No. 13-115

In The Supreme Court of the United States

TIM WOOD AND ROB SAVAGE,

Petitioners,

v.

MICHAEL MOSS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

STEVEN M. WILKER
Counsel of Record
TONKON TORP LLP
1600 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204
Telephone: (503) 802-2040
steven.wilker@tonkon.com
On behalf of ACLU Foundation of Oregon, Inc.

KEVIN DÍAZ
ACLU FOUNDATION OF OREGON, INC.
PO Box 40585
Portland, OR 97240
Telephone: (503) 227-6928

STEVEN R. SHAPIRO
BEN WIZNER
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
Telephone: (212) 549-2500

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL
4301 Connecticut Avenue, N.W.
Suite 434
Washington, D.C. 20008
Telephone: (202) 457-0800

Counsel for Respondents

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Petitioners' Questions Presented are premised on an inaccurate reading of the court of appeals' opinion and of respondents' Second Amended Complaint. Accepting respondents' well-pled factual allegations as true for purposes of the motion to dismiss, the appropriate questions presented are:

1. Whether the court of appeals properly concluded that respondents have adequately pled a plausible claim for viewpoint discrimination where the Second Amended Complaint alleged that (a) petitioners ordered respondents to be moved to a position more than twice as far from the President as his supporters so that respondents' protest message could neither be seen nor heard; (b) the disfavored treatment received by respondents was consistent with at least a dozen other incidents involving Secret Service agents during the first four years of the administration of President George W. Bush; and (c) the proffered security rationale for petitioners' actions was pretextual as demonstrated by their treatment of the President's supporters and the other diners and guests at the Inn.

2. Whether the court of appeals properly concluded that petitioners were not entitled to qualified immunity where they singled out respondents for differential treatment based on the viewpoint of their political speech.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTRODUCTION

This case was first filed more than seven years ago, yet it is still at the motion to dismiss stage. The court of appeals carefully and thoroughly addressed all the arguments presented in support of petitioners' motion to dismiss and concluded that this case could finally go forward. The court of appeals' opinion correctly applied well-established law to the facts alleged in the Second Amended Complaint. The petition should be denied.

STATEMENT OF THE CASE

Respondents filed this action in July 2006 seeking damages and other relief against federal, state, county and municipal defendants for interfering with and violently disrupting respondents' peaceful political protest, and for violating respondents' constitutional rights to peacefully assemble and to protest in connection with the then-ongoing 2004 presidential campaign. Respondents alleged that they were subjected to unconstitutional discrimination based on their viewpoint – *i.e.*, their opposition to President Bush – when they were removed from the vicinity of the Jacksonville Inn where President Bush was dining on October 14, 2004, by the use of constitutionally excessive force.

After the district court ruled on defendants' motions to dismiss or for summary judgment, the federal defendants (petitioners here) appealed the partial

denial of their motion to dismiss and also sought to appeal the district court's constructive denial of their motion for summary judgment. On review, the Ninth Circuit, relying on the decisions of this Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (decided after argument in the district court on the motions to dismiss the First Amended Complaint) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (decided after argument to the Ninth Circuit), concluded that the First Amended Complaint did not meet the new heightened pleading standard that had been announced in *Twombly* and expanded upon in *Iqbal*. *Moss v. United States Secret Service*, 572 F.3d 962, 971-72 (9th Cir. 2009) (*Moss I*). Because the pleading standard was new, the Ninth Circuit granted respondents leave to replead. *Id.* at 972. Following remand, respondents filed their Second Amended Complaint, alleging additional factual content to demonstrate the plausibility of their claims.

Respondents' Second Amended Complaint asserts claims arising under the First, Fourth and Fifth Amendments as well as under the Oregon Constitution and Oregon common law. For purposes of the petition, however, the only claim at issue is respondents' First Amendment claim for viewpoint discrimination against petitioners Wood and Savage. Petitioners filed a motion to dismiss, which the district court denied in relevant part. Pet. App. 60a. The court of appeals affirmed, *Moss v. United States Secret Service*, 675 F.3d 1213 (9th Cir. 2012), and denied rehearing en banc. 711 F.3d 941 (9th Cir. 2013) (as

amended on denial of rehearing en banc) (*Moss II*), Pet. App. 1a.

STATEMENT OF THE FACTS

The petitioners' Statement of the Facts does not include a complete description of the events at issue as pled in the Second Amended Complaint. Respondents are entitled to have this Court accept the well-pleaded allegations of the Second Amended Complaint and to give respondents the benefit of all inferences reasonably drawn from those factual allegations. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. at 679. Respondents provide the following statement, focusing on the facts alleged in the Second Amended Complaint that are most relevant to the petition.

1. In October 2004, President Bush was scheduled to make a campaign stop in Jacksonville, Oregon, just weeks before the upcoming presidential election. When they learned of the planned visit, respondents informed the Chief of Police of the City of Jacksonville and the Jackson County Sheriff that they intended to demonstrate in opposition to President Bush and his policies, and indicated that the protest would be multi-generational, with many parents bringing small children. *Id.* at 172a-173a. Neither the Sheriff nor the Chief of Police raised any

objection to the demonstration, but they did advise respondents to stay on the sidewalks and not to obstruct traffic. *Id.* at 173a. Respondents followed those instructions and remained peaceful and law-abiding at all times. *Id*. at 160a, 174a.

At about 5:00 p.m. on October 14th, between two and three hundred anti-Bush protestors, including elderly people, families, children and young infants, gathered in Griffin Park in Jacksonville. *Id.* at 173a. An hour later, the protestors left the park and proceeded to California Street between Third and Fourth Streets, following the route they had pre-cleared with local law enforcement. *Id.* at 174a. They stood in front of the main building of the Jacksonville Inn, approximately two blocks south of the Inn's Honeymoon Cottage where the President planned to stay. *Id.* at 172a, 174a. A similarly-sized group of pro-Bush demonstrators gathered across Third Street. *Id.* at 174a.

Upon learning that the President had changed his plans and intended to dine at the Inn's restaurant rather than the Honeymoon Cottage, pro- and anti-Bush demonstrators clustered on opposite corners at the intersection of Third Street and California Street. *Id*. at 175a. In advance of the President's arrival, petitioners cleared and secured the alleyways adjacent to the Inn. The demonstrators, however, were allowed to remain where they had gathered as the President's motorcade passed through the intersection on its way to the restaurant. *Id*. at 175a-176a. At that point, the pro- and anti-Bush demonstrators were identically situated for all relevant purposes,

"separated only by the 37-foot width of Third Street," *Id*. at 174a.[1]

Once inside the restaurant, the President ate in the patio dining area behind the Inn. *Id*. at 175a, 177a. There is no line of sight to the patio restaurant from the sidewalks on California Street, except immediately adjacent to the alley, *id.* at 176a, and that portion of the sidewalk had already been cleared. *Id.* at 175a-176a. The remainder of the sidewalk on California Street abuts the buildings on that side of the street, blocking any line of sight or access to the patio dining area behind the Inn. *Id.* at 176a. Likewise, from the sidewalk on the south side of California Street across from the Jacksonville Inn there is an even more limited line of sight down the alley to the patio restaurant because of the obstructions caused by the Inn itself, including its exterior stairway into the alley, the six-foot high fence, and the bank on the east side of the alley. *Id.*

A few minutes after the President sat down for dinner, petitioners ordered respondents to move two blocks away where their protest message could not heard by the President during dinner and where their protest signs would not be seen by the President when he departed the restaurant following dinner. *Id*.

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[1] A copy of the map attached as Exhibit A to the Second Amended Complaint showing the two groups in relation to the Inn is included in the appendix to the petition. Pet. App. 59a, 212a.

at 177a-178a. The pro-Bush demonstrators were not moved, *id*., and the Inn's other diner's and guests were never subject to any security screening. *Id*. at 178a-179a.

2. The Second Amended Complaint also alleges that petitioners' actions in this case were consistent with a longstanding practice of the Secret Service. *Id*. at 181a-182a. It specifically cites a dozen incidents during the first four years of the Bush Administration, including during his re-election campaign and before the events at issue here, where Secret Service agents reportedly engaged in conduct designed to keep critical protesters and their messages away from the President. *Id.* at 189a-194a. It further alleges that the actions of petitioners here were in line with the actual policy and practice of the Secret Service "to work with the White House under President Bush to eliminate dissent and protest from presidential appearances." *Id.* at 184a. The relevant portion of the Advance Manual, cited in the Second Amended Complaint, states as follows:

> **Preparing for demonstrators**
>
> There are several ways the advance person can prepare a site to minimize demonstrators. First, as always, work with the Secret Service and have them ask the local police department to designate a protest area where demonstrators can be placed; preferably not in view of the event site or motorcade route.

Id. at 183a, 218a-219a.

3. Petitioners moved to dismiss the Second Amended Complaint. Adopting the report and recommendation of the magistrate judge, as relevant here, the district court denied petitioners' motion to dismiss respondents' claims for violations of the First Amendment, finding that the Second Amended Complaint "meets the stricter pleading standards imposed by *Twombly* and *Iqbal*" and that petitioners "have not shown, at least at this stage of the litigation, that they are entitled to qualified immunity." Pet. App. 61a; *see id*. at 89a-121a.

4. On appeal, the Ninth Circuit affirmed the district court's ruling, finding respondents' allegations

> that, at the direction of the Secret Service agents, they were moved to a location where they had less opportunity than the pro-Bush demonstrators to communicate their message to the President and those around him, both while the President was dining at the Inn and while he was en route to the Honeymoon Cottage . . . support a plausible claim of viewpoint discrimination.

Id. at 38a. The court of appeals also found that the specific allegations of a dozen similar incidents involving the Secret Service as well as the allegations regarding how respondents' treatment corresponded to the instructions in the Presidential Advance Manual, redacted excerpts of which were attached to and incorporated in the Second Amended Complaint, demonstrated the plausibility of respondents' allegations that petitioners acted with an impermissible

discriminatory motive. As the court of appeals explained:

> The protestors' allegations that the agents' conduct in this case accords with viewpoint discriminatory practices instituted in other, similar, circumstances and encouraged by the President's Advance Manual support the plausibility of the inference that, in this case, the Secret Service agents directed that the anti-Bush protestors be moved because of their viewpoint.
>
> In sum, the anti-Bush protestors have pleaded nonconclusory factual allegations that they were treated differently than the pro-Bush demonstrators; that any security-based explanation for this differential treatment offered by the Secret Service agents was pretextual; and that the agents' directives in this case accord with a pattern of Secret Service action suppressing the speech of those opposed to the President. These allegations, taken together, are sufficient to allow the protestors' claim of viewpoint discrimination to proceed.

Id. at 42a-43a (footnote omitted).

The court of appeals then rejected petitioners' qualified immunity defense, finding that "it is clear that no reasonable agent would think that it was permissible under the First Amendment to direct the police to move protestors farther from the President because of the critical viewpoint they sought to express." *Id*. at 45a; *see ibid*. (finding it " 'beyond debate'

that, particularly in a public forum, government officials may not disadvantage speakers based on their viewpoint") (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)).

REASONS FOR DENYING THE WRIT

The petition should be denied because the Ninth Circuit's decision does not involve the creation of any new or novel proposition of law by the court of appeals and does not create a conflict with any decision by another Circuit. Rather, the court of appeals faithfully applied this Court's recent precedents regarding the sufficiency of the allegations of a complaint, and applied well-established law regarding qualified immunity.

I. The Second Amended Complaint sufficiently pleads a claim of viewpoint discrimination in violation of the First Amendment.

In finding that the Second Amended Complaint meets the "plausibility" pleading standard articulated in *Twombly* and *Iqbal*, the court of appeals properly found that the gravamen of respondents' claim is that the petitioners ordered respondents moved from where they were demonstrating, not for the security reasons they offered, but to minimize the President's exposure to the opposition views that respondents were expressing.

As this Court explained in *Iqbal*:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." [*Bell Atlantic Corp. v. Twombly, supra,* 550 U.S.] at 570. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.,* at 556. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid*. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 557 (brackets omitted).

556 U.S. at 678.

Respondents satisfied the pleading standard by providing factual detail and context regarding the events of the evening of October 14, 2004. The Second Amended Complaint specifically alleges facts demonstrating that (1) respondents were treated differently than similarly situated pro-Bush demonstrators and (2) the differential treatment was the result of intentional viewpoint discrimination. These are not conclusory allegations. Rather, they are supported by detailed factual assertions regarding the differential treatment respondents received, and demonstrating how the security rationale proffered by petitioners, is

undermined by their treatment of the pro-Bush demonstrators as well as the diners and other visitors at the Inn.

Furthermore, in paragraphs 82(a) to (*l*) of the Second Amended Complaint, respondents allege in detail twelve other instances during the first term of the Bush administration where the Secret Service engaged in conduct designed to keep critical protesters and their messages away from the President, and describe how the actions of petitioners here were in line with those other instances and in line with White House strategy as expressed in the Presidential Advance Manual to limit the President's exposure to dissenting views. *Id.* at 183a-184a, 189a-194a. As the court of appeals found, those allegations further support the plausibility of respondents' claim that petitioners' actions in this case reflected a decision to shield the President from respondents' unwelcome message while he was dining, rather than any legitimate security concern. *Id.* at 42a.

If petitioners' view were accepted, no plaintiff asserting a claim for viewpoint discrimination could survive a motion to dismiss unless the plaintiff could allege that the defendant announced his or her intention to discriminate on the basis of the plaintiff's viewpoint. Neither *Iqbal* nor *Twombly* requires such a result. Respondents' allegations provide a more than sufficient basis to support a claim of intentional viewpoint discrimination.

A. Respondents were treated differently than the similarly situated pro-Bush demonstrators.

The allegations of the Second Amended Complaint demonstrate that respondents were for all intents and purposes similarly situated to the pro-Bush demonstrators on October 14, 2004, but only respondents were forcibly moved to a location more than twice as far from the Inn.

Specifically, before the Secret Service directed the removal of the respondents, the two groups of demonstrators were not even one block apart; they were all on California Street, "separated only by the 37-foot width of Third Street." *Id.* at 174a. Moreover, because the California Street buildings blocked the Jacksonville Inn's rear-patio from both the pro- and anti-Bush demonstrators on California Street, none of them had access or a line of sight to the patio or the President. *Id.* at 176a, 212a.

Indeed, the westernmost portion of the pro-Bush demonstrators and the easternmost portion of anti-Bush demonstrators were effectively identically situated for security purposes; both groups were at the corner of Third and California Streets. The individuals on both sides of Third Street were in positions of greater proximity to the President than all other members of their respective groups. *Id.* at 212a. They were within a few feet of the President's limousine as it passed that corner when the President was arriving at the Inn, and again would be within a few feet of his

limousine on the President's departure from the Inn en route to the Honeymoon Cottage where he was spending the night. *Id.* at 175a, 179a, 188a, 212a.

After respondents were moved beyond Fourth Street to east of Fifth Street, nearly two blocks away from the Inn, respondents were significantly farther from the President than the pro-Bush demonstrators. *Id.* at 177a. At their new site, respondents could not be heard or heard as well by the President while he was dining and could not be seen by the President when his motorcade left the Inn. Pet. App. 177a, 178a, 212a; *see also Moss II*, Pet. App. 37a ("it is a plausible inference from the facts alleged that the protestors' chants would be less intelligible from two blocks away").

B. The differential treatment was the result of intentional viewpoint discrimination; it was not the result of petitioners' pretextual security rationale.

Petitioners' principal response is that the allegations of viewpoint discrimination are not plausible given their assertion that their actions were motivated by legitimate security concerns. After reviewing the record, however, the court of appeals properly found that it was petitioners' explanation that strained credulity, accepting, as it was required to do, the factual allegations in the Second Amended complaint.

Specifically, the security rationale offered by the petitioners for the decision to move the anti-Bush

protestors is belied by their treatment of both the pro-Bush supporters and the diners and other visitors at the Inn. If preventing people from being within handgun or explosive range of the President "[h]ad been the true reason for the . . . [order to move the respondents], the Defendant Secret Service agents would have requested or directed that the pro-Bush demonstrators at the corner of Third and California be moved further to the west so that they would not be in range of the President as he travelled from the Inn to the Honeymoon Cottage." *Id.* at 178a. "Instead, the Defendant Secret Service Agents left the pro-Bush demonstrators" at Third and California "to cheer for President Bush. . . . while the anti-Bush demonstrators . . . [were] violently moved two blocks east, well out of the President's view." *Id.*

Moreover, that respondents were on the east side of the 37-foot separation between the groups did not make respondents a greater security risk; it was irrelevant for the professed security purpose, because neither assemblage was in handgun or explosive range of the President while he was dining at the Inn. *Id.* at 176a. These concrete facts undermine the security rationale offered by petitioners, and strongly suggest (at the very least) that the real reason for moving respondents was to prevent or diminish the expression of their opposition views within the President's sight and hearing. *Id.* at 178a-179a.

At best, petitioners have raised a factual dispute that should not be decided on a motion to dismiss and is not properly appealable under the collateral order

doctrine. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995).

C. Petitioners' treatment of the diners, guests, and other visitors at the Inn also undermines their asserted security rationale.

The Second Amended Complaint also alleges facts explaining why the petitioners' failure to screen or remove the guests and diners inside the Inn further supports respondents' allegation that suppression of opposition views was the true reason respondents were moved. *Id.* at 177a, 178a. As the Eighth Circuit has noted, prohibiting expressive activity "while at the same time allowing conduct completely unrelated to the First Amendment, yet equally annoying [or equally threatening to security], to continue unabated . . . stands the First Amendment on its head." *Pursley v. City of Fayetteville*, 820 F.2d 951, 956 (8th Cir. 1987).

As the district court found,

> The threat to the President's security here, as implied by the security rationale, came simply from the *proximity* of persons to the President. . . . The[ ] proximity [of the diners and guests] to the President makes them a part of the security problem, political views notwithstanding. They received different and, arguably, better treatment than the anti-Bush demonstrators as shown by the

> fact that they were neither relocated nor screened.
>
> That the diners and guests were not expressing a political view is immaterial to the fact that their proximity made them a potential threat to the President's safety.

Pet. App. 112a-113a.

The fact that those inside the Inn were not in a public area exercising First Amendment rights made them *more*, not *less,* susceptible to legitimate security restrictions. And surely they posed a greater risk of assaulting the President with a handgun or explosive – or even with a thrown steak knife or wine bottle – than the anti-Bush demonstrators outside the Inn, separated from and blocked from even seeing the President by the Inn itself, the other buildings on California Street, and the six foot tall fence surrounding the dining patio. *Id.* at 176a. "'Freedom of expression . . . would rest on a soft foundation indeed if government could distinguish' between demonstrators and pedestrians on 'a wholesale and categorical basis,' without providing evidence that demonstrators pose a greater risk to identified government interests than do pedestrians." *Lederman v. United States*, 291 F.3d 36, 45 (D.C. Cir. 2002) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 101 (1972)) (ellipsis by the court of appeals).

The differing treatment of the anti-Bush protestors from the President's supporters and the diners and guests at the Inn shows – not just plausibly, but

persuasively – that the petitioners' "handgun and explosive range" security rationale was false. The demonstrators were entirely peaceful; the local police were fully in control of the situation; there was no unrest or emergency situation. The court of appeals and district court correctly concluded that the security rationale did not justify the differential treatment of respondents and that respondents had plausibly stated a claim for viewpoint discrimination.[2]

II. The court of appeals correctly held that petitioners are not entitled to qualified immunity.

Petitioners contend that the Ninth Circuit erred in analyzing the issue of qualified immunity at too high a level of generality. Petitioners are incorrect. Their argument is premised on their factual assertion – contrary to the allegations of the Second Amended Complaint – that they did not treat respondents differently (or differently enough) based on the viewpoint of their speech. Such factual disputes are not appropriate for resolution on a motion to dismiss (or even a motion for summary judgment). *See Johnson v. Jones*, *supra*, 515 U.S. at 313-15 (1995) (limiting interlocutory appellate review of qualified immunity

[2] The facts alleged in the Second Amended Complaint also state plausible claims for content discrimination and discrimination against expression in violation of the First Amendment. (*Id.* at 185a-186a). Neither the district court nor the court of appeals addressed these claims directly in their decisions.

decisions to questions of law, not evidence sufficiency).

A. The First Amendment's requirement of viewpoint neutrality is well-established and undisputed.

"Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828 (1995). The Second Amended Complaint alleges that the petitioners targeted respondents because of their views and the content of their speech. Any reasonable official in petitioners' positions would know that discriminating against individuals based on the viewpoint they are expressing is unconstitutional.

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Id. at 828-29 (citations omitted). *See also Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 642-43

(1994) (discrimination based on viewpoint violates the First Amendment); *R.A.V. v. St. Paul,* 505 U.S. 377, 382 (1992) (same); *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989) (same); *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95-96 (1972) (same).

The proposition that discriminating against respondents because of their views violates the First Amendment "should be and is obvious to everyone," including petitioners. *Metro Display Adver., Inc. v. City of Victorville*, 143 F.3d 1191, 1196 (9th Cir. 1998) (rejecting the city officials' argument that the unconstitutionality of viewpoint discrimination was not clearly established). Petitioners do not dispute that the principle of viewpoint neutrality is well-established.

B. Secret Service agents are not exempt from the First Amendment.

The principle of viewpoint neutrality applies to Secret Service agents as well as other government officials. More than 35 years ago, the D.C. Circuit noted: "The congressional grants of authority to the Secret Service to protect the President, and to control access to temporary presidential residences, cannot be said to authorize procedures or actions violative of the Constitution." *Sherrill v. Knight*, 569 F.2d 124, 128 n.14 (D.C. Cir. 1977) (internal citations omitted). Citing *A Quaker Action Group v. Hickel*, 421 F.2d 1111 (D.C. Cir. 1969), the *Sherrill* court went on to "reassert our conclusion in that case that we cannot

agree with the Government's argument that mere mention of the President's safety must be allowed to trump any First Amendment issue." *Sherrill*, 569 F.2d at 128. The *Sherrill* court's statement was as true at the time of the events at issue here as it was in 1977.

Petitioners cite Justice Ginsburg's concurring opinion in *Reichle v. Howards*, 132 S.Ct. 2088, 2097 (2012), for the proposition that Secret Service agents "rightly take into account words spoken to, or in close proximity of, the person whose safety is their charge" in evaluating security threats. *Reichle*, however, is a very different case than this one. In *Reichle*, the defendant was arrested after making physical contact with Vice President Cheney at a shopping mall. Here, respondents were never anywhere near President Bush. Even before they were moved, there were buildings between respondents and the President, and they never engaged in any conduct that might be regarded as threatening. Nothing in *Reichle* suggests that, in the absence of a true or even potential threat, the defendant in that case could have been physically restrained on the basis of his words alone.

To the contrary, the law is clear that government agents may not override the First Amendment merely to shield the President or Vice-President from dissent at public events. Courts have been vigilant in condemning such conduct as unconstitutional.

For example, in 1971, President Nixon attended a public function in North Carolina. Certain federal

and local officials excluded anti-war demonstrators from the event because of their critical signs and leaflets. When the protestors filed suit, the district court had no difficulty finding in their favor, calling the defendants' viewpoint-based exclusion a "wholesale assault" on the "right to freedom of assembly and right to petition for redress of grievances." *Sparrow v. Goodman*, 361 F. Supp. 566, 585 (W.D.N.C. 1973), *aff'd sub nom.*, *Rowley v. McMillan*, 502 F.2d 1326 (4th Cir. 1974).

Likewise, in 1972, government officials in Hawaii detained and excluded from a public welcoming ceremony for President Nixon several individuals with signs expressing their opposition to his policies. The court held that the breach of First Amendment rights was so clear as to defeat a motion to dismiss based on immunity. *Butler v. United States*, 365 F. Supp. 1035 (D. Haw. 1973).

When Vice President George H. W. Bush attended a public ceremony at Independence Hall celebrating the 200th anniversary of the Constitution, people carrying "non-controversial" signs and banners were welcomed, but anyone with a controversial message was excluded. The district court determined that the federal defendants had violated the Constitution because "[National] Park Service personnel sought to prevent respondents from expressing their dissenting views in any manner that might come to the attention of persons attending the Vice-President's speech, and which might detract from the mainstream patriotism" of the event. *Pledge of Resistance v. We The*

People 200, Inc., 665 F. Supp. 414, 417, 419 (E.D. Pa. 1987).

More recently, in *Mahoney v. Babbitt*, 105 F.3d 1452 (D.C. Cir. 1997), the D.C. Circuit reversed the district court's Order allowing the National Park Service to bar demonstrators critical of President Clinton's position on abortion rights from his Inaugural Parade route. The court noted that "[n]o case called to our attention says that anyone has ever successfully established the power of a government to so suppress opposing viewpoints; indeed, in few cases has the government of the United States even tried." *Id.* at 1456-57. The D.C. Circuit concluded: "In short, all constitutional authority supports the position we would have thought unremarkable, that a government entity may not exclude from a public forum persons who wish to engage in First Amendment protected activity solely because the government actor fears, dislikes, or disagrees with the opinions of those citizens." *Id.* at 1459; *see also Johnson v. Bax*, 63 F.3d 154, 157-58 (2d Cir. 1995) (protester carrying sign addressed to President Clinton stated cause of action when he was arrested for refusing to move to an anti-Clinton area designated by police); *Grady v. El Paso Community College*, 979 F.2d 1111, 1114 (5th Cir. 1992) (defendants should have known that speech criticizing the Persian Gulf War was protected).

In short, the district court and court of appeals' decisions here are just the most recent example in a long line of cases that condemn federal officials' disregard of the First Amendment to shield the

President or Vice-President from dissent at public events. "The First Amendment is not a problem. It is a solution to a problem. The problem is government officials trying to abridge the liberty of private individuals to say what they like." *Metro Display*, 143 F.3d at 1195. The Ninth Circuit followed well-established law in denying petitioners' claim to qualified immunity as a matter of law.

C. Petitioners' argument about the level of generality of the court of appeals' decision is simply a reformulation of their improper attempt to dispute the factual allegations of the Second Amended Complaint.

The argument that the court of appeals resolved the issue of qualified immunity at too high a level of generality is nothing more than a restated quarrel with the factual allegations in the Second Amended Complaint. Those allegations describe with particularity the manner in which anti-Bush protestors were treated differently than pro-Bush demonstrators. Petitioners' attempt to redefine the question by asking whether "it was clearly established that moving one group to a location one block further from the President than another when creating a presidential security perimeter constituted a violation of that group's First Amendment rights?" That is a description of the facts but not a description of the relevant legal principle. And, it is such a remarkably narrow statement of the principle that only a decision in a

case involving an identical fact situation could overcome qualified immunity.

As the court of appeals noted, petitioners "inaccurately characterize[d] both the protestors' allegations and the governing law." Pet. App. 44a. The court of appeals concluded that petitioners had, among other things, improperly restated respondents' factual allegations about the distances between the protestors; ignored "the allegation that the pro-Bush demonstrators were permitted to remain along the President's motorcade route, while the anti-Bush protestors were kept away"; and, fundamentally, ignored the fact that "the protestors' claim is not simply that they were moved, but that they were relocated because they criticized the President." *Id.* at 44a-45a (emphasis in original). Petitioners repeat that same mistake in their petition to this Court.

D. A case with identical facts is not required to survive a qualified immunity defense where, as here, the application of a well-established legal principle to the facts alleged in the complaint is unmistakably clear.

The government's contention that no court had ever previously held that the Secret Service is required to ensure that "groups of differing viewpoints [are] positioned in locations exactly equidistant from the President at all times" misses the point. The issue in this case is whether the Secret Service can treat different groups differently because of their viewpoint.

As the court of appeals correctly held, the application of that well-established legal principle to the facts alleged in the Second Amended Complaint was clear, and the absence of another case with identical facts therefore does not entitle petitioners to qualified immunity:

> [T]he denial of qualified immunity does "not require a case directly on point." *Ashcroft v. al-Kidd,* ___ U.S. ___, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011). Rather, it requires that "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* It is "beyond debate" that, particularly in a public forum, government officials may not disadvantage speakers based on their viewpoint.

Pet. App. 45a; *see Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("the salient question" of a motion for qualified immunity is not whether there is another case with "fundamentally similar" facts, but "whether the state of the law" gave defendants "fair warning" that their actions were unconstitutional).

When this Court in *Rosenberger, supra*, 515 U.S. at 828, said it was "axiomatic" that the government could not regulate speech based upon the message it conveys, its choice of the word "axiomatic" disposed of arguments such as the one made by petitioners here. The word "axiomatic" in this context means a self-evident or universally recognized truth. American Heritage Dictionary of the English Language (2d College Ed. 1985). That is to say, the proposition should be and is obvious to everyone. Even in a nonpublic

forum, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788 (1985). And that is exactly what the well-pled facts of the Second Amended Complaint plausibly allege the petitioners did here.

Petitioners' argument that there was no clearly established law requiring them to move respondents back to the motorcade route prior to the President's departure from the Inn is another distortion of the record and a complete red herring. Respondents do not claim that they should have been returned to their former position; rather, they contend that they should never have been moved in the first place because the decision to move them was based on the viewpoint they were expressing, not the false security rationale offered by petitioners.

E. There is no circuit conflict here.

Petitioners suggest that there is a conflict between the Ninth Circuit's decision below and the Tenth Circuit's decision in *Pahls v. Thomas*, 718 F.3d 1210 (10th Cir. 2013). Although *Pahls* involves presidential security and claims of viewpoint discrimination, the similarities are superficial. *Pahls* rests on very different facts and is easily distinguishable from the present case.

In *Pahls*, in anticipation of an announced visit by President George W. Bush at a fundraiser for former

Senator Pete Domenici at the private home of the mayor of the village of Los Ranchos de Albuquerque, a group of anti-Bush protestors sought to demonstrate along the President's motorcade route. Local police, however, had directed the anti-Bush protestors to an area on the public right of way that was 150 feet away from the President's planned route. At the same time, a Secret Service Agent had allowed supporters of President Bush to remain on private property closer to the President's route. But that Agent was not involved in the decision about where to locate the anti-Bush protestors and thus could not be held responsible for the actions of the local police in keeping the protestors away from the President. *Id.* at 1233. And the local police officers could not be liable for the Secret Service Agent's decision not to move the President's supporters who were on private property. *Id.*

By contrast, petitioners here personally violated respondents' constitutional rights by expressly directing the removal of the protestors, and only the protestors, when their message could be heard by the President and his party in the dining area. It was petitioners' decision to move the protestors *and* it was petitioners' decision to leave the President's supporters and the other unscreened guests and diners in place and within handgun and explosive range of the President. These facts persuasively demonstrate that respondents' message, not their proximity to the President, was the reason they were moved to a

location significantly further from the President than where his supporters were permitted to remain.

F. The court of appeals (and the district court) did not improperly second-guess any split-second security determination by the Secret Service agents.

This case does not involve the courts or respondents second-guessing any split-second security determination by petitioners. There is no allegation in this case that petitioners made mistaken split-second judgments in a good-faith attempt to carry out their duties. Rather, as alleged in the Second Amended Complaint, the facts of this case reflect a pattern of behavior rather than the sort of split-second judgments that are entitled to deference from this Court. Respondents specifically allege that petitioners made a considered, deliberate choice, based on policy and practice, to treat groups of demonstrators differently based on the content of their messages.

As the court of appeals properly concluded:

> In sum, the anti-Bush protestors have pleaded nonconclusory factual allegations that they were treated differently than the pro-Bush demonstrators; that any security-based explanation for this differential treatment offered by the Secret Service agents was pretextual; and that the agents' directives in this case accord with a pattern of Secret Service action suppressing the speech of those opposed to the President. These

> allegations, taken together, are sufficient to allow the protestors' claim of viewpoint discrimination to proceed.

Pet. App. 43a.

By suggesting that this case is about second-guessing the Agents' security determinations, petitioners are again attempting to substitute their version of the facts for the facts alleged in the Second Amended Complaint. Because this case involves an appeal from the denial of a motion to dismiss, all facts and reasonable inferences must be viewed in the light most favorable to respondents. It is inappropriate for petitioners to attempt to rewrite or recharacterize respondents' factual allegations, or to argue that the evidence will support a different version of events at trial.

The district court and court of appeals were faced with the purely legal question whether respondents' allegations stated a claim sufficient to survive a defense of qualified immunity. At this stage, "[a]n appellate court reviewing the denial of a defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts." *Johnson v. Jones*, *supra,* 515 U.S. at 313 (1995) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985)). In affirming the denial of petitioners' motion to dismiss, the court of appeals applied the proper standards to the allegations in the Second Amended Complaint.

CONCLUSION

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

Respectfully submitted,

STEVEN M. WILKER
Counsel of Record
TONKON TORP LLP
1600 Pioneer Tower
888 S.W. Fifth Avenue
Portland, OR 97204
Telephone: (503) 802-2040
On behalf of ACLU Foundation of Oregon, Inc.

STEVEN R. SHAPIRO
BEN WIZNER
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
Telephone: (212) 549-2500

KEVIN DÍAZ
ACLU FOUNDATION OF OREGON, INC.
PO Box 40585
Portland, OR 97240
Telephone: (503) 227-6928

ARTHUR B. SPITZER
AMERICAN CIVIL LIBERTIES UNION
OF THE NATION'S CAPITAL
4301 Connecticut Avenue, N.W.
Suite 434
Washington, D.C. 20008
Telephone: (202) 457-0800

Counsel for Respondents

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