

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

JEANNE PAHLS, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	
)	
)	1:08-cv-53 (LH)(ACT)
)	
)	
BOARD OF COUNTY)	
COMMISSIONERS FOR THE COUNTY)	
OF BERNALILLO, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
DEFENDANTS THOMAS AND MIMS'S MOTION FOR SUMMARY JUDGMENT**

On August 27, 2007, President Bush visited the Albuquerque area to attend a fundraiser. Pahls Decl., Doc. No. 99-5, ¶ 4. Some of the facts concerning that visit are not in dispute. The President's motorcade drove south along Rio Grande Boulevard in Los Ranchos de Albuquerque and turned into the driveway of Mayor Larry Abraham. Moffitt Decl., Doc. No. 99-4, ¶¶ 2, 16. Two groups of demonstrators were on the scene. Law enforcement required those expressing views critical of the President to stand and display their messages approximately 150 yards south of where the President turned into the driveway. *Id.* ¶¶ 4, 15; Pahls Decl. ¶¶ 7, 13, 18-20. The motorcade did not pass by them. *Id.* ¶ 23; Moffitt Decl. ¶ 16. They were blocked by horses and police cars and the President could not see them. *Id.* ¶ 17; Pahls Decl. ¶ 24. Law enforcement allowed the second group of demonstrators, expressing views supportive of the President, to stand

on the shoulder of the highway directly next to where the President's motorcade slowed to turn into the driveway and only feet from the car. Pahls Decl. ¶¶ 21-22, 25.

Some of the facts about the President's visit are in dispute. Defendants Lt. Matthew Thomas and Sgt. Edward Mims, supervisory employees of the Bernalillo County Sheriff's Department in charge of local law enforcement at the event, have moved for summary judgment. Doc. No. 142. They argue that they were not personally involved in restricting where demonstrators could stand, that there was no viewpoint discrimination because all of the demonstrators were outside the security perimeter and in one place, and that the demonstrators had ample alternative means of communicating their messages. The record belies these assertions. The testimony of law enforcement officers and a comparison of this motion with the similar motion by Secret Service agent Sheehan demonstrate that the personal responsibility of Lt. Thomas and Sgt. Mims is very much in dispute. In fact, the evidence in the record supports the conclusion that Lt. Thomas and Sgt. Mims were engaged in viewpoint discrimination.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed suit on January 15, 2008, arguing that the defendants violated their First and Fourteenth Amendment rights by engaging in viewpoint discrimination by treating anti-Bush demonstrators differently from pro-Bush demonstrators based on their message. Doc. No. 1. After completing discovery, plaintiffs amended their complaint and substituted individual defendants, including Lt. Thomas and Sgt. Mims from the BCSD, and others from the Secret Service and APD, for the Doe defendants. Doc. No. 112. This Court, on June 23, dismissed the County as an entity on the grounds that Lt. Thomas was not delegated sufficient unfettered authority to be deemed a final policymaker as to the placement of demonstrators. Doc. No. 124.

MATERIAL FACTS AS TO WHICH A GENUINE ISSUE EXISTS

A. Preliminary Points

In addition to their numbered statement of facts, Lt. Thomas and Sgt. Mims set forth “facts” in the second and third paragraphs of their Factual Background Section. Defs.’ Br. at 2-3. Because defendants provide no citation support, these factual statements are not supported by admissible evidence and should be ignored.

In their numbered statement, defendants refer to this Court’s “findings” in its Memorandum Opinion and Order of June 23, 2010. Doc. No. 124 (hereinafter “Opinion”). At summary judgment, courts do not make “findings.” Courts identify the version of events that reflects the facts that “are undisputed or, if disputed with admissible evidence, are construed in the light most favorable to Plaintiffs, the non-moving party.” Opinion at 2 n.1; *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986). At most, the Court’s opinion established that these facts were not in dispute between the County and the plaintiffs for the purpose of determining whether Lt. Thomas was a final policymaker. That is distinct from the issue in this motion, which is whether Lt. Thomas and Sgt. Mims engaged in viewpoint discrimination. *See* Opinion at 19 n.6. Where defendants provide no citation support except the Court’s opinion, their factual statements are unsupported by admissible evidence and should be ignored.

B. Response To Defendants’ Statement Of Undisputed Facts

Defendants Lt. Thomas and Sgt. Mims incorporate by reference Special Agent Sheehan’s Statement of Undisputed Material Facts numbers 1-19. By doing so, they assert as undisputed several facts tending to show that they, rather than the Secret Service, were responsible for the unconstitutional acts challenged by plaintiffs. For example, defendants assert that it is

undisputed, *inter alia*, that “the Secret Service defers to local law enforcement on questions such as where protestors are legally allowed to stand,” Sheehan Fact 9, “BCSD and APD personnel were responsible for implementing the security measures along . . . portions of the Rio Grande [near the Mayor’s driveway],” Sheehan Fact 15, and “Special Agent Sheehan did not designate a particular area for demonstrators and he did not direct anyone as to where protestors or supporters of the President could or should be located,” Sheehan Fact 18. When put together with deposition testimony that Lt. Thomas and Sgt. Mims were in charge of the site that day and implemented the practices at issue, these statements are sufficient to show that there are disputed facts concerning the personal involvement of Lt. Thomas and Sgt. Mims.

In their Opposition to defendant Sheehan’s Motion for Summary Judgment (Doc. No. 136, Sept. 30, 2010), plaintiffs pointed to evidence that the Secret Service and defendant Sheehan made decisions and engaged in conduct that discriminated against the plaintiffs on the basis of viewpoint. In this Opposition, plaintiffs point to evidence showing that Lt. Thomas and Sgt. Mims were responsible for some of these very same decisions. Because each of the actors in this case points fingers at the others, there are facts from which a jury could find some or all defendants liable. To prevail on this motion, plaintiffs need only show a dispute of material fact as to the liability of Lt. Thomas and Sgt. Mims. Plaintiffs thus incorporate their prior Opposition only to the extent that it illustrates that there are genuine disputes of material fact with regard to certain of Sheehan’s Facts 1-19. In doing so they do not admit to any “fact” tending to show that defendant Sheehan was liable and Lt. Thomas and Sgt. Mims were not (or vice versa).

Notwithstanding that some of the following undisputed “facts” are supported only by reference to the Court’s opinion, plaintiffs do not dispute defendants’ Statement of Undisputed

Facts (“Facts”) numbers 1-3, 16-17, 20, 28, 30-31, 33, 35-36, 41, 45, 47-50, and 53. Plaintiffs dispute the remaining facts as identified and explained below.

- Facts 4-6: Disputed to the extent they imply that Lt. Thomas and Sgt. Mims were not responsible for decisions on that day or were under Secret Service “control.” Although the Secret Service had a role in establishing the outer perimeter (hereinafter “perimeter”), Lt. Thomas and Sgt. Mims had responsibility for site security, including determining where demonstrators could stand. Sheehan Facts 9, 15, 18; Brown Dep. 11:4-15 (Declaration of Mariko Hirose, Doc. No. 99-1 to -3, Ex. C); Thomas Dep. 13:14-24 (Hirose Decl. Ex. A); *id.* at 36:14-19 (Declaration of Christopher A. Hansen, attached hereto as Ex. 1, at Ex. A); McCauley Dep. 36:14-37:6 (Hirose Decl. Ex. B); Linthicum Dep. 33:14-20 (Hirose Decl. Ex. F).

- Fact 7: This fact is incomplete. In addition to the APD officers, BCSD officers were also present at the south end. Mims Dep. 19:24-20:6, 21:10-17, 30:19-24 (Hirose Decl. Ex. D); Streif Dep. 35:5-36:2 (Hirose Decl. Ex. E).

- Fact 8: Whether Lt. McCauley told demonstrators that he could not disclose the motorcade route due to security concerns is immaterial. According to Ms. Jeanne Pahls, who was the principal contact person for plaintiffs with law enforcement, Lt. McCauley told her that he did not know the route. Pahls Decl. ¶ 9. In addition, in the same conversation she was told by Lt. McCauley that the police did not intend to allow people to demonstrate directly across the street from the Mayor’s estate. *Id.*

- Fact 9: Disputed. The nature of the “training” is irrelevant; the practices on that day are relevant. Demonstrators were not kept in one location. BCSD officers permitted one group to demonstrate support for the President closer to the Mayor’s estate. Fact 29; Thomas

Dep. 38:7-39:1 (Hirose Decl. Ex. A); Pahls Decl. ¶¶ 20-25. Plaintiffs dispute the contention that local law enforcement kept the “demonstrators” in one place to ensure the safety of the Presidential motorcade and of the demonstrators, because the pro-Bush demonstrators were allowed to stand in a different place, directly on the motorcade route within feet of the President’s car and the motorcade. Thomas Dep. 38:7-39:1 (Hirose Decl. Ex. A); Pahls Decl. ¶¶ 20-25; *see also* Sheehan Facts 8 & 18 (suggesting that Secret Service did not have objections to demonstrators being on the shoulder or in more than one location).

- Facts 10-11: Admitted insofar as defendants state that Lt. Thomas had decision-making authority. Disputed to the extent they suggest Lt. Thomas had sole decision-making authority. Sgt. Mims had authority to decide whether demonstrators would be let through the perimeter. Thomas Dep. 36:24-37:14 (Hirose Decl. Ex. A).

- Facts 12, 14-15: These facts are supported only by citation to the Court’s opinion and should be ignored. Moreover, these facts are stated at such a high level of generality that they are unresponsive to plaintiffs’ claims. Plaintiffs dispute these facts insofar as they state that Lt. Thomas could act only within the overall guidelines and parameters set by the Secret Service or was constrained in his ability to determine where demonstrators could stand. Rather, Lt. Thomas and Sgt. Mims had decision-making authority with regard to where demonstrators could stand, and BCSD was in charge of the site. Brown Dep. 11:4-15, 36:14-37:12 (Hirose Decl. Ex. C); Linthicum Dep. 22:20-23:22 (Hirose Decl. Ex. F); Thomas Dep. 36:24-37:20 (Hirose Decl. Ex. A); *id.* at 36:14-19 (Hansen Decl. Ex. A); Sheehan Facts 9, 15, 18.

- Fact 13: This fact is supported only by citation to the Court’s opinion and should be ignored. Whatever BCSD’s policy, plaintiffs dispute that political viewpoint was not a factor

determining where demonstrators could stand on that day. The anti-Bush demonstrators were forced to stand approximately 150 yards to the south of the Mayor's driveway. Pahls Decl. ¶ 20; Moffitt Decl. ¶ 15. The pro-Bush demonstrators, however, were permitted to stand across from the Mayor's driveway. Thomas Dep. 38:7-39:1 (Hirose Decl. Ex. A); Pahls Decl. ¶¶ 21-22, 25. An inference of viewpoint discrimination is obvious.

- Facts 18-19: Admitted. Sgt. Mims's responsibilities also included the authority to decide whether to let demonstrators through the perimeter. Thomas Dep. 36:24-37:14 (Hirose Decl. Ex. A); *id.* at 50:8-52:6 (Hansen Decl. Ex. A).

- Facts 21-23: These facts are incomplete. Fact 21 is admitted to the extent "protestor" includes pro-Bush demonstrators. Defendants' description of "protesters" in Facts 22-23 includes only anti-Bush demonstrators. There were also pro-Bush demonstrators during the Presidential visit on August 27, 2007. Pahls Decl. ¶¶ 21-22, 25. Defendants appear to believe that "protestors" are "demonstrators" but "supporters" are not, a belief that suggests defendants continue to be unaware of the fundamental First Amendment law that was violated in this case.

- Facts 24-25: Denied. Lt. Thomas did not merely "request" that anti-Bush demonstrators remain in one group; he issued orders requiring that the anti-Bush demonstrators be placed south of the driveway and not be permitted to cross the perimeter or to go north. Notwithstanding his own testimony, Sgt. Mims did not merely "recommend" that demonstrators stand to the south of the driveway; he delivered Lt. Thomas's orders at the briefing conducted for officers that morning. Sgt. Mims, moreover, was in charge of the perimeter and authorized the pro-Bush demonstrators to stand across the street from the Mayor's driveway and within the perimeter. Acting under these orders, BCSD officers confined anti-Bush protesters in one group

far to the south behind virtually opaque barriers, prohibited them from being north of the driveway, prohibited them from walking north from the location to which they had been relegated, and prohibited them from going north to stand on private property closer to the motorcade. Brown Dep. 11:4-15, 36:14-37:12 (Hirose Decl. Ex. C); Linthicum Dep. 22:20-23:22 (Hirose Decl. Ex. F); Thomas Dep. 36:24-37:20 (Hirose Decl. Ex. A); *id.* at 36:14-19, 50:8-52:6 (Hansen Decl. Ex. A); Sheehan Facts 9, 15, 18; McDonald Dep. 9:22-10:6 (Hansen Decl. Ex. B); Hernandez Dep. 36:18-37:14 (Hansen Decl. Ex. C); Streif Dep. 9:12-25, 23:18-24:9 (Hansen Decl. Ex. D); *id.* at 29:17-21 (Hirose Decl. Ex. E); Lovato Dep. 9:12-21 (Hirose Decl. Ex. J); Cabrera Dep. 14:12-15:1 (Hirose Decl. Ex. M); Mims Dep. 27:6-28:18, 30:25-31:18, 33:3-35:3 (Hansen Decl. Ex. E); Pahls Decl. ¶¶ 18-19; Moffitt Decl. ¶ 6-12; Wilson Dep. 55:20-57:22 (Hirose Decl. Ex. N).

- Fact 26: This factual statement is unclear. Ms. Pahls and other individuals gathered on the eastern shoulder of Rio Grande Blvd., to the north of the Mayor's driveway. Pahls Decl. ¶¶ 14, 16.

- Fact 27: Denied. The majority of the anti-Bush demonstrators were forced to gather approximately 150 yards south of the Mayor's driveway. Pahls Decl. ¶ 20; Moffitt Decl. ¶ 15. The pro-Bush demonstrators, however, were permitted to stand across from the Mayor's driveway. Thomas Dep. 38:7-39:1 (Hirose Decl. Ex. A); Pahls Decl. ¶¶ 21-22, 25.

- Fact 29: Denied. The BCSD officers did not know the perimeters of private property. Mims Dep. 66:12-67:14 (Hirose Decl. Ex. D); Streif Dep. 36:15-22 (Hirose Decl. Ex. E). Lt. Thomas permitted pro-Bush demonstrators to stand in the area without knowing whether they were standing on the shoulder or on private property. Thomas Dep. 40:2-7, 42:1-4 (Hirose

Decl. Ex. A). The pro-Bush demonstrators were not, in fact, on private property. Pahls Decl. ¶ 22 (describing the pro-Bush demonstrators as no more than six feet from the edge of the road); Plotner Decl., Doc. No. 136-3, ¶ 4 (private property line is 8.9 feet from edge of the road).

- Fact 32: Denied. Agent Sheehan testified that the pro-Bush demonstrators were “30 to 40 yards, 25, 30 yards, somewhere in there.” Sheehan Dep. 103:11-13 (Hansen Decl. Ex. L). See also response to Fact 29.

- Fact 34: Denied. Not all of the pro-Bush demonstrators were “on their own property”; some of the demonstrators were non-resident guests there with permission of the property owner. Brown Dep. 51:2-15 (Hansen Decl. Ex. F); McDonald Dep. 16:25-17:7 (Hansen Decl. Ex. B) (suggesting that as long as individuals were invited by the owner, they could stand on private property). See also response to Fact 29.

- Fact 37: This fact is supported only by citation to the Court’s opinion and should be ignored. Lt. Thomas did not just rely on the Secret Service with regard to the location of the pro-Bush demonstrators; rather, it was up to Lt. Thomas and Sgt. Mims to determine where demonstrators could stand. Sheehan Facts 9, 15, 18; Thomas Dep. 13:14-24, 36:24-37:20 (Hirose Decl. Ex. A); *id.* at 36:14-19 (Hansen Decl. Ex. A); Brown Dep. 11:4-15, 36:14-37:12 (Hirose Decl. Ex. C); Linthicum Dep. 22:20-23:22 (Hirose Decl. Ex. F).

- Fact 38: See response to Fact 29.
- Fact 39: See response to Fact 27.
- Fact 40: See responses to Facts 9 and 27.
- Fact 42: It is admitted that law enforcement personnel are generally concerned with threats associated with vehicles, including vehicles parking along the roadway, during such

an event. It is denied that these concerns applied to the white van that parked in order to pick up anti-Bush demonstrators and transport them to private property north of the Mayor's residence, thirty to forty-five minutes before Rio Grande Blvd. was closed to traffic. Moffitt Decl. ¶¶ 7-14; Lloyd Dep. 22:10-25:18 (Hansen Decl. Ex. M). It is further denied that law enforcement personnel were concerned with "any other threat" to the extent that it refers to anything taking place on that day. See response to Fact 43.

- Fact 43: Denied. This fact is supported only by citation to the Court's opinion and should be ignored. To the extent it refers to a general policy rather than the practices on the day of the President's visit, it is irrelevant. On the day of the visit, no one in law enforcement believed or had any reason to believe that plaintiffs posed a security threat. Thomas Dep. 56:7-11 (Hirose Decl. Ex. A); Mims Dep. 52:25-53:4 (Hirose Decl. Ex. D); Sheehan Dep. 119:11-15 (Hirose Decl. Ex. G). Defendants allowed access to the shoulder for pro-Bush demonstrators while restricting access for anti-Bush demonstrators. Thomas Dep. 38:7-39:1 (Hirose Decl. Ex. A); Pahls Decl. ¶¶ 20-25. Finally, because defendants forced some of the anti-Bush demonstrators to walk along Rio Grande Blvd. from their position north of the driveway to the area south of the driveway, it can be inferred that they were also on the shoulder during this time. Pahls Decl. ¶¶ 14-19; Moffitt Decl. ¶ 6; Lawrence Dep. 21:15-23:1 (Hansen Decl. Ex. G); Pahls Dep. 81:23-82:14, 82:25-83:11 (Hansen Decl. Ex. H).

- Fact 44: This fact is admitted but irrelevant. Plaintiffs sought to be seen by the President, as well as by the media. Pahls Decl. ¶ 7; Moffitt Decl. ¶ 4.

- Fact 46: Denied. In addition to police vehicles, there were mounted officers across Rio Grande Blvd. who were blocking plaintiffs' view of the Mayor's driveway and the President's view of them. Pahls Decl. ¶ 20; Moffitt Decl. ¶¶ 14-15, 17.

- Fact 51: See response to Fact 9.

- Fact 52: See response to Fact 9. In addition, plaintiffs dispute the contention that local law enforcement kept the "demonstrators" in one place to "ensure proper allocation of manpower," because there were spare officers who could be posted in front of the pro-Bush demonstrators in response to their request to stand in a different location. *See* Fact 38; *see also* Olivares Dep. 4:18-5:3, 10:13-18; 10:22-11:18 (Hansen Decl. Ex. I) (group of 7-11 "Gold Team" officers spent entire visit "basically just sitting around" "killing time" in a field "just in case" they were needed); Cabrera Dep. 47:15-48:2 (Hansen Decl. Ex. J) ("[T]here was a team standing by . . . just sitting there in their cars just in case something would go down, I guess."); DeFrates Dep. 5:15-18, 7:7-8:3 (Hansen Decl. Ex. K).

- Fact 54: Denied. Any "policy" is irrelevant to the practices on that day. In addition, there is no support in the cited depositions for the proposition that Bernalillo County (or APD) does not have any policies discriminating against demonstrators' speech based upon their viewpoint and/or content. In the cited portion of the deposition, Lt. Thomas stated only that his "philosophy" at the event was to keep the public in one location. Thomas Dep. 59:2-60:13 (Hirose Decl. Ex. A). This testimony is contradicted by the fact that Lt. Thomas and Sgt. Mims permitted pro-Bush demonstrators to stand in one location across the street from the event site whereas the anti-Bush demonstrators were made to stand in another location 150 yards away. *See id.* at 38:7-39:1; Pahls Decl. ¶¶ 20-25. This proposition is also incomplete in that the record

contains no Bernalillo County policy prohibiting viewpoint discrimination or even providing guidance to officers regarding the placement of demonstrators. Chief Deputy David Linthicum of the BCSD testified that there is a decision regarding the placement and treatment of demonstrators made at each event, depending on a number of factors. Linthicum Dep. 15:18-16:5, 16:21-18:19, 26:6-13 (Hirose Decl. Ex. F).

- Fact 55: This fact is incomplete. First, at the level of generality at which this fact is stated, it is not clear whether it applies to this event. Second, although demonstrators were allowed to gather and express their viewpoint, those expressing views opposing the President were treated very differently from those expressing views supporting the President. *See* Pahls Decl. ¶¶ 20-25.

C. Plaintiffs' Statement Of Additional Material Facts

Plaintiffs incorporate by reference Facts 34-64 of the Statement of Additional Material Facts contained in plaintiffs' Memorandum in Opposition to Bernalillo County Defendants' Motion for Summary Judgment (Doc. No. 99, Feb. 8, 2010). Plaintiffs set forth the following additional facts.

Placement Of Pro-Bush Demonstrators

56. At the point where the pro-Bush demonstrators were standing, the shoulder of Rio Grande extends to 8.9 feet from the edge of the pavement and is public property. Plotner Decl. ¶ 4.

57. The pro-Bush demonstrators were standing on public property. Pahls Decl. ¶ 22 (describing the pro-Bush demonstrators as no more than six feet from the edge of the road); Plotner Decl. ¶ 4 (private property line is 8.9 feet from edge of the road).

58. The shoulder of Rio Grande Blvd. was outside the perimeter. Mims Dep. 22:17-19 (Hirose Decl. Ex. D) (stating that Rio Grande was the eastern perimeter).

Additional Information About Involvement Of Lt. Thomas

59. Lt. Thomas was in charge of making decisions regarding the treatment of demonstrators at the event, including determining where they would be permitted to be. Linthicum Dep. 22:20-23:22 (Hirose Decl. Ex. F); Thomas Dep. 36:14-19 (Hansen Decl. Ex. A).

60. Lt. Thomas issued orders requiring that the anti-Bush demonstrators be placed south of the driveway and be told to remain there, prohibited from walking north on the shoulder. Brown Dep. 36:14-37:12 (Hirose Decl. Ex. C); McCauley Dep. 36:14-37:6 (Hirose Decl. Ex. B).

Additional Information About Involvement Of Sgt. Mims

61. Sgt. Mims conducted the morning briefing for the operation. McDonald Dep. 9:22-10:6 (Hansen Decl. Ex. B); Hernandez Dep. 36:18-37:14 (Hansen Decl. Ex. C); Streif Dep. 9:12-25 (Hansen Decl. Ex. D).

62. Sgt. Mims was responsible for the perimeter, and had authority to decide whether to let demonstrators through the perimeter. Thomas Dep. 36:24-37:14 (Hirose Decl. Ex. A); *id.* at 50:8-52:6 (Hansen Decl. Ex. A).

63. Sgt. Mims made the decision that the pro-Bush demonstrators could remain standing across the street from the Mayor's driveway and within the perimeter. Streif Dep. 23:18-24:9 (Hansen Decl. Ex. D); Mims Dep. 27:6-28:18, 30:25-31:18 (Hansen Decl. Ex. E).

64. Sgt. Mims instructed the anti-Bush demonstrators to gather on the south side, outside the perimeter, and told officers to advise other anti-Bush demonstrators in the same

manner. Mims Dep. 30:25-31:18, 33:3-35:3 (Hansen Decl. Ex. E); Lovato Dep. 9:12-21 (Hirose Decl. Ex. J); Streif Dep. 9:12-25 (Hansen Decl. Ex. D); *id.* at 29:17-21 (Hirose Decl. Ex. E).

ARGUMENT

“[S]ummary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248; *see Pinkerton v. Colo. Dep’t. of Transp.*, 563 F.3d 1052, 1058 (10th Cir. 2009). The inquiry at this stage is whether “there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson*, 477 U.S. at 250. Because “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions,” at this stage “[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Pinkerton*, 563 F.3d at 1058 (quoting *Anderson*, 477 U.S. at 255). The statement of material facts set forth above establishes that the jury could easily and reasonably resolve the central factual question—whether Lt. Thomas and Sgt. Mims engaged in viewpoint discrimination in violation of the First Amendment—in favor of plaintiffs.

I. A Reasonable Jury Could Find That Lt. Thomas And Sgt. Mims Personally Engaged In Viewpoint Discrimination In Violation Of The First Amendment.

Lt. Thomas and Sgt. Mims cannot seriously dispute that anti-Bush and pro-Bush demonstrators were treated differently when pro-Bush demonstrators were permitted to stand directly across from the Mayor’s driveway and anti-Bush demonstrators were forced to stand 150 feet south of that driveway and behind an effectively opaque barricade. At the very least, the facts raise the reasonable inference that Lt. Thomas and Sgt. Mims personally engaged in viewpoint discrimination in violation of the First Amendment. Summary judgment is therefore

unwarranted. *See Mesa v. White*, 197 F.3d 1041, 1047 (10th Cir. 1999) (reversing grant of summary judgment for defendants where evidence provides basis for inferring viewpoint discrimination).

Neither defendant disputes that viewpoint restrictions on speech are presumptively unconstitutional. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). “Viewpoint discrimination is an egregious form of content discrimination,” and “receive[s] even more critical judicial treatment.” *Mesa*, 197 F.3d at 1047 (internal quotation marks omitted). Lt. Thomas and Sgt. Mims rather argue that (1) they were not personally involved in any restrictions; and (2) even if they did restrict plaintiffs’ speech, any such restrictions were universally applied and justified by neutral safety concerns. A reasonable jury could easily conclude otherwise.

A. Lt. Thomas And Sgt. Mims Personally Treated Plaintiffs Unfavorably In Comparison With Supporters Of The President.

Lt. Thomas and Sgt. Mims cannot dispute that the practices in which they engaged on August 27, 2007, treated plaintiffs unfavorably in comparison to those supporting the President. Specifically, Lt. Thomas and Sgt. Mims forced plaintiffs to stand approximately 150 yards south of the driveway where the President’s motorcade would be entering the Mayor’s estate, while allowing pro-Bush demonstrators to stand directly across from the driveway on or near the shoulder of the road. Brown Dep. 36:14-37:12 (Hirose Decl. Ex. C); Thomas Dep. 38:7-39:1 (Hirose Decl. Ex. A); McDonald Dep. 9:1-10:1 (Hirose Decl. Ex. I); Streif Dep. 9:12-16, 29:17-21 (Hirose Decl. Ex. E); Lovato Dep. 9:12-21 (Hirose Decl. Ex. J); Mims Dep. 66:12-67:14 (Hirose Decl. Ex. D); Pahls Decl. ¶¶ 20-25; Call Dep. 35:10-19; 36:21-25 (Hirose Decl. Ex. L). They did so without knowing whether the pro-Bush demonstrators were standing on the shoulder of the road or on private property, and without even knowing where the private property line is.

Thomas Dep. 40:2-7, 42:1-4 (Hirose Decl. Ex. A); Mims Dep. 66:12-67:14 (Hirose Decl. Ex. D); Streif Dep. 36:15-22 (Hirose Decl. Ex. E). Although some of the plaintiffs were originally standing on the shoulder of the road to the northeast of the Mayor's estate, about six to seven feet from the road and near where the pro-Bush demonstrators ultimately stood, BCSD officers forced them to walk along the shoulder to go south and prohibited them from walking along the shoulder to go north. Pahls Decl. ¶¶ 13, 18-19. A BCSD officer, who took orders from the defendants, also prevented plaintiffs from being driven to private property on the motorcade route where they had permission to demonstrate. Moffitt Decl. ¶¶ 7-13; Wilson Dep. 55:20-57:22 (Hirose Decl. Ex. N); Lloyd Dep. 22:10-25:18 (Hansen Decl. Ex. M).

In addition to the distance from which plaintiffs had to demonstrate, the law enforcement officers blocked plaintiffs' view of the Mayor's driveway with a barricade of police vehicles and mounted officers right before the President's motorcade arrived. Pahls Decl. ¶¶ 20, 24; Moffitt Decl. ¶ 15. By contrast, only a few law enforcement officers were posted between the pro-Bush demonstrators and the motorcade. Fact 38. As a result, plaintiffs were prevented from communicating their message of protest to the President, whereas the pro-Bush demonstrators were able to clearly communicate their message.¹ Pahls Decl. ¶¶ 24-25.

Lt. Thomas and Sgt. Mims suggest that even if viewpoint discrimination occurred, it was not their fault. First, they suggest that the plaintiffs' placement far south of the driveway was voluntary, occasioned by "requests" and "recommendations." Facts 24-25. But Lt. Thomas did not merely "request" that anti-Bush demonstrators remain in one group. He ordered that anti-Bush demonstrators be placed south of the driveway, and that they be told to remain there,

¹ Because the defendants' practices were not content-neutral, *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212 (10th Cir. 2007), cited by Lt. Thomas and Sgt. Mims in their brief, is inapposite.

prohibited from walking north on the shoulder. Brown Dep. 36:14-37:12 (Hirose Decl. Ex. C). Sgt. Mims briefed officers on these orders and carried them out. Streif Dep. 9:12-25 (Hansen Decl. Ex. D); *id.* at 29:17-21 (Hirose Decl. Ex. E); Lovato Dep. 9:12-21 (Hirose Decl. Ex. J). Although Sgt. Mims states that he merely suggested rather than ordered that anti-Bush demonstrators move to the south, Mims Dep. 30:25-31:18, 33:3-35:3 (Hansen Decl. Ex. E), a reasonable jury could credit the officers' testimony to the contrary.

Second, Lt. Thomas and Sgt. Mims argue that all relevant decisions were made by the Secret Service. Their own facts, including the Sheehan facts they admit, belie that argument. "[T]he Secret Service defers to local law enforcement on questions such as where protestors are legally allowed to stand." Sheehan Fact 9. "BCSD and APD personnel were responsible for implementing the security measures along . . . portions of the Rio Grande [near the Mayor's driveway]." Sheehan Fact 15. "Special Agent Sheehan did not designate a particular area for demonstrators and he did not direct anyone as to where protestors or supporters of the President could or should be located." Sheehan Fact 18. Moreover, even if the Secret Service had tried to exercise "control," the testimony made clear that BCSD officers were not under the Secret Service's "control." Rather, if Lt. Thomas or Sgt. Mims, the commanders on the ground, disagreed with a Secret Service request, they could refuse to implement it or even pull out of the event entirely. Linthicum Dep. 33:14-20 (Hirose Decl. Ex. F).

Finally, Lt. Thomas and Sgt. Mims argue that the actions of BCSD officers cannot be attributed to them. This is incorrect. Although vicarious liability is not available under § 1983, supervisors may be held liable for the actions of subordinates under a theory of supervisory liability, provided that there is "an affirmative link between the constitutional deprivation and

either the supervisor's personal participation, his exercise of control or direction, or his failure to supervise." *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir. 2009) (internal quotation marks omitted). For example, where a police captain supervised officers' conduct and issued directives to them during a protest, the Tenth Circuit held that the captain could be held personally liable for officers' unconstitutional acts. *Buck v. City of Albuquerque*, 549 F.3d 1269, 1287 (10th Cir. 2008); *see also Holland ex. rel. Overdorff v. Harrington*, 268 F.3d 1179, 1187, 1197 (10th Cir. 2001) (holding SWAT team supervisor liable for unconstitutional acts of officers acting under his direction).

A reasonable jury could infer that the officers' actions were undertaken pursuant to defendants' express direction. BCSD was in charge of the site and Lt. Thomas was in charge of the BCSD operation; he decided that "protesters" would be confined south of the perimeter. Brown Dep. 11:4-15, 36:14-37:12 (Hirose Decl. Ex. C); Linthicum Dep. 22:20-23:22 (Hirose Decl. Ex. F); Thomas Dep. 36:24-37:20 (Hirose Decl. Ex. A); *id.* at 36:14-19, 50:8-52:6 (Hansen Decl. Ex. A); Sheehan Facts 9, 15, 18. The morning briefing was conducted by Sgt. Mims. McDonald Dep. 9:22-10:6 (Hansen Decl. Ex. B); Hernandez Dep. 36:18-37:14 (Hansen Decl. Ex. C); Streif Dep. 9:12-25 (Hansen Decl. Ex. D). Sgt. Mims informed officers at the briefing that demonstrators would be confined to the south and not permitted to cross the perimeter. Streif Dep. 29:17-21 (Hirose Decl. Ex. E); Lovato Dep. 9:12-21 (Hirose Decl. Ex. J); Cabrera Dep. 14:12-15:1 (Hirose Decl. Ex. M). Sgt. Mims was in charge of the perimeter and had the authority to decide whether to let demonstrators through it. Thomas Dep. 36:24-37:14 (Hirose Decl. Ex. A); *id.* at 50:8-52:6 (Hansen Decl. Ex. A). Sgt. Mims decided that pro-Bush demonstrators could remain standing across the street from the Mayor's driveway and within the perimeter. Streif

Dep. 23:18-24:9 (Hansen Decl. Ex. D); Mims Dep. 27:6-28:18, 30:25-31:18, 33:3-35:3 (Hansen Decl. Ex. E). Sgt. Mims himself acknowledged that he had advised the anti-Bush demonstrators to gather on the south side outside the perimeter and had told other officers to advise anti-Bush demonstrators in the same manner. Mims Dep. 30:25-31:18, 33:3-35:3 (Hansen Decl. Ex. E).

Acting consistently with these orders, BCSD officers told anti-Bush demonstrators standing on the north side that they had to walk south on the shoulder to the south side and could not stand on the north side. Pahls Decl. ¶¶ 18-19; Moffitt Decl. ¶ 6. BCSD officers also did not permit anti-Bush demonstrators to proceed in a vehicle to private property on the north side. Wilson Dep. 55:20-57:22 (Hirose Decl. Ex. N); Moffitt Decl. ¶¶ 7-12; Lloyd Dep. 22:10-25:18 (Hansen Decl. Ex. M). It is no great leap to conclude that individual BCSD officers acted in accordance with their instructions from those in charge of the operation that day—Lt. Thomas and Sgt. Mims—in restricting the anti-Bush demonstrators to the south of the southern perimeter while permitting pro-Bush demonstrators to be directly across from the place where the President’s car slowed and turned into the driveway.

Even if Sgt. Mims was merely following Lt. Thomas’s direction in implementing viewpoint discriminatory practices, he can still be held liable. Courts have rejected a “following orders defense” by individuals sued under § 1983 in their personal capacities. *See, e.g., O’Rourke v. Hayes*, 378 F.3d 1201, 1210 n.5 (11th Cir. 2004) (“[S]ince World War II, the ‘just following orders’ defense has not occupied a respected position in our jurisprudence, and officers in such cases may be held liable under § 1983 if there is a reason why any of them should question the validity of that order.” (internal quotation marks omitted)).

B. Any Purported Concern For Safety Was A Pretext For Viewpoint Discrimination.

Lt. Thomas and Sgt. Mims attempt to justify this vast difference in treatment by touting safety concerns. However, they admit in their brief that their safety rationale applies only to anti-Bush and not to pro-Bush demonstrators. For example, they state that the demonstrators were kept in one area for safety and to “ensure a protective distance from the President’s vehicle,” Facts 9, 40, 51, but Lt. Thomas, by his own admission, permitted demonstrators to be in *two* locations: 150 yards south of the motorcade route for those carrying anti-Bush signs, and on or near the shoulder of the road at the spot where the President’s motorcade slowed to its slowest speed for those carrying pro-Bush signs and American flags, Pahls Decl. ¶¶ 20-25; Call Dep. 35:10-19, 36:21-25 (Hirose Decl. Ex. L); Thomas Dep. 38:7-39:1 (Hirose Decl. Ex. A). The only way to make sense of their argument is to assume that Lt. Thomas and Sgt. Mims consider “demonstrators” to be limited to “anti-Bush demonstrators,” and that the need to keep demonstrators in one place applies only to anti-Bush demonstrators. Lt. Thomas and Sgt. Mims have offered no viewpoint neutral justifications for limiting these safety concerns to the anti-Bush demonstrators, and there are none considering that the anti-Bush demonstrators did not pose a security risk. Thomas Dep. 56:7-11 (Hirose Decl. Ex. A); Mims Dep. 52:25-53:4 (Hirose Decl. Ex. D); Sheehan Dep. 119:11-15 (Hirose Decl. Ex. G).

Lt. Thomas and Sgt. Mims refer to a content-neutral “security zone.” The testimony of law enforcement officers as to a security zone was hopelessly inconsistent. *See, e.g.*, Mims Dep. 22:17-19 (Hirose Decl. Ex. D) (stating that Rio Grande Blvd. was the perimeter); *id.* 27:6-9 (stating that the pro-Bush demonstrators were standing within the perimeter); *id.* 64:17-25 (stating, in response to a question whether the eastern perimeter extended to the private property

lines: “You know, we never really talked about—this is the demarcation line and beyond this line is a no go and within this line is—they could travel freely. Essentially—but that was essentially the—what you said is essentially correct.”); Sheehan Dep. 74:17-75:1 (Hirose Decl. Ex. G) (stating that the eastern perimeter was at Rio Grande Blvd). Even if such a security zone had been drawn up, the perimeter was mere feet from the motorcade route at the point where the pro-Bush demonstrators were standing, while it was 150 yards from the motorcade route at the site to which the anti-Bush demonstrators were relegated. Pahls Decl. ¶¶ 7, 13, 18-22, 25; Moffitt Decl. ¶¶ 4, 7-13, 15. Such an irregular shape raises the inference of viewpoint discrimination. *See Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (holding that the allegation that the state redefined the boundaries of a city to a “strangely irregular twenty-eight-sided figure,” if proven, would lead to an “irresistible” conclusion of discriminatory animus).

Safety concerns cannot justify preventing the plaintiffs from standing on the shoulder of the road as the pro-Bush demonstrators did. Sheehan Dep. 106:18-107:10, 107:16-108:2 (Hirose Decl. Ex. G); Pahls Decl. ¶¶ 10-12, 14, 16. They cannot justify preventing the plaintiffs from walking north on the shoulder while requiring them to walk south on the shoulder. Pahls Decl. ¶¶ 14-19; Moffitt Decl. ¶ 6; Lawrence Dep. 21:15-23:1 (Hansen Decl. Ex. G); Pahls Dep. 81:23-82:14, 82:25-83:11 (Hansen Decl. Ex. H).

Moreover, even if the law enforcement officers had established an irregularly shaped security zone that extended east to the boundary of an unknown private property line, that does not explain why plaintiffs were prohibited from standing on private property along the motorcade route. More than thirty minutes before the perimeter “hardened,” and while traffic was moving on Rio Grande Blvd., a woman attempted to drive plaintiffs in her car to the north of

the Mayor's estate, where the driver's friend had offered the anti-Bush demonstrators a place to stand on her private property. Moffitt Decl. ¶¶ 8-11. She had been parked briefly in a driveway outside the southern perimeter on Rio Grande in order to pick up the plaintiffs, when a BCSD officer instructed her that none of the anti-Bush demonstrators could go north and that none of them could get in her van. Moffitt Decl. ¶ 12; Wilson Dep. 55:20-57:22 (Hirose Decl. Ex. N); Lloyd Dep. 22:10-25:18 (Hansen Decl. Ex. M). He forced her to drive away without any of the anti-Bush demonstrators, although a couple of the demonstrators were already in the van or getting into the van. Moffitt Decl. ¶ 13. Indeed, Officer Juan Cabrera of the APD testified that under the orders in force that day, the anti-Bush demonstrators were not allowed on private property to the north of the southern perimeter, in closer proximity to the motorcade. Cabrera Dep. 14:12-15:1 (Hirose Decl. Ex. M). Obviously, the pro-Bush demonstrators were.

Finally, without offering any details, Lt. Thomas and Sgt. Mims contend that they provided plaintiffs with "ample alternatives." The availability of an inferior alternative channel of communication, however, cannot justify requiring only those opposed to the President to make use of it. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002) (content-based time, place, and manner restrictions are presumptively invalid and subject to strict scrutiny).

II. The Actions Of Lt. Thomas And Sgt. Mims Violated Clearly Established Law.

Qualified immunity is only appropriate where the conduct at issue "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The qualified immunity inquiry usually involves two prongs: "whether plaintiff's allegations, if true, establish a constitutional

violation,” *Hope v. Pelzer*, 536 U.S. 730, 736 (2002) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)), and whether the violated right was “clearly established” at the time of the relevant action, *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Lt. Thomas and Sgt. Mims cannot seriously dispute that at the time of the incident, it was “clearly established” that placing some demonstrators where their message cannot be heard because of disagreement with their viewpoint violated the First Amendment. As long ago as 1959, the Supreme Court held that the government cannot engage in viewpoint discrimination. *Kingsley Int’l Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959). Even viewpoints antithetical to democracy itself are protected under the Constitution. *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (invalidating a statute that, among other things, criminalized the “mere advocacy” of violence “as a means of accomplishing industrial or political reform.”). “[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.” *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

Courts have found that affording differential treatment to demonstrators on the basis of their message constitutes viewpoint discrimination. In *Mahoney v. Babbitt*, the D.C. Circuit held that the National Park Service’s refusal to permit anti-Clinton demonstrators to demonstrate along the Presidential Inaugural Parade route while not imposing a similar restriction on pro-Clinton demonstrators constituted viewpoint discrimination; offering anti-Clinton demonstrators an alternative site not along the parade route did not cure the violation. 105 F.3d 1452, 1459 (D.C. Cir. 1997). Similarly, in *McCabe v. Macaulay*, anti-Bush demonstrators protested at a rally for President Bush, were ordered by law enforcement to move, and were then arrested after hesitating

and asking why other people were not asked to move. 450 F. Supp. 2d 928, 932 (N.D. Iowa 2006). The court held that the demonstrators were entitled to discovery to support their claim of viewpoint discrimination based on the allegation that others were not arrested or asked to move. *Id.* at 935.

Viewpoint discrimination strikes “at the very heart of constitutionally protected liberty.” *Kingsley Int’l Pictures Corp.*, 360 U.S. at 688. “[P]unishment [on the basis of viewpoint] . . . would be an unconstitutional abridgment of freedom of speech” and “cannot survive in a country which has the First Amendment.” *Schacht v. United States*, 398 U.S. 58, 63 (1970); *see also Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (“[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”) (internal quotation marks omitted); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (holding that, 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.”). And in this instance, the viewpoint at issue involves core political speech. *See, e.g., McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346-347 (1995).²

CONCLUSION

For the reasons set forth above, there are genuine issues of material fact as to whether Lt. Thomas and Sgt. Mims violated plaintiffs’ First and Fourteenth Amendment rights. The Court should therefore deny their Motion for Summary Judgment.

² Defendants also contend that plaintiffs have not asserted a viable Fourteenth Amendment claim. Plaintiffs do so because the Fourteenth Amendment incorporates the First Amendment and makes it applicable to the states. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of December, 2010, the attached Plaintiffs' Memorandum in Opposition to Defendant Thomas and Mims's Motion for Summary Judgment was filed electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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