No. 13-115

In The Supreme Court of the United States

TIM WOOD AND ROB SAVAGE,

Petitioners,

v.

MICHAEL MOSS, et al.,

Respondents.

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

BRIEF FOR RESPONDENTS

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

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

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

Counsel for Respondents

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

RESTATEMENT OF QUESTIONS PRESENTED

Petitioners' Questions Presented put the cart before the horse. To determine whether qualified immunity is available as a matter of a law in this case, the Court must accept respondents' well-pleaded factual allegations as true for purposes of the motion to dismiss. Thus, the appropriate questions presented are:

1. Whether the court of appeals properly concluded that respondents have sufficiently pleaded a plausible claim for viewpoint discrimination where the Second Amended Complaint alleges facts showing (a) that petitioners ordered respondents to be moved to a position more than twice as far from the President as his supporters for the specific purpose of assuring that respondents' protest message could neither be seen nor heard by the President; (b) that this treatment of respondents was pursuant to a viewpoint-discriminatory policy of the Secret Service, as exemplified by 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) that 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 the factual allegations of the Second

RESTATEMENT OF QUESTIONS PRESENTED – Continued

Amended Complaint, which must be accepted as true on petitioners' motion to dismiss, show that petitioners moved respondents out of sight and sound of the President based only on the viewpoint of respondents' political speech, and not for any legitimate security reason.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTRODUCTION

This case was filed more than seven years ago, yet is still at the motion to dismiss stage. The district court and the court of appeals carefully and thoroughly addressed all the arguments presented in support of petitioners' motion to dismiss, correctly applied well-established law to the facts alleged in the Second Amended Complaint, and properly concluded that respondents have sufficiently pleaded a claim for viewpoint discrimination in violation of the First Amendment and that petitioners are not entitled to qualified immunity as a matter of law. Petitioners' brief seeks to substitute their version of the facts for the factual allegations of the Second Amended Complaint, and essentially argues that Secret Service agents can do no wrong as a matter of law. That argument should be rejected, and the decisions below should be affirmed.

STATEMENT OF THE CASE

In October 2004, President Bush was scheduled to make a campaign stop in Jacksonville, Oregon, just weeks before the upcoming presidential election. Pet. App. 172a. When respondents learned of the planned visit, they informed the Jacksonville Chief of Police 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 Chief nor the Sheriff raised any objection to the demonstration; they simply advised 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. *Id.* at 172a, 174a. A similarly-sized group of pro-Bush demonstrators gathered on California Street directly 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 at the Honeymoon Cottage, both 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 (two Secret Service agents, directing the activities of local law enforcement forces) cleared and secured the alleyways adjacent to the Inn. *Id*. at 175a-176a. The demonstrators, both pro- and anti-Bush, however, were allowed to remain where they had gathered as the President's

motorcade passed through the intersection on its way to the restaurant. *Ibid*. At the time the President's motorcade passed through the intersection, 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. The demonstrators had no line of sight to the patio restaurant from the sidewalks on California Street, *id.* at 176a, and most of the demonstrators on the north side of California Street were behind the buildings on that side of the street – the United States Hotel, the Bijou, the Jacksonville Inn itself, and the Sterling Savings Bank – completely blocking any line of sight or access to the patio dining area behind the Inn. *Id.* at 176a, 212a. Drawing a reasonable inference in favor of respondents as the non-moving party on the motion to dismiss, the Secret Service agents had concluded that these measures were adequate to protect the President's safety while dining at the Inn.

However, approximately 15 minutes after the President sat down for dinner, when it became clear that respondents' chanting could be heard in the

[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.

restaurant, petitioners ordered local law enforcement forces to move respondents first one block and then ultimately two blocks further away, to where their 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 after dinner. *Id*. at 177a-178a. The pro-Bush demonstrators were not moved, *ibid*., and the Inn's other diner's and guests were never subject to any security screening. *Id*. at 178a-179a. A number of guests at the Inn who had not been in the restaurant when the President arrived but who had learned of his presence there came downstairs and entered the restaurant to gawk at the President; they were not screened or prevented from standing within approximately 15 feet of the President. *Id*. at 177a.

As alleged in detail in the Second Amended Complaint, petitioners' actions in this case were taken pursuant to the Secret Service's "unwritten policy and practice" of "work[ing] with the White House under President Bush to eliminate dissent and protest from presidential appearances." *Id*. at 184a; *see also id*. at 181a-182a. There were more than 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 out of sight and sound of the President. *Id.* at 189a-194a. This goal was described in the Presidential Advance Manual, a redacted version of which was attached as

Exhibit B to and referenced in the Second Amended Complaint. *Id.* at 183a-184a, 212a. The relevant portion of the Advance Manual 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 (emphasis added).

Respondents filed this action in July 2006, alleging, among other claims, that they were subjected to unconstitutional discrimination based on their viewpoint – specifically, their opposition to President Bush – when they were removed from the vicinity of the Jacksonville Inn by the use of constitutionally excessive force.[2] After the district court ruled on defendants' motions to dismiss or for summary judgment against the First Amended Complaint in 2007, 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

[2] The excessive force claims were asserted against state and local law enforcement defendants, and are not involved in this appeal.

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), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (decided after argument in 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). 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.

Petitioners moved to dismiss the Second Amended Complaint. The district court (adopting the Report and Recommendation of a Magistrate Judge) 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.

On appeal, the Ninth Circuit affirmed, 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 demonstrated the plausibility of respondents' allegations that petitioners acted with an impermissible discriminatory motive. *Id.* at 42a-43a. 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.

Ibid. (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*, 563 U.S. ___, 131 S. Ct. 2074, 2083 (2011)).

Petitioners' petition for rehearing en banc was denied over the dissent of eight judges who essentially concluded that allegations of misconduct by Secret Service agents are either inherently incredible or must be rejected as a matter of law in order to protect the President. Pet. App. 8a-23a. After dismissing the well-pleaded allegations of the Second Amended Complaint in favor of the inferences sought by the agents (and some hypothesized solely by the dissenting judges), the dissent concluded that the panel had focused its analysis on an overly broad characterization of the right at issue, and that the proper characterization of the right at issue was (1) "was it clearly established that moving one group

to a location one block farther from the President than another when creating a presidential security perimeter constituted a violation of that group's First Amendment rights?" and (2) "was it clearly established that Secret Service agents, who moved a group to maintain a consistent security perimeter around the President, had to move the group back to their original location before the President could leave in his motorcade (or at least had to alter the motorcade route so that all involved got an equal chance to see the President)?" Pet. App. 18a. The dissent answered these questions with "a clear 'no.'" *Ibid*. However, respondents have never asserted such rights, and the dissent's statement of the issues – echoed by petitioners here – explicitly assumes facts contrary to the factual allegations of the Second Amended Complaint. *Id*. at 18a-20a.

SUMMARY OF ARGUMENT

Petitioners' brief rests on two fundamentally flawed arguments. First, they seek review from the denial of a motion to dismiss based on facts outside the complaint and based on inferences favorable to them rather than to the non-moving party. Second, after mischaracterizing respondents' First Amendment claim, they ask this Court to analyze the issue of qualified immunity at too low a level of generality.

This Court has repeatedly held that government actors cannot discriminate against speakers based on

the viewpoint of their speech. To determine whether that clearly established principle of law applies in this case, the Court should first examine the constitutional violation claimed by respondents and then determine whether the court of appeals evaluated the qualified immunity defense at the correct level of specificity. Properly characterized, respondents' claim for viewpoint discrimination in violation of the First Amendment rests on clearly established law; petitioners reach the opposite conclusion only by recharacterizing respondents' claim in a manner inconsistent with the Second Amended Complaint.

Respondents have complied with the pleading requirements of *Twombly* and *Iqbal* and alleged a plausible claim for viewpoint discrimination in violation of the First Amendment. They did not merely satisfy those pleading standards, they embraced them. Respondents provided substantial factual detail and context, specifically alleging 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 and not security concerns. These detailed factual allegations 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 are sufficient to state a plausible claim for relief. The plausibility of respondents' claim is further supported by their allegations

regarding how petitioners' actions were in accord with the actual policy and practice of the Secret Service to suppress or assist in the suppression of viewpoints critical of President Bush. The Second Amended Complaint alleges a dozen other incidents involving Secret Service agents directing or facilitating the suppression of viewpoints critical of President Bush and/or ensuring that those opposed to the President were out of sight or sound from the President. One or two incidents might be coincidence; a dozen (or more) is a pattern from which an unwritten policy can be inferred. That is particularly true, here, where it was the official policy of the White House to work with the Secret Service to suppress dissenting viewpoints at the President's public appearances. The plausibility of respondents' claim is also reinforced by the timing of the events. It was not until 15 minutes after the President was seated in the dining area and the chants of respondents could be heard that the agents directed the removal of respondents.

The Second Amended Complaint alleges that petitioners had respondents pushed two blocks away, to where the President could not hear them during dinner or see them as he drove away from the Inn, while leaving the pro-Bush crowd in place, *because of* the message of respondents' speech. Any reasonable official in petitioners' position would have known in 2004 that such viewpoint-based discrimination was unconstitutional. The proposition that actively suppressing peaceful speakers in a public forum specifically

because of their viewpoint violates the First Amendment should be obvious to everyone.

The principle of viewpoint neutrality applies to Secret Service agents as well as other government officials; there is no Secret Service exception to the First Amendment, and Presidential appearances are not First-Amendment-free zones. To the contrary, federal courts have recognized for decades that, as a matter of well-established law, it is clear that government agents may not override the First Amendment merely to shield the President or Vice-President from peaceful dissent at public events. Courts have been vigilant in condemning such conduct as unconstitutional.

The issue in this case is whether Secret Service agents can treat different groups of demonstrators differently *because* of their differing viewpoints, and *without* a valid security reason, as the Second Amended Complaint alleges that petitioners did here. There is no dispute about the well-established legal principle that governmental actors violate the First Amendment when they discriminate against individuals exercising First Amendment rights in a public forum because of their disfavored political views. The court of appeals and district court correctly applied that well-established principle to the facts alleged in the Second Amended Complaint. The absence of another case with identical or nearly-identical facts therefore does not entitle petitioners to qualified immunity.

Petitioners' proposed qualified immunity inquiry suffers from two major defects: (1) it assumes that the facts are as petitioners would have them, contrary to the Second Amended Complaint, and (2) it is so narrow a statement of the issue that only a case involving virtually identical facts could ever come within the rule announced by a decision in this case. As the court of appeals noted, petitioners "inaccurately characterize[d] both the protestors' allegations and the governing law"; improperly restated respondents' factual allegations about the distances between the two groups of 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 crucial fact that "the protestors' claim is not simply that they were moved, but that they were relocated *because* they criticized the President." Pet. App. 44a-45a (emphasis in original). The defects in petitioners' arguments have not changed here.

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. This case does not involve the courts or respondents second-guessing any urgent security determination by petitioners. It was only after the President was seated in the dining area, and the anti-Bush protestors' chants could be heard that petitioners ordered local police to move respondents two blocks away to a

location where their protest message could not be heard (or heard as well) by the President during dinner and where their protest signs would not be seen by the President when he departed the restaurant after dinner.

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.

ARGUMENT

The decision below should be affirmed because 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 in permitting respondents to go forward with their case.

There are two fundamental flaws in petitioners' argument. First, they ask this Court to decide this appeal from the denial of a motion to dismiss based on facts outside the complaint and inferences favorable to them rather than to the non-moving party.[3]

[3] The qualified immunity defense in this case cannot properly be assessed without first accepting the plausible, non-conclusory factual allegations contained in the Second Amended

(Continued on following page)

Second, they mischaracterize respondents' First Amendment claim and then ask this Court to analyze the issue of qualified immunity at too low a level of generality. No earlier decision of this Court regarding the intersection of Third and California Streets in Jacksonville, Oregon, is needed to inform a competent Secret Service agent that pushing peaceful protesters out of sight and sound of the President for purely political reasons violates the First Amendment.

I. The Second Amended Complaint Pleads A First Amendment Claim That Is More Than Plausible.

In finding that the Second Amended Complaint meets the "plausibility" 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.

Complaint. For that reason, it makes logical sense to begin with the sufficiency of the pleadings. That approach (which was followed below) is consistent with the reasoning of *Pearson v. Callahan,* 555 U.S. 223 (2009), and is certainly not foreclosed by it, although the Court can and should reach the same result regardless of where it starts the analysis.

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 did not merely satisfy that pleading standard, they embraced it. They provided substantial factual detail and context regarding the events 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 and not security concerns. These are not conclusory allegations. Rather, they are supported by detailed factual allegations 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. Pet. App. 177a-179a.

Further, in paragraphs 82(a) to (l) of the Second Amended Complaint, respondents specifically allege in detail twelve other instances during the first term of the George W. Bush administration where the Secret Service engaged in conduct designed to keep critical protesters and their messages away from the President. The complaint also describes how the actions of petitioners here were like the actions of Secret Service agents in those other instances and were taken pursuant to the 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.

Petitioners dismiss the significance of these allegations. The most they are willing to concede is that respondents' claim of viewpoint discrimination "might have been plausible" if the Second Amended Complaint alleged that

> local law enforcement officers had said that the Secret Service agents invoked a discriminatory

> reason for moving the anti-Bush group (rather than the viewpoint-neutral justification they gave); or if the pro-Bush group had then been allowed to move into the nearer location that the anti-Bush group had vacated; or, perhaps, if the other incidents had involved the same agents and were similar in nature to the events here (as opposed to being primarily at ticketed events).

Brief for Petitioners at 52. If petitioners' view is accepted, a plaintiff asserting a claim of viewpoint discrimination (or any other claim requiring intent) would rarely, if ever, survive a motion to dismiss unless the plaintiff could allege that the defendant had publicly declared his or her intention to discriminate on the basis of the plaintiff's viewpoint. Any such confession would be powerful evidence, to be sure. But it is not, and never has been, the only way that discriminatory intent can be shown. *See* p. 26 below.

The same is true for petitioners' suggestion that an allegation that anti-Bush demonstrators had been displaced in favor of pro-Bush demonstrators might have plausibly supported a claim of viewpoint discrimination. Contrary to petitioners' contention, respondents need not allege that the pro-Bush demonstrators were given respondents' prior space to sufficiently allege that respondents were treated differently based on the viewpoint of their speech. Leaving the pro-Bush supporters in place while moving respondents out of sight and sound of the President

because of their message violates the First Amendment, regardless whether the pro-Bush supporters were allowed to take respondents' former position.

Finally, the other incidents alleged in the complaint were in fact similar in that each involved Secret Service agents directing or facilitating the suppression of viewpoints critical of President Bush and/or ensuring that those opposed to the President were out of sight or sound of the President. That petitioners were apparently not involved in the other incidents, and that some of the other incidents involved "ticketed events," is of no moment.[4] The allegation here is that petitioners acted pursuant to the actual policy and practice of the Secret Service as demonstrated by these other incidents of viewpoint suppression involving the Secret Service. These other similar incidents are sufficient to demonstrate the plausibility of respondents' allegations that petitioners acted with an improper discriminatory intent.

---

[4] In the context of presidential appearances, a "ticketed event" does not necessarily mean an event attended only by a selected audience. Tickets are often distributed to the general public by Members of Congress, federal agencies, or local officeholders. *See, e.g., Rank v. Jenkins*, Civ. A. No. 2:04-0997, 2006 WL 515533 (S.D. W.Va. Feb. 28, 2006). In *Rank*, the court noting that the plaintiff in an earlier case involving the removal of protestors from a public presidential appearance had obtained tickets from "her employer, the Federal Emergency Management Agency," and that "[t]he tickets provided that patrons would be seated on a first come, first served basis, without regard to either political affiliation or affinity with the President or his policies." *Id.* at *1.

Neither *Iqbal* nor *Twombly* requires a rule so carefully designed to assure that the truth shall never be known. Rule 9(b) of the Federal Rules of Civil Procedure specifically provides that: "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Iqbal* did not, and could not have, repealed that rule. Nevertheless, respondents have done far more than Rule 9(b) requires; the allegations of the Second Amended Complaint 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 non-conclusory factual allegations of the Second Amended Complaint demonstrate that respondents were for all relevant 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 the California Street sidewalks, "separated only by the 37-foot width of Third Street." Pet. App. 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 the 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 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.

As already noted, both groups had no access or line of sight to where the President was dining. Most of the respondents were immediately adjacent to a solid line of buildings (the United States Hotel, the Bijou, and the Jacksonville Inn) on the north side of California Street, between themselves and the President. *See id.* at 212a. A few were immediately adjacent to the Sterling Bank, which was likewise between themselves and the President. *See ibid*. The alley between the Jacksonville Inn and the Sterling Bank had been cleared and secured. *Id.* at 175a-176a. To the extent that there was any concern about demonstrators on the sidewalk outside the mouth of that alley, moving them a few steps east or west so

that they were behind the adjacent buildings would eliminate that concern.

Petitioners rely heavily on the map showing a line of sight from the northeast corner of California Street and Fourth Street to the patio dining area. *See* Brief for Petitioners at 7. But this is a red herring, because *no demonstrators were at that location until petitioners moved them there*. Even if there were legitimate security concerns about allowing demonstrators to gather at Fourth and California, that was a reason for leaving the demonstrators where they were, not for moving them.

After respondents were moved beyond Fourth Street to east of Fifth Street, nearly two blocks away from the Inn, respondents were significantly further from the President than the pro-Bush demonstrators. Pet. App. 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. *Id.* at 177a, 178a, 212a; *see also id.* at 37a ("it is a plausible inference from the facts alleged that the protestors' chants would be less intelligible from two blocks away").

B. The forcible relocation of respondents was the result of intentional viewpoint discrimination; it was not the result of petitioners' pretextual security rationale.

Petitioners' principal argument is that the allegations of viewpoint discrimination are not plausible

given petitioners' 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 petitioners is belied by their treatment of both the pro-Bush demonstrators and the diners and other visitors at the Inn. If preventing people from being in a position to harm the President had been petitioners' real concern, there would have been no need to move the demonstrators at all, as the President was well protected by a line of buildings. Instead, it is entirely plausible to believe on the well-pleaded facts in this complaint that the real purpose and effect of petitioners' action was to leave "the pro-Bush demonstrators on the Northwest and Southwest corners of Third and California Streets to cheer for President Bush as he traveled to the Honeymoon Cottage [after dinner], while causing the anti-Bush demonstrators to be violently moved two blocks east, well out of the President's view [or hearing, both during and after dinner]." *Id.* at 178a.

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. Petitioners' hypothesis that someone either in respondents' group or using the group as a cover might have been in a position to toss a grenade or use some other military weaponry from the California Street sidewalk misses the point. Petitioners' Brief at 44. If proximity to the President was the cause of the agents' concern, they would have done far more to screen those individuals who were far closer to the President than respondents. These concrete facts undermine the security rationale offered by petitioners, and strongly support the proposition 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. Pet. App. 178a-179a.

Petitioners seek to avoid this obvious conclusion by isolating each of respondents' allegations and asserting that each allegation by itself is insufficient to demonstrate the plausibility of respondents' claim. But the differential treatment of the anti-Bush protestors must be considered in the context of the other allegations, including the non-conclusory allegations regarding other incidents of viewpoint suppression involving the Secret Service during President Bush's Administration and the official policy of the Bush Administration to suppress dissenting viewpoints at events attended by the President with the assistance of the Secret Service. Pet. App. 183a-184a, 189a-194a. Moreover, petitioners fail to address why someone intent on doing harm would not more likely conceal himself or herself among a group of the President's

supporters, particularly given the reports about the Administration's efforts to suppress dissenting viewpoints and to keep protestors at a distance from the President.[5]

Likewise, the allegation that petitioners acted in accord with the actual policy and practice of the Secret Service is not merely an allegation consistent with liability, it is a specific, non-conclusory allegation of fact demonstrating an improper discriminatory motive in light of the allegations of other incidents of viewpoint suppression involving the Secret Service. Petitioners quarrel with the similarity of the other incidents. But, a fair reading of the allegations regarding those dozen other incidents demonstrate that each involved Secret Service agents directing or facilitating the suppression of viewpoints critical of President Bush and/or ensuring that those opposed to the President were out of sight or sound from the President. Pet. App. 189a-194a. Likewise, petitioners' argument that the earlier incidents involved different agents proves nothing; respondents' allegation is not

[5] The suggestion by petitioners and *amici* National Conference of State Legislatures, *et al*., that it is acceptable for Secret Service agents to consider those who oppose a president's policies in a *non-threatening* way to be more dangerous than those who support his policies strikes at the heart of the First Amendment. Brief for Petitioners at 32-34; Brief for National Conference of State Legislatures, *et al*. at 18-22. Should all of the *amicus* mayors, sheriffs and state legislators who are not members of the President's party be kept further away from the President than politicians of the President's party when he visits their territories?

that the petitioners here were rogue agents but that they were acting in accordance with Secret Service policy; the fact of similar incidents involving many other agents supports the plausibility of that policy.

After a trial, a jury can infer motive from actions and facts; that is how motive is usually established. *Cf. Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 147 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive."); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination."); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

If motive cannot be pleaded generally as provided in Rule 9(b) of the Federal Rules of Civil Procedure and cannot be inferred from the factual allegations concerning the incident at issue and from the factual allegations concerning the context of the incident as

one among many involving the Secret Service and the official policy of the President's administration, then there is virtually no circumstance in which a plaintiff could survive a motion to dismiss in the absence of an agent unguarded enough to incriminate him or herself to the plaintiff or a third party. In effect, Secret Service agents will be clothed with a conclusive presumption of lawful behavior. Neither *Twombly* nor *Iqbal* requires such a draconian and counterfactual result.

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

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). The Second Amended Complaint 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. Pet. App. 177a, 178a. 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.

Id. at 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 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).

Petitioners argue that "the other diners and guests . . . were at the Inn before it was known that the President would dine there. Because they thus would have had no opportunity to plan to harm the President, those individuals were differently situated from the crowd outside, which had gathered in specific anticipation of being near the President." Brief for Petitioners at 47-48. This is wrong for four reasons. First, as petitioners' *amici* point out, "Oregon is a 'shall-issue' concealed-carry state." Brief of National Conference of State Legislatures, *et al*. at 12 n.4. Thus, it was entirely possible that a person sitting at the table next to the President carried a handgun in his shoulder holster as a matter of course. Second, the Second Amended Complaint alleges that people who were upstairs at the Inn learned of the President's presence and came down to gawk, coming within 15 feet of the President. Pet. App. 177a. Such individuals had every opportunity to arm themselves – if they were not already armed – if they wished to harm the President. Third, use of a firearm is not the only way to harm a person; a diner having a T-bone steak at an adjacent table would have had a sharp knife within a few feet of the President. Finally, it is simply not true that the demonstrators "had gathered in specific anticipation of being near the President." They had anticipated being at least two blocks away from the President. *Id.* at 172a. His arrival at the Jacksonville Inn was as much a surprise to them as to the diners

at the Inn. Petitioners' attempt to justify their very different treatment of the diners and guests at the Inn on security grounds is not credible.

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; petitioners were not responding to unrest or an emergency situation. *Id.* at 186a-187a. The court of appeals and the district court correctly concluded that the security rationale did not explain the differential treatment of respondents and that respondents had plausibly stated a claim for viewpoint discrimination.[6]

D. The timing of petitioners' actions reinforces the plausibility of respondents' allegations.

Petitioners had at least 20 minutes from the time the President decided to dine at the Inn to assess the security situation and secure the area, and they did so. *Id.* at 186a. After the President sat down to

[6] 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. Pet. App. 185a-186a. Neither the district court nor the court of appeals addressed these claims directly in their decisions.

dinner, another 15 minutes passed before any decision was made to move respondents. *Id*. at 177a. Nothing had changed from a security point of view (except, perhaps, the entry of unsecured gawkers into the dining area); it was only when respondents' chants and slogans could be heard where the President was dining that the decision was made to move respondents two blocks away. *Ibid*.

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. That is 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 Scott v. Harris*, 550 U.S. 372, 378-80 (2007) (when a defendant raises qualified immunity on summary judgment, the court must "adop[t] . . . the plaintiff's version of the facts" unless "no reasonable jury could believe it"); *Johnson v. Jones*, 515 U.S. 304, 313-15 (1995) (limiting interlocutory appellate review of qualified immunity 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 petitioners had respondents pushed two blocks away, to where the President could not hear them (or hear them as well) during dinner or see them as he drove away from the Inn, while leaving the pro-Bush crowd in place, *because of* the message of respondents' speech. Any reasonable official in petitioners' position would have known in 2004 that such viewpoint-based discrimination was 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 treating speakers in a public forum unequally because of their views – intentionally disadvantaging those whose views are critical of government while advantaging those whose views are favorable to government – violates the First Amendment "should be and is obvious to everyone." *Metro Display Adver., Inc. v. City of Victorville*, 143 F.3d 1191, 1196 (9th Cir. 1998) (rejecting defendants' argument that the unconstitutionality of viewpoint discrimination was not clearly established in the context of rejecting advertisements on bus shelters because their viewpoint was disfavored by the Mayor). Petitioners do not dispute that the principle of viewpoint neutrality is well established in the context of government regulation of First Amendment activity in a public forum.

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

Presidential security is not a mantra that, once uttered, permits government agents to censor the message of peaceful protesters based on the views they express. The principle of viewpoint neutrality applies to Secret Service agents as well as other government officials; there is no Secret Service exception to the First Amendment.

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*, 566 U.S. ___, 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. Respondents take no issue with that general proposition; as Justice Ginsburg explained, the content of statements made by a person in physical proximity to the Vice President may well be relevant "in determining whether he posed an immediate threat to the Vice President's physical security." *Ibid*. *Reichle*, however, is a very different case than this one. There, the plaintiff was arrested after making physical contact with Vice President Cheney, falsely denying that he

had done so, and responding in a hostile manner to a Secret Service agent's question. *See id*. at 2091-92. Here, respondents were never anywhere near President Bush. Even before they were moved, there were whole buildings between them 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 plaintiff in that case could lawfully have been arrested on the basis of his words alone.

To the contrary, federal courts have recognized for decades that, as a matter of well-established law, it is clear that government agents may not override the First Amendment merely to shield the President or Vice-President from peaceful 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 then-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 main-stream 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 issued an emergency injunction pending appeal prohibiting the National Park Service from barring 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 court 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 (Sentelle, J.).

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. There is no Secret Service exemption from the First Amendment.

C. Petitioners' proposed "level of analysis" of the qualified immunity issue is unreasonably fact-specific and improperly incorporates facts contrary to the factual allegations of the Second Amended Complaint.

Petitioners complain that the court of appeals analyzed the issue of qualified immunity at too high a level of generality. But petitioners' proposed level of analysis is so fact-specific that it states no principle at all, and, more egregiously, ignores the factual allegations of the Second Amended Complaint.

Petitioners propose that the proper level of analysis would be captured 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.'" Brief for Petitioners at 22 (quoting the dissenting opinion of O'Scannlain, J.). That statement of the issue suffers from two major defects. First, it assumes that the facts are as petitioners would have them, quite contrary to the facts alleged in the Second Amended Complaint. Second, it is such a remarkably narrow statement of the issue that only a case involving virtually identical facts could ever come within the rule announced by a decision in this case.

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 explained that petitioners had, among other things, improperly restated respondents' factual allegations about the distances between the two groups of 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 crucial 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 those same mistakes here.

Additionally, petitioners' proposed statement of the qualified immunity issue improperly incorporates the false assumption that when petitioners moved respondents they were "creating a Presidential security perimeter." To the contrary, the Second Amended Complaint alleges that petitioners' action against respondents had nothing to do with creating a security perimeter, which had been created almost 30 minutes earlier, *see id.* at 175a-177a, and everything to do with viewpoint censorship. *Id.* at 186a. In sum, petitioners' proposed "level of analysis" is a stacked deck against which plaintiff cannot win.

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 Second Amended Complaint is unmistakably clear.

Petitioners' contention that no court had previously held that "Secret Service agents [must] ensure that groups of differing viewpoints [are] positioned in locations exactly equidistant from the President at all times," Brief for Petitioners at 22 (quoting the dissenting opinion of O'Scannlain, J.), misses the point. First, it does not accurately describe petitioners' constitutional grievance.[7] See page 38 above. Second,

[7] In their petition, petitioners also suggested incorrectly that respondents are seeking a rule that the First Amendment entitled them to be returned to their original location after the

(Continued on following page)

as this Court noted in *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), "the salient question" on 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.

The issue in this case is whether Secret Service agents can suppress the message of a particular peaceful group of demonstrators specifically *because* of their viewpoint, and *without* a valid security reason, as the Second Amended Complaint alleges that the agents did here. As noted above, there is no dispute about the well-established legal principle that governmental actors violate the First Amendment when they discriminate against individuals exercising First Amendment rights in a public forum because of their disfavored political views. The court of appeals and the district court correctly held that the application of that well-established principle to the facts alleged in the Second Amended Complaint was clear, and the absence of another case with identical or nearly-identical facts therefore does not entitle petitioners to qualified immunity:

President's dinner and before his motorcade departed. Pet. at 18. Respondents' position is that it was constitutionally improper to move them in the first place on the basis of their political viewpoint. Had they not been improperly moved, the question of returning them to their original location along the motorcade route would never arise.

> [T]he denial of qualified immunity does "not require a case directly on point." *Ashcroft v. al-Kidd,* [563] 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.

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-pleaded facts of the Second Amended Complaint plausibly allege the petitioners did here. No reasonably competent agent could have believed that it was lawful to push the peaceful anti-Bush demonstrators out of sight and sound of President Bush *because* of the viewpoint

they were expressing, *without* any legitimate security purpose, while leaving the pro-Bush demonstrators in place.

E. The court of appeals 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 urgent security determination by petitioners. The factual allegations in this case cannot support the theory 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, it was only after the President was seated in the dining area and the anti-Bush protestors' chants could be heard, that petitioners ordered local police to move respondents 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 after dinner. Pet. App. 177a-178a. 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. Nothing in the Second Amended Complaint reflects the sort of split-second judgments that are entitled to deference from this Court.

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.

Id. at 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.

This Court, like the district court and the court of appeals below, is faced with the purely legal question whether respondents' allegations state 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 and reached the proper result.

CONCLUSION

For the reasons stated above, the decision of the court of appeals should be affirmed and the case returned to the district court for further proceedings.

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.

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

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

Counsel for Respondents

FEBRUARY 2014