parted ways

with its sister circuits, which have strongly emphasized the importance of examining the specific factual allegations made against each individual defendant.[5]

c. *Summary reversal, or grant of certiorari, is warranted.* Given the Sixth Circuit's departure from bedrock qualified immunity principles, summary reversal is appropriate here. Faced with reports of men wearing kevlar helmets and flak vests and driving box trucks and a *faux* police vehicle, Agents Morris and Shaw can hardly be faulted for concluding that the FBI should take a hands-on approach. On the undisputed facts, it would not have been clear to a reasonable FBI agent – regardless of his motive – that "his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. This is because it would not have been clear that the *FBI portion of the investigation*, which involved getting to the scene and less than an

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[5] *See, e.g.*, *Poe v. Leonard*, 282 F.3d 123, 134 (2d Cir. 2002) ("The qualified immunity analysis depends upon an individualized determination of the misconduct alleged. . . . [B]oth the subordinate's and the supervisor's actions (or lack thereof) are relevant."); *Rouse v. Plantier*, 182 F.3d 192, 200 (3d Cir. 1999) ("the determination of whether a government official has acted in an objectively reasonable manner demands a highly individualized inquiry"); *Trulock v. Freeh*, 275 F.3d 391, 401-02 (4th Cir. 2001); *Bakalis v. Golembeski*, 35 F.3d 318, 326-27 (7th Cir. 1994); *Cunningham v. Gates*, 229 F.3d 1271, 1287 (9th Cir. 2000) ("in resolving a motion for summary judgment based on qualified immunity, a court must carefully examine the specific factual allegations against each individual defendant"); *Foote v. Spiegel*, 118 F.3d 1416, 1423 (10th Cir. 1997); *Waldrop v. Evans*, 871 F.2d 1030, 1034 (11th Cir. 1989).

hour-long inquiry, would chill a person of ordinary firmness from continuing in the activities in which CBR regularly engaged.[6] *Id.* at 206 ("Qualified immunity operates . . . to protect officers from the sometimes 'hazy border' . . . ."); *see also Eaton v. Meneley*, 379 F.3d 949, 956 (10th Cir. 2004) (holding that "the objective standard of a person of ordinary firmness is a vigorous standard").

It is notable that the District Judge reached this very conclusion. Pet.App.59a. As this Court has previously noted, where even judges disagree as to the propriety of the actions of agents in the field, it can hardly be said that a reasonable agent should have known that he was taking unconstitutional action. An FBI agent cannot be expected to do better in ascertaining the law than a federal judge. *See, e.g.*, *Wilson v. Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."); *Mitchell*, 472 U.S. at 533; *Malley*, 475 U.S. at 341.

Given the undisputed facts and the district court's own resolution of the question of whether the agents' conduct would have a chilling effect, *Crawford-El's* test for immunity – whether there is "doubt as to the illegality of the defendant's particular conduct," 523 U.S. at 593 – is plainly met here. This Court should not allow a decision that so undercuts "the substance of the qualified immunity defense," *id.* at 597, to stand. *See, e.g.*, *Los Angeles*

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[6] This is true regardless of the level of specificity with which a "person of ordinary firmness" is defined. *See infra* pp. 28-31.

County v. Rettele, 127 S. Ct. 1989 (2007) (per curiam) (summarily reversing erroneous immunity decision); *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam) (same); *Hunter v. Bryant*, 502 U.S. 224 (1991) (per curiam) (same).

But even if this Court is not inclined to summarily reverse the Sixth Circuit, it should grant review to clarify this area of the law. Motive cases arise frequently in the qualified immunity context, and the consequences of failing to deal with them as this Court's precedents demand can be devastating – not only for individual agents subject to personal monetary liability, *see Siegert v. Gilley*, 500 U.S. 226, 232 (1991), but also for government agencies charged with carrying out crucially important duties, and ultimately for the public. 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, particularly where the scene of the incident is difficult for the FBI to reach quickly. The decision also discourages law enforcement from taking the time necessary to investigate thoroughly, or indeed from acting at all in the face of expressive activity by a person of interest. In short, the decision has a serious practical impact on important public safety concerns in the Sixth Circuit.

II. The Sixth Circuit's Ruling Conflicts With The Decisions of Other Circuits Regarding the Standard for Assessing Whether Alleged Government Conduct Would Chill a Person of Ordinary Firmness from Speaking Freely.

As discussed above, the Sixth Circuit committed serious error in failing to evaluate the objective elements of the First Amendment retaliation claim under the second step of *Saucier*. The court's decision, however, also raises an important question under the first step of *Saucier* – whether the plaintiffs made out a First Amendment claim at all. *See Saucier*, 533 U.S. at 201.

In this and other cases, the Sixth Circuit asks, under the first *Saucier* step, whether an "average law-abiding citizen" would be chilled by the alleged government conduct. *E.g.*, Pet.App.25a; *see also See v. City of Elyria*, 502 F.3d 484, 492 (6th Cir. 2007).[7] The Tenth Circuit similarly asks whether an "ordinary person" would be chilled. *E.g.*, *Perez*, 421 F.3d at 1132; *Smith v. Plati*, 258 F.3d 1167, 1177 (10th Cir. 2001). This approach analyzes the "chill" issue at a high level of abstraction. By contrast, the Second and Fourth Circuits ask whether "a *similarly situated person* of ordinary firmness" would be chilled by the government conduct, and thus engage in a fact-intensive inquiry that takes into account relevant circumstances such as employment position,

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[7] The Sixth Circuit does take into account whether the plaintiff is a public official or prisoner, but does not consider other particular circumstances. *See Mattox v. City of Forest Park*, 183 F.3d 515, 522 (6th Cir. 1999); *Thaddeus-X v. Blatter*, 175 F.3d 378, 398 (6th Cir. 1999).

experience, or conduct, all of which may inform the firmness that a person would display. *E.g.*, *Blankenship v. Manchin*, 471 F.3d 523, 531 (4th Cir. 2006); *Gill v. Pidlypchak*, 389 F.3d 379, 381 (2d Cir. 2004); *see also Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000).

The difference in standards is readily apparent when contrasting the Fourth Circuit's decision in *Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410 (4th Cir. 2006), with the Sixth Circuit's decision here. In *Baltimore Sun*, two reporters brought a First Amendment retaliation suit against Maryland's governor, alleging that he prohibited executive department employees from speaking with the reporters in retaliation for their previous reporting. In applying the "similarly situated person of ordinary firmness" test, the Fourth Circuit considered whether "a *reporter* of ordinary firmness" would be chilled, and answered in the negative: "[i]t would be inconsistent with the journalist's accepted role in the 'rough and tumble' political arena to accept that a *reporter* of ordinary firmness can be chilled by a politician's refusal to comment or answer questions on account of the reporter's previous reporting." *Id.* at 419 (emphasis added).[8]

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[8] Similarly, in *Blankenship v. Manchin*, 471 F.3d 523 (4th Cir. 2006), the chairman of a large coal company brought suit against the governor for his alleged threat to take regulatory actions against the company in retaliation for the chairman's political activities. The Fourth Circuit held that "the person of ordinary firmness we consider should be . . . . an ordinarily firm owner of a regulated business who has entered the political arena." *Id.* at 531.

The Sixth Circuit took a very different approach in the case at hand. The court did not ask whether a person similarly situated to Respondents would be chilled, but asked instead how "an average law abiding citizen" would react. Pet.App.25a. As a result, the Court did not take into account that a person similarly situated to Respondents would be someone who has willingly entered an extremely contentious political and moral debate and who has willingly protested at the acknowledged risk of being shot or otherwise violently attacked by a member of the public. As the district court rightly concluded, such a similarly situated person would not be chilled by the stop at issue in this case: "when stopped for a traffic violation, and found to be in possession of police equipment, radio equipment, body armor and kevlar helmets, a three hour detention would not chill a person of ordinary firmness from continuing in this particular activity, participation in the public debate on one of the most contentious issues in society today." Pet.App.59a. There can be little doubt that had it employed the Fourth and Second Circuits' standard, the Sixth Circuit would have reached a different result.

Review in this Court is needed in order to resolve the conflict among the Circuits and to ensure "the balance that [this Court's] cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Anderson*, 483 U.S. at 639 (internal quotation marks omitted). If the plaintiff is not an "average citizen," then the government actor's conduct should not be assessed as if that were so.

Here, some of the characteristics that made Respondents seem suspicious – the use of kevlar helmets, vests, and a vehicle resembling a police car – are the very same characteristics that indicate that similarly situated persons would not have been chilled by the *Terry* stop. The Sixth Circuit should have taken these circumstances into account in its analysis of Respondents' First Amendment retaliation claim.

III. The Sixth Circuit's Ruling Conflicts With The Decisions of This Court and Other Circuits in Holding that Petitioners Violated Clearly Established Fourth Amendment Law.

Even if the Sixth Circuit was correct in holding that Respondents had alleged facts sufficient to constitute a Fourth Amendment violation, the Sixth Circuit simply failed to heed this Court's precedents in holding that Petitioners violated clearly established law. The Sixth Circuit failed to consider the specific circumstances that confronted Agents Morris and Shaw, and also failed to analyze the Fourth Amendment right at a sufficient level of specificity. *See supra* pp. 21, 24-25.

This Court's qualified immunity precedents dictate that under the circumstances it was far from clearly established on June 10, 2002, that the actions of either Agent Morris or Agent Shaw violated the Fourth Amendment. At that time, both this Court and the Sixth Circuit had expressly declined to place an outside limit on the permissible duration of a *Terry* stop. *See, e.g.*, *United States v. Sharpe*, 470 U.S. 675, 685 (1985) (stating that "our cases impose

no rigid time limitation on *Terry* stops"); *Houston v. Clark County Sheriff Deputy John Does 1-5*, 174 F.3d 809, 815 (6th Cir. 1999). In addition, this Court had made clear that assessing the reasonableness of a *Terry* stop requires consideration of "the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes." *Sharpe*, 470 U.S. at 685; *see also id.* ("we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly"). More specifically, this Court had recognized that concerns about terrorist activity affect the permissible scope of a search or seizure under the Fourth Amendment. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000); *Florida v. J.L.*, 529 U.S. 266, 273-74 (2000); *cf. United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985).

As a matter of qualified immunity law, "when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary" in order for a right to be clearly established. *United States v. Lanier*, 520 U.S. 259, 271 (1997); *see also Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002). No such prior factual particularity existed to guide Petitioners. No federal court had ruled on the permissible boundaries of a *Terry* stop in a case involving similar suspicions of terrorism. This lack of meaningful guidance is particularly important given that Petitioners were acting a mere nine months after 9/11, and in the midst of withering

criticism of federal law enforcement agencies for failing to uncover the 9/11 plot.

Further, to the extent there was any guidance in the case law, it indicated that the actions of Agents Morris and Shaw were wholly permissible. Prior to the stop of the CBR vehicles, the Sixth Circuit had upheld a *Terry* stop of approximately the same duration where it took a DEA agent a long period of time to get to the scene and investigate. In *Jackson v. Wren*, 893 F.2d 1334, 1990 WL 4051 (6th Cir. 1990) (unpublished table decision), the suspect was transferred to the sheriff's office after an initial search, and DEA was contacted and advised to send an agent to interview him. Although it took two hours for the DEA agent to arrive, the Sixth Circuit upheld the investigative detention as reasonable. *Id.* at *2; *see also United States v. Winfrey*, 915 F.2d 212, 217 (6th Cir. 1990) ("The sheriff's deputies were not trained as drug agents and needed the DEA agents' expertise to confirm or dispel their suspicions."); *United States v. Borrero*, 770 F. Supp. 1178, 1190 (E.D. Mich. 1991) (relying on *Wren* in upholding a 70-minute detention at a DEA office); 20 U.S. Op. Off. Legal Counsel 26, 1996 WL 33101191 (Feb. 5, 1996).[9]

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[9] More generally, the Sixth Circuit had repeatedly held that the proper focus in assessing the reasonableness of a *Terry* stop should be on the diligence of the police, not the length of the detention. *See, e.g., United States v. Calderon-Valenzuela*, 211 F.3d 1270, 2000 WL 571953, at *4 (6th Cir. 2000) (unpublished table decision). The Sixth Circuit's opinion in the instant case cited a handful of cases in support of the view that Petitioners' actions violated clearly established Fourth Amendment rights,

Given that it was lawful in *Wren* for a suspect to be detained for two hours at a sheriff's office awaiting the arrival of DEA agents, a reasonable officer in Agent Morris's or Agent Shaw's position would have believed it lawful for Respondents to be held at the location of a *Terry* stop for a similar period of time so that FBI agents could arrive and investigate suspicions of domestic terrorism. Morris called Shaw and the other FBI agents to the scene shortly after Morris was first contacted by local law enforcement, and the agents proceeded to the scene as quickly as possible, in rush hour traffic. Shaw had no knowledge of the overall length of the stop, and played no conceivable role in holding Respondents prior to his arrival. And, as Respondents concede, the FBI agents completed their investigation within twenty to twenty-five minutes of its inception. These facts led the magistrate to conclude that "[t]here is no evidence that the F.B.I. agents were dilatory." Pet.App.91a.

In disregarding these facts, the Sixth Circuit improperly lumped together all of the local and federal law enforcement officials at the Pennroyal and Queensgate Road locations, on the apparent

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see Pet.App.45a-46a, but none of those cases would have placed a reasonable agent in Morris's or Shaw's position on adequate notice here. *See United States v. Place*, 462 U.S. 696, 709 (1983) (officers failed to "diligently pursue their investigation"); *United States v. Butler*, 223 F.3d 368, 375 (6th Cir. 2000) (officers' conduct in placing suspect in police car violated Fourth Amendment); *United States v. Heath*, 259 F.3d 522, 530 (6th Cir. 2001) ("once these officers used all of the appropriate means available to them to allay their concerns of criminal activity," they were required to release Heath).

belief that they acted in the same manner, based on the same information and with the same expertise. Pet.App.39a; 44a-46a. The court further assumed that all suspicions of criminal activity – including suspicions of involvement in domestic terrorism – were dispelled in the first twenty to thirty minutes of the *Terry* stop once local officers had completed license and registration checks and initial questioning of Respondents, but *before* any investigation by the FBI agents, who have jurisdiction over federal criminal inquiries and are trained to detect terrorists and kept apprised of the latest threats from terrorist groups. Pet.App.40a, 45a-46a. The Sixth Circuit thus engaged in the kind of "unrealistic second guessing" that this Court has cautioned against, *Sharpe*, 470 U.S. at 686, and ran afoul of decisions of this Court and of its sister Circuits holding that each individual government actor's behavior must be separately assessed, *see supra* pp. 21, 24-25.

In short, the Sixth Circuit's conclusion that Agents Morris and Shaw should stand trial in their personal capacities on Respondents' Fourth Amendment claims simply cannot be reconciled with this Court's precedents. Had the Sixth Circuit analyzed the Fourth Amendment right at the appropriate level of specificity, and had it properly considered the individual actions taken by Agent Morris and Agent Shaw, it would necessarily have found them immune from the Fourth Amendment claims against them. This Court should summarily reverse or, in the alternative, 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.

CONCLUSION

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

Respectfully submitted,

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