No. 12-4476

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL BRAY, *ET AL.*,

Plaintiffs-Appellants,

v.

PLANNED PARENTHOOD COLUMBIA-WILLAMETTE, *ET AL.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

DEFENDANT-APPELLEES' RESPONSE IN OPPOSITION TO PETITION FOR REHEARING EN BANC

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STATEMENT

The Brays ask this Court to grant rehearing en banc to address qualified immunity questions correctly resolved in favor of Deputy U.S. Marshals Riley and Kimmet by both the district court and a unanimous panel of this Court. The Brays have not identified any conflict between the panel's decision and decisions of the Supreme Court, this Court, or another circuit. Nor have they otherwise identified a question warranting the extraordinary step of rehearing en banc. Thus, the petition should be denied.

This case arises from the United States Marshals Service's enforcement of a federal court's writ of execution in litigation between private parties. Neither the Government nor its officers were parties to that litigation, and they played no role in formulating the writ. The Brays did not appeal the writ or orders entered in the judgment-enforcement case and do not challenge them here. *See* Opinion at 2. Instead, they seek damages under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), from Riley and Kimmet for "carrying out the presumptively valid order of a federal judge." Opinion at 2.

1. The Brays allege that plaintiff Michael Bray is an anti-abortion advocate who authored a book, *A Time to Kill*, "defend[ing] as a moral and ethical proposition the use of force to defend innocent human beings, born and unborn." Opinion at 3 (quoting Am. Complt ¶ 4.3) (internal quotations

omitted). In 1985, he was convicted in Maryland for a felony "relating to physical damage inflicted on several abortion centers," and spent four years in prison *Id.* (citing Am. Complt ¶ 4.2). Despite that, and the title and content of his book, Bray nonetheless alleges that he has never advocated or encouraged anyone to kill or physically attack abortion providers or to physically damage abortion facilities. *See id.* (citing Am. Complt ¶ 4.3).

Planned Parenthood of Columbia/Willamette operates abortion clinics. In litigation in the District of Oregon, Planned Parenthood won an $850,000 judgment against Bray for violating the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248. Opinion at 3. In 2005, Planned Parenthood initiated judgment-enforcement proceedings against Bray in the United States District Court for the Southern District of Ohio. Opinion at 3. That court issued a writ of execution taken verbatim from a proposed order submitted by Planned Parenthood. Opinion at 5. The writ directed the Marshals Service to seize the Bray home and various items of personal property, including computers, printers, audio/visual and stereo equipment, and books and written material (published and unpublished) excepting children's entertainment and educational books and bibles. *See* Opinion at 4-5.

In a separate order, the court also directed that "[u]ntil the actual sale of the real estate occurs, the real property w[as] not be damaged, impaired, or diminished in value by the acts or omissions of any person." R31-3 (Page ID #

275). The order also required that a Planned Parenthood representative assist in identifying property subject to seizure if requested by the Marshals Service. *See* Opinion at 5.

On October 1, 2007, Deputy U.S. Marshals and other law enforcement officers enforced the writ of execution. Attorneys from the law firm of Squire, Sanders & Dempsey, which represented Planned Parenthood, and people unknown to the Brays were also present. Am. Complt ¶ 4.11, R13 (Page ID # 115). Riley asked Bray if any guns were in the house, and directed him to remain seated on a sofa in a front room during execution of the writ. *Id.* An unidentified male videotaped the inside of the house. Riley explained that Planned Parenthood's attorneys wanted a record to assure that the interior remained undamaged in accordance with the court's order. Am. Complt ¶¶ 4.12, 4.13 (Page ID # 116).

2. The Brays sued Planned Parenthood; Squire, Sanders & Dempsey; and Deputies Riley and Kimmet, against whom they alleged Fourth Amendment claims. *See* Opinion at 7. The district court granted the Marshals' dismissal motion on both absolute and qualified immunity grounds, holding that the Marshals' authority to act as the Brays alleged was fairly implicit in the court's orders in the judgment-enforcement case. *Bray v. Planned Parenthood Columbia Willamette, Inc.,* 2011 WL 1043940 at *6 (S.D. Ohio Mar. 17, 2011).

After settling with the private parties, the Brays appealed the dismissal. A panel of this Court unanimously affirmed. The panel first considered whether the Brays alleged a constitutional violation. *See* Opinion at 8. Concluding that "the overwhelming focus of the writ was media and communications property," the panel applied what it called a "particularly exacting" Fourth Amendment standard, *id.*, under which the Marshals violated the Fourth Amendment by detaining Bray on the sofa; allowing multiple Planned Parenthood representatives to be present; and filming inside the home. *Id.* at 8-10.

But the panel affirmed the dismissal on qualified immunity grounds, explaining that "these constitutional rights were not clearly established at the time of the violations." *Id.* at 11 (footnote omitted). It pointed out that "the legal and factual scenario presented in this action is not identical to any the Sixth Circuit or the Supreme Court has previously addressed. . . ." *Id.* at 11. Michael Bray's detention on the sofa "might have been permissible in the distinct but more common context of executing a warrant for contraband," but the Supreme Court "has not examined the Fourth Amendment implications of a search or seizure under a civil writ of execution." *Id.* at 11-12. And Sixth Circuit precedent has approved "absolute quasi-judicial immunity" for officers who detained persons in the civil judgment enforcement context when enforcing a court order. *Id.* at 12 (citing *Cooper v. Parrish*, 203 F.3d 937 (6th Cir.

2000)). "Accordingly, in the absence of specific guidance to the contrary, a reasonable officer could have interpreted existing precedent to permit the detention of Michael Bray." *Id.*

Similarly, "[t]he Marshals might also reasonably have believed that it was acceptable to invite additional representatives of PPCW to join the raid, because outside involvement in the execution of court orders is sometimes permissible." *Id.* (citing *United States v. Clouston*, 623 F.3d 485, 486-87 (6th Cir. 1980)). And because "several circuits have held that warrantless filming does not violate the Constitution if the cameramen are authorized to be present in the home," *id.* at 11, "reasonable officers who were mistaken about the lawfulness of inviting additional representatives of PPCW to join the raid might likewise have been mistaken about whether those representatives could film the home, particularly in light of the camera's utility in capturing the condition of the property prior to its sale." *Id.* at 12-13.

ARGUMENT

1. Rehearing en banc is unwarranted. The Brays argue first that the panel erred because the conduct here was "egregious," and the "Fourth Amendment values" in this case "well-defined." Pet. at 7. They presumably refer to the Fourth Amendment's protection of privacy and the home. But the inquiry whether officials violated a clearly-established right "must be undertaken in light of the specific context of the case, not as a broad general proposition."

Saucier v. Katz, 533 U.S. 194, 201 (2001), *overruled in part on other grounds, Pearson v. Callahan*, 555 U.S. 223 (2009). That is no less true in cases involving searches and seizures in the home, *see, e.g., Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987). The Supreme Court has reminded lower courts that "[t]he general proposition . . . that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011). Thus, it would be error to "f[ind]clearly established law lurking in the broad 'history and purposes of the Fourth Amendment.'" *Id.* (citations omitted). The Bray's argument—Fourth Amendment values are sufficiently well-defined to overcome qualified immunity without more—is therefore incorrect. The panel here performed the appropriate inquiry and correctly held that "existing precedent" had not "placed the statutory or constitutional question beyond debate." *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012). *See* Opinion at 11.

2. The panel applied the correct principles and reached the correct result. Given scant case authority, and cases from roughly analogous contexts supporting detentions during the execution of warrants and other court orders, *e.g., Michigan v. Summers*, 452 U.S. 692 (1981); *Cooper*, 203 F.3d at 948-50, the Marshals reasonably if mistakenly could have thought, as the district court did, that "implicit [in the writ] is the authority to ensure that the property being

seized is not damaged or destroyed, and the authority to take reasonable steps to ensure the safety of those tasked with seizing the property," and that this permitted Bray's detention. 2011 WL 1043940 at *4. The panel's decision implies that the district court erred in assessing the validity of its orders, but that actually underscores the correctness of the panel's qualified-immunity decision. "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." *Wilson v. Layne*, 526 U.S. 603, 618 (1999).

The same is true for inviting additional Planned Parenthood representatives to be present and filming inside the home. The district court thought that its orders implicitly authorized these steps, showing that the Marshals did no worse than reasonably misapprehend the law. The panel properly held that reasonable officials in the Marshals' circumstances would not be on notice of a constitutional violation in light of *Clouston*, 623 F.2d 486-87, and cases from other circuits holding or assuming that filming is lawful if the officers have a valid warrant or if the cameraman is otherwise authorized to be present. Opinion at 12 (collecting cases). The Brays identify no conflict between the panel's decision and other qualified-immunity precedents.[1]

[1] The Brays argue that the cases the panel cited are distinguishable. Pet. at 9-10. That misconceives the "clearly-established" inquiry. Because the unlawfulness of the Marshals' actions was not apparent from general Fourth Amendment principles, the Brays must point to "cases of controlling authority in their

3. The Brays complain that the "panel rejected security or safety concerns as a reasonable basis for Mr. Bray's detention. . . ." Pet. at 10. That confuses the panel's Fourth Amendment reasoning with its qualified-immunity holding. "The qualified immunity inquiry . . . has a further dimension" which "acknowledge[s] that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Saucier*, 533 U.S. at 205. Thus the Marshals reasonably if mistakenly could have thought security or safety concerns to justify their actions. The panel correctly held the law to be unclear on this point, and the Brays identify no grounds for rehearing en banc.

3. The Brays argue that because this case involves "sufficiently egregious" conduct (Pet. at 7), qualified immunity properly is denied even "in the absence of fact-specific precedent." *Id.* at 8. That argument also is unavailing. Although a case on point is not needed for the law to be clearly established, and "general statements of the law are not inherently incapable of giving fair and clear warning" for qualified- immunity purposes, *Hope v. Pelzer*, 536 U.S. 730, 741 (2003) (citation and internal quotation omitted), nonetheless "qualified immunity is appropriate unless either a precedent 'squarely governs' the outcome of the case or the case is so 'obvious' that 'general tests . . . .

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jurisdiction at the time of the incident which clearly established the rule on which they seek to rely," or identify "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Wilson v. Layne*, 526 U.S. 603, 617 (1999). They have not done so.

"clearly establish" the answer, even without a body of relevant case law[.]'" *Baranski v. Fifteen Unknown Agents of Bureau of Alcohol, Tobacco and Firearms*, 452 F.3d 433, 447 (6th Cir. 2006) (en banc) (parenthetical explaining *Brosseau v. Haugen*, 543 U.S. 194, 199-201 (2004) (per curiam)). The panel's decision is faithful to those principles. Here, as in *Wilson*, 526 U.S. at 615-16, "it is not obvious from the general principles of the Fourth Amendment that the conduct of the officers in this case violated the Amendment."

4. The panel's decision also does not conflict with cases the Brays describe as denying immunity on the basis of general principles of law. *See* Pet. at 8-9. In *Stemler v. City of Florence*, 126 F.3d 856, 870 (6th Cir. 1997), and *Brannum v. Overton County School Bd.*, 516 F.3d 489, 499 (6th Cir. 2008), this Court relied on a number of precedents rather than just general statements of law. And *McBride v. Village of Michiana*, 100 F.3d 457 (6th Cir. 1996), represented simply the kind of hyper-specific description of the right that *Anderson*, *Hope,* and other cases foreclose. That is a far cry from this case.

5. The Brays suggest that qualified immunity is inapplicable given the strong terms in which the panel expressed its dismay at the constitutional violation it identified. *See* Pet. at 2, 4. They misread the panel's decision. Important to the panel's constitutional holding was "the highly questionable way in which the court's order of execution was apparently aimed to stifle the debtor's ability to express ideas. . . ." Opinion at 2. As explained, the

Government did not seek that writ, which issued in a suit between private adversaries. The Government's only role was to enforce what the panel acknowledged to be "a presumptively valid order of a federal judge." *Id.* The Brays themselves never challenged the writ or related orders. Their acquiescence undercuts any claim that the Marshals were on notice of an obvious constitutional violation and makes this case a particularly inapt one for rehearing en banc. Even leaving that aside, the panel's decision follows from established principles governing qualified immunity, and it is correct. Consequently rehearing en banc is unwarranted.

CONCLUSION

For foregoing reasons, the Petition for Rehearing En Banc should be denied.

Respectfully submitted,

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May 14, 2014

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2014, I electronically filed the foregoing Response in Opposition to Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system, which constitutes service on counsel for the Appellants under the Court's rules.

s/ Richard Montague
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