No. _____

IN THE

Supreme Court of the United States

LESLIE WEISE, ALEX YOUNG,

Petitioners,

—v.—

MICHAEL CASPER, JAY BOB KLINKERMAN, GREG JENKINS, STEVEN A. ATKISS, JAMES A. O'KEEFE, and JOHN/JANE DOES 1-2, all in their individual capacities,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether clearly established First Amendment law prohibits government officials who are speaking at events that are open to the public and paid for by taxpayers from excluding people from the audience on the basis of viewpoint.

LIST OF PARTIES

Petitioners are Leslie Weise and Alex Young.

Respondents are Michael Casper and Jay Bob Klinkerman.

Additional defendants in the case are Steven A. Atkiss, James A. O'Keefe, and John/Jane Does 1-2 in their individual capacities. They were not appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners is a corporation that has issued shares to the public, nor is any a parent corporation, a subsidiary, or affiliate of corporations that have done so.

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The opinion of the United States Court of Appeals for the Tenth Circuit sought to be reviewed (App. at 1a) is published at 593 F.3d 1163. The order denying en banc hearing by a split vote of the active judges (App. at 56a) is unpublished. The district court's opinion (App. at 36a) is unpublished but available at 2008 WL 4838682.

An earlier decision of the district court denying Respondents' motions to dismiss without prejudice is unpublished but available at 2006 WL 3093133. The Tenth Circuit opinion dismissing the appeal from that decision is available at 507 F.3d 1260.

JURISDICTION

The judgment of the Tenth Circuit affirming the district court's decision was entered on January 27, 2010. App. at 1a. That court entered an order denying the petition for rehearing en banc on April 20, 2010. App. at 56a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The First Amendment of the United States Constitution provides that:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

The district court granted Respondents' motions to dismiss. Accordingly, the facts in the Complaint must be taken as true.

On March 21, 2005, President George W. Bush gave a speech on social security at an official government-sponsored and taxpayer-funded event at the Wings Over the Rockies Air and Space Museum in Denver, Colorado. App. at 3a. The event was open to the public. *Id.* at 4a. Government employees at the White House set policies and procedures for members of the public to obtain tickets to attend and delegated ticket distribution to local officials. *Id.* at 3a-4a. Following these policies and procedures, petitioners Leslie Weise and Alex Young secured tickets through their Congressperson. *Id.* at 4a.

On the day of the event, Weise and Young arrived in Weise's vehicle, which had a bumper sticker that read "No More Blood for Oil." *Id.* Although they showed their tickets and were initially admitted to the event, they were ejected by respondents Michael Casper and Jay Bob Klinkerman before the event began. *Id.* The two respondents were acting at the direction of Steven A. Atkiss and James A. O'Keefe, White House Advance Office employees. *Id.* The Advance Office had a policy of excluding those who disagree with the President from the President's public appearances. *Id.* at 3a.

Weise and Young never disrupted the President's event, never intended to cause any

disruption, and never indicated that they would disrupt the event. *Id.* at 5a. According to the Secret Service, they were removed from the event solely based on the perceptions of White House Advance Office employees and volunteers that the bumper sticker on Weise's car expressed disagreement with the President's policies. *Id.* at 4a-5a.

Weise and Young filed suit against Casper and Klinkerman under 28 U.S.C. § 1331, alleging violation of their First and Fourth Amendment rights. In response to their motions to dismiss, the district court held that Casper and Klinkerman were entitled to qualified immunity because they did not violate Weise and Young's constitutional rights, and that in any event any such rights were not clearly established. *Id.* at 53a-55a.[1] On the parties' joint motion, the district court certified that order as a final judgment pursuant to Rule 54(b).[2] *Id.* at 58a.

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[1] The district court initially denied Respondents' motions to dismiss without prejudice because discovery might reveal that, as private volunteers acting under color of federal law, they are not entitled to assert qualified immunity. App. at 5a. While the interlocutory appeal from that decision was pending, Petitioners conducted limited discovery into the identity of other individuals involved and filed a separate suit against Atkins, O'Keefe, and Gregory Jenkins, the former Director of the Advance Office. *Id.* at 5a. The two suits were consolidated after the Tenth Circuit dismissed the appeal. *Id.* The discovery also established that Casper and Klinkerman were entitled to assert qualified immunity, thus resolving that issue. *Id.* at 5a-6a.

[2] Defendants Atkins and O'Keefe, who were represented by the Department of Justice, filed answers instead of moving for

Petitioners appealed the qualified immunity decision to the Tenth Circuit. The majority affirmed, bypassing the question whether Weise and Young's constitutional rights were violated and holding solely that they did not have the clearly established right not to be excluded from a public event on the basis of the government's disagreement with their viewpoint. *Id.* at 6a-16a. Even though the event in this case was sponsored by the government, paid for by tax dollars, and open to the public, the majority held that the First Amendment rule prohibiting government officials from discriminating on the basis of viewpoint was no longer clearly established and implied that this was so because of the combination of this Court's decision in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that private parade organizers could exclude marchers on the basis of viewpoint) and the government speech doctrine, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009).[3] *See* App. at 15a-

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dismissal. They filed a motion to dismiss after the Tenth Circuit opinion issued; that motion is still pending before the district court. Jenkins filed a motion to be dismissed for lack of personal jurisdiction, which the district court granted. Petitioners did not appeal that decision, but instead filed a separate case in the District of Columbia against Jenkins and Todd Beyer, his successor as the Director of the Advance Office. Those defendants moved to be dismissed or for summary judgment. After the Tenth Circuit issued its opinion in this case, the district court asked for supplemental briefing on its preclusive effect. That decision is still pending before the district court.

[3] This implication is evident from the majority's holding that this case is most similar to *Sistrunk v. City of Strongsville*, 99

16a. The majority also suggested that the speech was unprotected under the First Amendment, that the First Amendment might not apply because the public event took place on private property, and that Petitioners might have prevailed if they had cited retaliation cases rather than exclusion cases. *Id.* at 10a-15a.

Judge Holloway dissented, stating that the district court's reasoning was "severely misguided" and "rel[ied] on precedents that have no bearing on the questions presented in the instant case." *Id.* at 18a. Judge Holloway would have held that Respondents were not entitled to qualified immunity, noting that it "is simply astounding that any member of the executive branch could have believed that our Constitution justified this egregious violation of Plaintiffs' rights." *Id.*

Weise and Young filed a petition for rehearing en banc, and on April 20, 2010, the Tenth Circuit denied the petition by a split vote, with half of the active judges voting to take the case en banc and one judge recused. *Id.* at 58a-59a.

REASON FOR GRANTING THE WRIT

The Tenth Circuit opinion in this case creates a split among the circuits and conflicts with this Court's precedent on a fundamental First

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F.3d 194 (6th Cir. 1996) (holding that a private entity could exclude people from its rally), *cert. denied*, 520 U.S. 1251 (1997). *Sistrunk*, which involved a private speaker and not a government speaker like this case, relied extensively on *Hurley*. 99 F.3d at 198-99.

Amendment issue: Whether clearly established First Amendment law prohibits government officials who are speaking at events that are open to the public and paid for by taxpayers from excluding people from the audience on the basis of viewpoint. The answer to that question has been, until now, an unambiguous "yes." This Court should grant certiorari to resolve this split and reaffirm that "the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010).

I. The Opinion Below Creates a Split Among the Circuits and Conflicts with this Court's Precedent Prohibiting Viewpoint Discrimination.

The Tenth Circuit diverged from the reasoned decisions of other circuits holding that government officers may not exclude individuals from a public event for a viewpoint discriminatory reason. In doing so, it contravened this Court's precedent.

This split is illustrated vividly by *Rowley v. McMillan*, in which the Fourth Circuit affirmed an order enjoining the government from conduct nearly identical to Respondents' in this case. 502 F.2d 1326 (4th Cir. 1974), *aff'g Sparrow v. Goodman*, 361 F. Supp. 566, 585-86 (W.D.N.C. 1973). The plaintiffs in *Rowley*, like Weise and Young, obtained tickets to attend a public event at which the President was scheduled to speak. *Id.* at 1329. Like Weise and Young, they were denied admission or removed before the beginning of the program on the basis of their opposition to the President and his

policies. *Id.* The district court held that such exclusions based on the desire to suppress dissent and unjustified by concern for presidential safety amounted to "wholesale assaults, exclusions, embarrassments, slanders, and deprivations of free speech" in violation of the Constitution. *Sparrow*, 361 F. Supp. at 585-86. The court enjoined the defendants from further discriminating against plaintiffs for their expression of political views. *See id.* at 587-88.

Likewise, all circuits to consider the constitutionality of excluding individuals from publicly accessible spaces and public events—whether city council meetings, public festivals, or along the President's inaugural parade route—have affirmed, in factual circumstances similar to this case, the clearly established law that the First Amendment prohibits such exclusions based on viewpoint. *See, e.g.*, *Wickersham v. City of Columbia*, 481 F.3d 591, 601 (8th Cir. 2007), *cert. denied*, 552 U.S. 950 (2007); *Monteiro v. City of Elizabeth*, 436 F.3d 397, 404 (3d Cir. 2006), *cert. denied sub nom. Perkins-Auguste v. Monteiro*, 549 U.S. 820 (2006); *Gathright v. City of Portland*, 439 F.3d 573, 577 (9th Cir. 2006), *cert. denied*, 549 U.S. 815 (2006); *Parks v. City of Columbus*, 395 F.3d 643, 653 (6th Cir. 2005); *Mahoney v. Babbitt*, 105 F.3d 1452, 1459 (D.C. Cir. 1997); *Musso v. Hourigan*, 836 F.2d 736, 742-43 (2d Cir. 1988); *Glasson v. City of*

Louisville, 518 F.2d 899, 905 (6th Cir. 1975), *cert. denied*, 423 U.S. 930 (1975).[4]

The Tenth Circuit opinion cannot be squared with these circuit decisions, all of which were grounded in the principle underscored repeatedly by this Court: that viewpoint discrimination is a "blatant" violation of the First Amendment, regardless of whether it occurs in a traditional public forum, a limited public forum, or a non-public forum. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995); *see also, e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993); *Boos v. Barry*, 485 U.S. 312, 319 (1988); *Cornelius v. NAACP*, 473 U.S. 788, 811 (1985); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *City of Madison Joint Sch. Dist. No. 8 v. Wisc. Employment Relations Comm'n*, 429 U.S. 167, 175-76 (1976); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Cohen v. California*, 403 U.S. 15, 19 (1971); *Schacht v. United States*, 398 U.S. 58, 63 (1970); *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York*, 360 U.S. 684, 688-89 (1959).

The majority below gave three reasons why the application of this fundamental principle to the

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[4] District courts have held the same, in decisions that were not appealed. *See, e.g.*, *Pledge of Resistance v. We the People 200, Inc.*, 665 F. Supp. 414, 416-18 (E.D. Pa. 1987); *Butler v. United States*, 365 F. Supp. 1035 (D. Haw. 1973); *Farber v. Rizzo*, 363 F. Supp. 386, 395 (E.D. Pa. 1973).

facts of this case was not clearly established: the nature of the speech, the nature of the forum, and Petitioners' framing of the legal theory. Each is seriously flawed.

First, the majority suggested that the law was not clearly established given the nature of the speech at issue. The majority distinguished a page of cases holding that viewpoint discrimination is impermissible by asserting that those cases "bear a common feature: speech that is protected for some reason." App. at 13a. If the majority meant to suggest that the "No More Blood for Oil" sticker on Weise's car was not protected by the First Amendment, the decision is simply and clearly wrong. Such political speech is not only protected, but it is "central to the meaning and purpose of the First Amendment." *Citizens United v. FEC*, 130 S. Ct. 876, 892 (2010); App. at 19a, n.1 ("I cannot believe that the majority truly intends this implication.") (Holloway, J., dissenting).

Second, the majority cited the lack of case law holding that the government may not exclude individuals "from an official speech on private property on the basis of their viewpoint." App. at 10a. The majority thus appeared to suggest, contrary to this Court's case law and Petitioners' allegations, that the prohibition on viewpoint discrimination may not apply because the event took place in a non-public forum or because it took place on private property.

For example, the majority distinguished another page of case law prohibiting viewpoint discrimination by holding that those cases are

irrelevant because they involved a "public forum." App. at 14a. But viewpoint discrimination is impermissible even in a non-public forum and thus forum analysis was irrelevant. *See Cornelius*, 473 U.S. at 806; *Perry Educ. Ass'n,* 460 U.S. at 46.

If the Tenth Circuit was not making a formal point about forum analysis, but instead the more simple point that the President's speech took place on private property, the point is nevertheless still fundamentally wrong. Petitioners have alleged that the event was open to the public, and whether the government rented private property and opened it to the public or whether the government used its own property is irrelevant. The relevant focus of the First Amendment analysis is the access sought by the individual, regardless of whether the property at issue is "public property or . . . private property dedicated to public use." *Cornelius*, 473 U.S. at 801; *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 792 (1996) (Kennedy, J., concurring) ("Public fora do not have to be physical gathering places . . . nor are they limited to property owned by the government . . . . Indeed, in the majority of jurisdictions, title to some of the most traditional of public fora, streets and sidewalks, remains in private hands.") (internal citations omitted).

The panel majority ultimately appeared to lose sight of Petitioners' allegations that this was a public event with decisions made by government employees rather than a private event with decisions made by private actors. Thus, the majority erroneously relied on *Sistrunk v. City of*

Strongsville, 99 F.3d 194 (6th Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997), and *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995), which involved non-public events where the decisions to exclude were made by non-governmental officials.[5]

Third, the majority hinted that Petitioners might have prevailed if they had alleged that they were retaliated against because of their viewpoint instead of being excluded because of their viewpoint. App. at 11a n.1; *see also* App. at 12a (speech occurred "elsewhere," *i.e.*, outside in the parking lot). But whether this case is analyzed in retaliation terms or exclusion terms, the outcome is the same. As this Court held in *Perry v. Sindermann*, 408 U.S. 593 (1972), the seminal retaliation case, "[f]or at least a quarter-century, this Court had made clear that . . . [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Id.* at 597; *see also Speiser v. Randall*, 357 U.S. 513, 518-19 (1958). Petitioners stated a retaliation claim under *Perry*, as well as under the Tenth Circuit's elaboration of the theory in *Worrell v. Henry*, 219 F.3d 1197 (10th Cir. 2000), *cert. denied sub nom. Turner v. Worrell*, 533 U.S. 916 (2001). First, Petitioners engaged in political speech which is clearly protected speech. *Supra* at 9. Second, Petitioners unquestionably

[5] *See Mahoney*, 105 F.3d at 1456 (distinguishing *Hurley* because *Hurley* involved private parties whereas the instant case involved plaintiffs' "desired First Amendment conduct [being] barred directly by the government").

suffered an injury when they were excluded from an event that was open to the public, an injury that would chill a person of ordinary firmness from continuing to engage in that activity. If the general public knew that they could be excluded from public events because of their political views, the danger of chill is self-evident. Finally, the "defendants' actions were motivated by plaintiffs' protected activities." App. at 11a, n.1 (paraphrasing *Worrell*, 219 F.3d at 1212); *see* App. 4a-5a (plaintiffs excluded because of their speech).[6]

Whether this case is analyzed in retaliation terms or exclusion terms, the clearly established law from this Court and other courts prohibits government officials from excluding individuals from public events for a viewpoint discriminatory reason.

[6] Even if there is any doubt about Petitioners' framing of the case, the court should have considered all relevant applicable law, not just that cited by the parties, in analyzing qualified immunity. *See Elder v. Holloway*, 510 U.S. 510, 516 (1994) ("A court engaging in review of a qualified immunity judgment should therefore use its 'full knowledge of its own [and other relevant] precedents.'" (citing *Davis v. Scherer*, 468 U.S. 183, 192, n. 9 (1984))); *see also Citizens United*, 130 S. Ct. at 893 (citing the First Amendment is sufficient to raise all First Amendment theories).

II. The Opinion Below Represents an Unprecedented Expansion of the Government Speech Doctrine by Merging it with the Court's Decision in *Hurley*.

The Tenth Circuit in effect suggested, in contrast to the law of at least five circuits, that the views of the audience are always attributable to the President even when he is speaking at an event paid for by taxpayers, announced as open to the public, and for which he has delegated authority to others to grant admission tickets. App. at 15a-16a. In other words, even in those circumstances, the President always has the right to pick and choose his audience to make it appear that everyone agrees with him.

In coming to this unsound conclusion, the majority below relied on the doctrine that originated in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), in which this Court held that a private speaker has the right to exclude another speaker with an opposing viewpoint from participating in and thus changing the content of his speech. *Id.* at 576. A state therefore could not force private organizers of a St. Patrick's Day parade to accept a group with a message contrary to its own to march in its parade. *Id.*

Hurley has been applied to other private speakers. Thus, the case that the Tenth Circuit cited involved an event by a private political party. *Sistrunk v. City of Strongville*, 99 F.3d 194 (6th Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997). *Hurley*

has not been applied to government speakers, and even if it were, it does not authorize the speaker to engage in viewpoint-discriminatory exclusion of individuals who seek only to attend a public event but not to participate in the speaker's expression—as at least five circuits have held. *See, e.g.*, *Startzell v. City of Philadelphia*, 533 F.3d 183, 194 (3d Cir. 2008); *Wickersham v. City of Columbia*, 481 F.3d 591, 600 (8th Cir. 2007), *cert. denied*, 552 U.S. 950 (2007); *Gathright v. City of Portland*, 439 F.3d 573, 577 (9th Cir. 2006), *cert. denied*, 549 U.S. 815 (2006); *Parks v. City of Columbus*, 395 F.3d 643, 651 (6th Cir. 2005); *Mahoney v. Babbitt*, 105 F.3d 1452, 1456 (D.C. Cir. 1997).

The reason is simple: for public events like speeches by the President, "[i]t simply makes no sense to suppose that the mere presence in the audience of persons who might have some disagreement with the President on some issues would have any effect on the President's message." App. at 29a (Holloway, J., dissenting); *see also PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 87 (1980) (holding that a state may force a shopping center that is open to the public to allow individuals to hand out pamphlets or seek signatures for a petition, as the speech of those individuals will not likely be attributed to the shopping center).

The Tenth Circuit relied on *Sistrunk*, but that decision is consistent with this common-sense observation. It held only that *Hurley* permitted the viewpoint-discriminatory exclusion of individuals from a political rally sponsored by a private entity because at such a rally, the support of the audience

is essential to the message being conveyed to the media. 99 F.3d at 196-200. The same does not hold for the President's public speech.

The Tenth Circuit thus stands alone in granting government speakers an unwarranted and expansive authority to discriminate against individuals attending a public event on the basis of viewpoint. This Court should not allow the limited right of the speaker to control his own message to erode the clearly established principle prohibiting viewpoint discrimination by government officials. *Cf. Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1141 (2009) (Souter, J., concurring in judgment) (warning of the effect of the government speech doctrine on existing doctrine).

III. This Case Presents an Important and Recurring Question About the Right to Dissent.

There are few questions more important to the foundation of this country than whether government officers may discriminate against individuals for the expression of their viewpoint. *See Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is . . . an egregious form of content discrimination"); *Schacht v. United States*, 398 U.S. 58, 63 (1970) (holding that a statutory provision that punishes those speaking out against the Vietnam war "cannot survive in a country which has the First Amendment").

The question presented squarely and cleanly by this case—whether government officers may

exclude individuals from a public event for a viewpoint discriminatory reason—is of recurring importance to those who express disagreement with government officers and their policies. Weise and Young's experience is not unique to the presidency of George W. Bush; it will likely occur again, just as past Presidents (and Vice-Presidents) of both parties have also sought to exclude individuals from publicly accessible spaces and public events on the basis of viewpoint. *See, e.g.*, *Mahoney v. Babbitt*, 105 F.3d 1452 (D.C. Cir. 1997) (President Clinton); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975) (President Nixon); *Rowley v. McMillan*, 502 F.2d 1326 (4th Cir. 1974) (President Nixon); *Pledge of Resistance v. We the People 200, Inc.*, 665 F. Supp. 414 (E.D. Pa. 1987) (Vice-President Bush); *Butler v. United States*, 365 F. Supp. 1035 (D. Haw. 1973) (President Nixon); *Farber v. Rizzo*, 363 F. Supp. 386 (E.D. Pa. 1973) (President Nixon). Moreover, the same question arises in the myriad instances when government officers other than the President discriminate against individuals by excluding them from public events, public meetings, and other publicly available benefits on the basis of viewpoint. *See, e.g.*, *Wickersham v. City of Columbia*, 481 F.3d 591, 601 (8th Cir. 2007), , *cert. denied*, 552 U.S. 950 (2007); *Monteiro v. City of Elizabeth*, 436 F.3d 397, 404 (3d Cir. 2006), *cert. denied sub nom. Perkins-Auguste v. Monteiro*, 549 U.S. 820 (2006); *Gathright v. City of Portland*, 439 F.3d 573, 577 (9th Cir. 2006), *cert. denied*, 549 U.S. 815 (2006); *Parks v. City of Columbus*, 395 F.3d 643, 653 (6th Cir. 2005); *Musso v. Hourigan*, 836 F.2d 736, 742-43 (2d Cir. 1988).

The Tenth Circuit opinion injects uncertainty into the clearly established law that had, until now, prohibited government officers from engaging in viewpoint discrimination in these instances in which officers excluded individuals from public events. This uncertainty will allow government officers in the Tenth Circuit to continue to engage in viewpoint discrimination with impunity. It thus has the potential to "chill political speech, speech that is central to the meaning and purpose of the First Amendment," *Citizens United v. FEC*, 130 S. Ct. 876, 892 (2010). This Court should review the opinion below to allay the chilling effect and dispel any doubt that the prohibition on viewpoint discrimination applies with full force when individuals seek to attend public events sponsored by their government.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

FILED
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Tenth Circuit
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Elisabeth A. Shumaker
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PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LESLIE WEISE; ALEX YOUNG,
Plaintiffs - Appellants,

v. No. 09-1085

MICHAEL CASPER, in his individual capacity; JAY BOB KLINKERMAN, in his individual capacity,

Defendants - Appellees,
and

GREG JENKINS, in his individual capacity; STEVEN A. ATKISS, in his individual capacity; JAMES A. O'KEEFE, in his individual capacity and JOHN/JANE DOES 1-2, both in their individual capacities,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 05-CV-02355-WYD-CBS)

Christopher Hansen (and Catherine Crump of American Civil Liberties Union, New York, New York; Mark Silverstein of American Civil Liberties Union of Colorado, Denver, Colorado; Martha M. Tierney and Jerremy M. Ramp of Kelly, Haglund, Garnsey & Kahn, L.L.C, In cooperation with the ACLU Foundation of Colorado, Denver, Colorado, on the briefs), for Plaintiffs - Appellants. Sean Gallagher (and Dugan Bliss of Hogan & Hartson, L.L.P., with him on the brief), Denver, Colorado, for Appellee Casper.

Brett Lilly of Brett R. Lilly, L.L.C.,Wheat Ridge, Colorado, (John S. Zakhem and Matthew Cassady of Zakhem & Atherton, L.L.C., Denver, Colorado, on the brief), for Appellee Klinkerman.

Before **TACHA**, **HOLLOWAY**, and **KELLY**, Circuit Judges.

KELLY, Circuit Judge.

Plaintiffs-Appellants Leslie Weise and Alex Young appeal from the district court's dismissal of their Bivens complaint against certain defendants. Mr. Weise and Ms. Young brought this action claiming violations of their First Amendment rights. In ruling on pretrial motions,

the district court held that Defendants-Appellees Michael Casper and Jay Bob Klinkerman were entitled to qualified immunity. Weise v. Casper, No. 05-cv-02355-WYD-CBS, 2008 WL 4838682 (D. Colo. Nov. 6, 2008). At the parties' request, it then certified its order as a final order pursuant to Fed. R. Civ. P. 54(b). Aplt. App. 152-53. Our jurisdiction arises under 28 U.S.C. § 1291. Because the constitutional right asserted by the Plaintiffs was not clearly established at the time of the alleged violation, we affirm the grant of qualified immunity.

Background

Although our prior decision in this case set out most of the operative facts, Weise v. Casper, 507 F.3d 1260, 1262-63 (10th Cir. 2007), later proceedings have better developed the factual record.

The Plaintiffs' suit arises from their attendance at President George W. Bush's March 21, 2005 speech at the Wings Over the Rockies Museum. Aplt. App. 16. The President's speech was an official government event, funded by the government. Id. White House policies and procedures established who could attend. Id. Sometime before the President's speech, the White House Advance Office established a policy of excluding those who disagree with the President from the President's official public appearances. Id. at 18. The Defendants were

present at the event, carrying out the White House's instructions and policies. Id. at 20.

The White House made tickets available to any member of the public. Aplt. App. 16. The Plaintiffs obtained tickets from the office of Congressman Bob Beauprez by showing their driver's licenses and writing down their names. Id. On March 21, 2005, Ms. Weise and Mr. Young drove to the event in Ms. Weise's vehicle, which sported a "No More Blood For Oil" bumper sticker. Id. at 17.

Although Mr. Young passed through security without incident, Mr. Klinkerman, a volunteer working for the White House, approached Ms. Weise and told her that she had to wait for the Secret Service to speak with her. Aplt. App. 17. Mr. Casper arrived minutes later wearing a suit, earpiece, and lapel pin. Id. at 18. Mr. Casper told Ms. Weise that "she had been 'ID'd'" based on the bumper sticker, and "that if she had any ill intentions" or "tried any 'funny stuff' that [she] would be arrested, but that he was going to let [her] in." Id.

Mr. Casper let Ms. Weise into the event, but then consulted with Defendants Steven A. Atkiss and James A. O'Keefe, White House Advance Office employees. Aplt. App. 165. Mr. Atkiss and Mr. O'Keefe instructed Mr. Casper to eject Plaintiffs from the event. Id. Mr. Casper then approached Plaintiffs at their seats and asked them to leave. Id. at 19. Plaintiffs were escorted from the event and not allowed to reenter. Id. at 19-20. The Secret Service

confirmed to Plaintiffs that they were asked to leave because of the bumper sticker on Ms. Weise's vehicle. Id. at 20, 166-67.

Plaintiffs claim that they never disrupted the event, intended to disrupt the event, or indicated that they would disrupt the event. Aplt. App. 20. Mr. Young would have asked the President a question, if given the opportunity. Id. at 17.

This case is before us for the second time. In the first appeal, Defendants challenged the district court's denial of qualified immunity. Weise, 507 F.3d at 1261. Because a factual question existed as to whether Defendants could assert the qualified immunity defense, we dismissed the interlocutory appeal for lack of jurisdiction. Id. at 1264-68.

While the first appeal was pending, Plaintiffs deposed Mr. Casper and Mr. Klinkerman, revealing the roles of Defendants Jenkins, Atkiss, and O'Keefe. Aplt. Br. at 6; Aplt. App. 10. Because the statute of limitations was about to run, Plaintiffs filed a separate suit against these three Defendants, which was later consolidated into the original suit against Mr. Casper and Mr. Klinkerman. Aplt. Br. at 6; Aplt. App. 10. When the case returned to the district court, Mr.Casper and Mr. Klinkerman again filed motions to dismiss based on qualified immunity. Aplt. App. 23-56. The discovery obtained since the first motion to dismiss resolved the outstanding factual question and demonstrated that Mr. Casper and Mr. Klinkerman were governmental

actors entitled to invoke the defense of qualified immunity. Weise, 2008 WL 4838682, at *5. The district court then granted Mr. Casper and Mr. Klinkerman's motions to dismiss based on qualified immunity. Aplt. App. 150-51. It also granted Defendant Jenkins's motion to dismiss for lack of personal jurisdiction. Id.

Discussion

This court reviews de novo a district court's grant of a motion to dismiss based on qualified immunity. Gann v. Cline, 519 F.3d 1090, 1092 (10th Cir. 2008). Well-pleaded factual allegations are taken as true, but a court must also consider whether "they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009). Dismissal is not appropriate where "the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Facial plausibility requires sufficient factual content (as opposed to legal conclusions) suggesting "that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949.

A preliminary question is whether Defendants, as volunteers acting under close government supervision, may assert the defense of qualified immunity. Before the first appeal, the district court held that Defendants could

assert qualified immunity if they were acting under the close supervision of federal officials. Weise v. Casper, No. 05-cv-02355-WYD-CBS, 2006 WL 3093133, at *4 (D. Colo. Oct. 30, 2006). Plaintiffs concede that Defendants acted under the close supervision of White House officials at the Wings Over the Rockies event. Aplt. App. 16-21, 58; Weise, 2008 WL 4838682, at *5. On appeal, Plaintiffs do not challenge Defendants' assertion of the qualified immunity defense. Therefore, it is unnecessary to reach the issue.

Qualified immunity "protects governmental officials from liability for civil damages insofar as their conduct does not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pearson v. Callahan, 129 S. Ct. 808, 815 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The qualified immunity inquiry has two prongs: whether a constitutional violation occurred, and whether the violated right was "clearly established" at the time of the violation. Pearson, 129 S. Ct. at 816.

In their discretion, courts are free to decide which prong to address first "in light of the circumstances of the particular case at hand." Pearson, 129 S. Ct. at 818. The Pearson Court recognized that skipping the constitutional violation question may conserve judicial resources in "cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right." Id. Some cases are so fact-bound that deciding the

constitutional question offers "little guidance for further cases." Id. at 819. Further, proceeding directly to the "clearly established" question may avoid the risk of deciding a case incorrectly given insufficient briefing on the constitutional violation question. Id. at 820. Although it is unclear whether Defendants' alleged conduct violated Plaintiffs' constitutional rights, it is obvious that the rights were not clearly established at the time of the violation.

"[F]or a right to be clearly established, 'there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.'" Cortez v. McCauley, 478 F.3d 1108, 1114-15 (10th Cir. 2006) (en banc) (quoting Medina v. City of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992)). The qualified immunity doctrine does not require a case exactly on point. "Clearly established" does not mean "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Anderson v. Creighton, 483 U.S. 635, 640 (1987); see also Hope v. Pelzer, 536 U.S. 730, 741 (2002) ("officials can still be on notice that their conduct violates established law even in novel factual circumstances"). Qualified immunity protects "all but the plainly incompetent or those who knowingly violated the law." Morse v. Frederick,

551 U.S. 393, 429 (2007) (citations and internal quotation marks omitted).

The district court held that Defendants did not violate Plaintiffs' constitutional rights and, alternatively, that Plaintiffs had not shown that any such rights were clearly established. Weise, 2008 WL 4838682, at *7-8. Concerning the "clearly established" question, the district court stated: "Plaintiffs do not cite any Tenth Circuit or Supreme Court case that defines the contours of this right as it applies to a situation in which the President, speaking in a limited private forum or limited nonpublic forum, excludes persons for the reasons identified in this Order." Id. at *8. According to Plaintiffs, it "is clearly established First Amendment law that individuals have a right to be free from discrimination based on viewpoint." Aplt. Br. at 9. Stated more precisely, "the government cannot engage in viewpoint discrimination." Id. at 18.

At the most general level, Plaintiffs are correct that the government usually cannot discriminate against a speaker based upon that speaker's viewpoint. But in qualified immunity cases, except in the most obvious cases, broad, general propositions of law are insufficient to suggest clearly established law. See Brousseau v. Hagan, 543 U.S. 194, 198-99 (2004) (per curiam). That is because the clearly established law must be such that it would put a reasonable official on notice that his conduct was unlawful. Id. That is particularly true here. Beyond the abstract principle that the government ordinarily cannot

discriminate based upon viewpoint, however, a First Amendment claim must be situated somewhere within the free speech jurisprudence because we accord speech various levels of protection depending upon the nature of the speech, the speaker, and the setting. See, e.g., Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1138 (2009) (because government speech "is not subject to the Free Speech Clause," the government as speaker can discriminate on the basis of viewpoint); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (recognizing three types of public fora and varying levels of speech protection depending on the forum); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980) (government regulation of truthful, non-misleading commercial speech regarding lawful activity must directly advance a substantial governmental interest, and the regulation must be no more extensive than necessary to serve that interest); New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (public official cannot recover damages for libel unless he proves falsity and actual malice).

Plaintiffs simply have not identified any First Amendment doctrine that prohibits the government from excluding them from an official speech on private property on the basis of their viewpoint. For the First Amendment to bar the government from taking action against a speaker, the speaker's activity in question must be (1) speech and (2) protected. First, the speech at

issue, the bumper sticker on Ms. Weise's car, occurred outside the event. However, Defendants did not suppress Plaintiffs' bumper sticker speech nor did the government prosecute Plaintiffs for the speech.[1] At the event itself, Plaintiffs were

[1] Thus, this case differs from Glasson v. City of Louisville, 518 F.2d 899, 902 (6th Cir. 1975), where a police officer took a sign critical of the President and tore it up, thereby suppressing the plaintiff's speech. The dissent insists that this case is about "the exercise of First Amendment rights embodied in Ms. Wiese's bumper sticker." First, the issue on appeal as framed by the Plaintiffs is whether the President has a right to exclude from his appearances those who disagree with his policies and whether it is clearly established that individuals have a right to be free from viewpoint discrimination. Aplt. Br. at 9, 13-14, 20. Aside from law on viewpoint discrimination, framing the issue in this manner implicates the intersection of the President's rights as a speaker under the government speech doctrine, his rights to expressive association, and the nature of the forum. Second, such a formulation suggests the case really should have been structured as a First Amendment retaliation case—Plaintiffs were not allowed to attend in retaliation for the constitutionally protected speech on the bumper sticker. See Worrell v. Henry, 219 F.3d 1197, 1212 (10th Cir. 2000) (requiring that a plaintiff (1) be engaged in constitutionally protected activity; (2) suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) defendants' actions were motivated by plaintiffs' protected activity). No such argument appears in the briefs. The potential relevance of these doctrines reveals that the proper categorization of this case is far more complicated than the dissent acknowledges and that Plaintiffs' rights are far from clearly established. Of course, when it comes to qualified immunity, merely stating that the government cannot engage in viewpoint discrimination is just about as general as seizures—an approach that is too general for the qualified immunity analysis where a plaintiff has the burden of demonstrating

"not speakers at all," as their counsel conceded at oral argument, but rather attendees. They did not intend to speak at the President's speech.[2] Although Defendants ejected them from the event on the basis of their speech outside the event, Plaintiffs have identified no authority suggesting that mere attendance is transformed into speech or even expressive activity because of their speech elsewhere.

Second, Plaintiffs have not put forth any authority establishing that their presence at the President's speech was protected. In arguing that Defendants' actions violated clearly established constitutional rights, Plaintiffs offer various First Amendment cases holding that the "government cannot engage in viewpoint discrimination." Aplt. Br. at 18-20 (citing, among others, Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of N.Y., 360 U.S. 684 (1959) (state could not bar exhibition of non-obscene film advocating

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not only a constitutional violation, but also a violation of clearly established law. Compare Aplt. Reply Br. at 8 ("public forum analysis is irrelevant in this case because viewpoint discrimination is impermissible in any forum.") with Anderson v. Creighton, 483 U.S. 635, 639-41 (1987) (a formulation that warrantless searches are not permitted absent probable cause and exigent circumstances is too general for qualified immunity purposes).

[2] Plaintiffs have not argued that Mr. Young's desire to ask a question if given the opportunity confers any additional First Amendment protections to their presence at the speech. Rather, they argue, their mere presence at an official Presidential speech, open to the public, was protected by the First Amendment.

adultery); Schacht v. United States, 398 U.S. 58 (1970) (reversing conviction for wearing military uniform without authority where defendant had worn uniform in theatrical production opposed to the Vietnam War); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (school district could not exclude religious groups from using school property when not in use for school purposes); see also Aplt. Reply Br. at 10-11 (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (state university could not exclude religious groups from limited public speech forum); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (invalidating as viewpoint discrimination a city ordinance prohibiting burning crosses or swastikas or other symbols, etc., that would arouse anger on the basis of race, color, creed, religion or gender); Texas v. Johnson, 491 U.S. 397 (1989) (affirming reversal of conviction for flag-burning); Niemotko v. Maryland, 340 U.S. 268 (1951) (religious speech in a public park); Mesa v. White, 197 F.3d 1041 (10th Cir. 1999) (public comment period of public meeting)). These and other cases that Plaintiffs cite bear a common feature: speech that is protected for some reason. This discussion of impermissible viewpoint discrimination does not amount to clearly established law that provides guidance in these circumstances.

In this context, however, Plaintiffs briefly attempt to remedy that, presenting some factually similar cases in which persons with opposing viewpoints were excluded from

Presidential events. Aplt. Br. at 15-17, 21-22 (citing Mahoney v. Babbitt, 105 F.3d 1452 (D.C. Cir. 1997) (National Park Service could not revoke permit for protesters along Pennsylvania Avenue for Presidential inaugural parade, a public forum, based on content of speech); Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975) (protesting in public forum); Pledge of Resistance v. We the People 200, Inc., 665 F. Supp. 414, 416-17 (E.D. Pa. 1987) (permit to use public forum does not justify excluding expressive activity absent actual disruption); Butler v. United States, 365 F. Supp. 1035 (D. Haw. 1973) (denial of motion to dismiss suit against government defendants who stopped protesters from entering Air Force base during Presidential visit); Farber v. Rizzo, 363 F. Supp. 386 (E.D. Pa. 1973) (civil contempt entered against defendants who violated TRO that allowed protesters to remain in a public forum); Sparrow v. Goodman, 361 F. Supp. 566, 568 (W.D.N.C. 1973), aff'd sub nom. Rowley v. McMillan, 502 F.2d 1326 (4th Cir. 1974) (preliminary injunction against police and Secret Service who excluded dissenters from Presidential event at arena)). Of these cases, only Mahoney, Glasson, and Pledge of Resistance reached the question of whether a constitutional violation occurred. Plaintiffs fail to recognize a crucial distinction between those three cases and this case: First Amendment protection, in those cases because the plaintiffs wished to speak or demonstrate in a public forum. Given that distinction, these cases, decided prior to

significant First Amendment developments, cannot constitute the clearly established law.

The most similar case weighs against Plaintiffs' argument that the alleged constitutional right was clearly established. In Sistrunk v. City of Strongville, 99 F.3d 194 (6th Cir. 1996), the plaintiff sought access to a Bush-Quayle rally being held at a city park. Id. at 196. The campaign committee had obtained a permit to hold the rally, and the permit provided that the grounds were "limited to the members of the organization and their invitees." Id. The plaintiff obtained a ticket to the rally, and tried to enter wearing a Bill Clinton button. Id. But the "committee prohibited rally participants from carrying or displaying signs or buttons that carried messages critical of President [George H.W.] Bush." Id. Once the plaintiff surrendered her Clinton button, she was allowed to attend the rally. Id. The Sistrunk court analogized the Presidential rally to the parade in Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995). In Hurley, "the state could not require private citizens who organized a parade through public streets to include among the marchers a group imparting a message the organizers did not wish to convey." Sistrunk, 99 F.3d at 198 (citing Hurley, 515 U.S. at 572-74). Similarly, the plaintiff in Sistrunk wanted to require the rally organizers to accept her displayed views in their expressive activity, the rally. Id. at 199. "[T]he committee that organized the rally for George Bush could not be compelled

to include in its message an expression of confidence for Clinton." Id. Thus, Sistrunk *upheld* the exclusion of the attendee.

In sum, no specific authority instructs this court (let alone a reasonable public official) how to treat the ejection of a silent attendee from an official speech based on the attendee's protected expression outside the speech area. To be sure, in some obvious situations, general authority may put a reasonable public official on notice that his or her conduct is violative of constitutional rights. This is not one of them.

Because it is plain that the constitutional right claimed was not clearly established at the time of the alleged violation, Defendants are entitled to qualified immunity. Therefore, we need not reach the question of whether Defendants violated Plaintiffs' constitutional rights.

AFFIRMED.

No. 09- 1085, Weise v. Casper
HOLLOWAY, J., dissenting.

I respectfully dissent as explained below.

I

Plaintiff-appellant Weise expressed an opinion on a matter of great public concern in a manner that has become very familiar in recent decades: She put it on a bumper sticker affixed to her car, stating bluntly: "No more blood for oil." As was said about a sign carried by a protestor against another war more than thirty years ago, "[t]he message that [she] sought to communicate was an expression of her views about important public questions and policies. *This kind of expression is entitled to the greatest constitutional protection*." *Glasson v. City of Louisville*, 518 F.2d 899, 904 (6th Cir. 1975) (emphasis added).

Ms. Weise's expression did not, however, receive the protection to which it was entitled. Instead, because she had expressed an opinion that operatives of the executive branch disapproved, she and two of her friends – who have not been shown to have any responsibility for the bumper sticker and who may or may not have agreed with its message – were rudely, publicly, and forcefully ejected from a public meeting to which they had properly gained admission by complying with the requirements that had been established. The speaker at the

meeting was the President of the United States of America.

Neither Ms. Weise nor Plaintiff Young had committed any objectionable act inside the museum where the speech was to occur, nor had they expressed any opinion whatsoever within that venue. The sole basis for conspicuously removing them from the premises was the bumper sticker that was attached to Ms. Weise's car, which was parked in a parking lot some distance away, presumably with those of hundreds of other persons.

It is simply astounding that any member of the executive branch could have believed that our Constitution justified this egregious violation of Plaintiffs' rights. *"The right of an American citizen to criticize public officials and policies and to advocate peacefully ideas for change is 'the central meaning of the First Amendment.'" Id.* (quoting *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964)) (emphasis added).

The district court found that there had been no violation of Plaintiffs' rights, employing reasoning that is severely misguided and relying on precedents that have no bearing on the questions presented in the instant case. On appeal, the majority opts not to consider whether precious and fundamental constitutional rights were violated, holding only that any violation would not have been necessarily apparent to the Defendants.

I respectfully dissent. I would reach the first issue presented here and would hold that the Plaintiffs' rights under the First Amendment were clearly violated by the Defendants' actions in publicly ejecting them from the audience that had gathered to hear the President's speech on social security. On the second issue, I am unpersuaded by the majority's analysis and conclusion. I would hold that the rights so violated were clearly established because of the fundamental importance of the right of free speech on topics of public concern and because no reasonable officer could have believed that it was permissible under the Constitution to humiliate these Plaintiffs solely because one of them had legitimately exercised her right of free speech at another time and place.[1]

Several years ago the Supreme Court held that rights may be clearly established and qualified immunity should be denied "despite notable factual distinctions" from previous cases "so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Hope v.Pelzer*, 536 U.S.

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[1] Defendants do not dispute that the bumper sticker on Plaintiff Weise's car critical of war policy is protected speech. The majority recognizes that the "speech at issue" here is the bumper sticker, maj. op. at 10, and yet, listing but not discussing cases relied on by Plaintiffs, the majority says that these cases have in common "speech that is protected for some reason," *Id.* at 11. This seems to imply that Ms. Weise's speech was not protected, but I cannot believe that the majority truly intends this implication.

730, 740 (2002) (quoting *United States v. Lanier*, 520 U.S. 259, 269 (1997)). I would hold that this is a case, like *Hope v. Pelzer*, in which Defendants are not protected by qualified immunity; Defendants violated Plaintiffs' rights on a pretext so flimsy that the violation was obvious.

II

The allegations of Plaintiffs' Complaint, which establish the underlying facts at this stage of the litigation, are set out in the majority opinion. That summary is correct as far as it goes.[2] It does not, however, fully reflect the allegations of the Complaint (which, of course, we must take as true at this stage) regarding the manner in which Defendants ejected Plaintiffs from the event. The Complaint alleges that Defendant Casper "shouted" to Ms. Weise that she had to leave, and it averred that he "shoved" Mr. Young toward the door. Once outside the event, the Plaintiffs "were confronted by four or five men, two of whom were uniformed police officers . . . ." Complaint at 6.

In addition to taking these well-pleaded facts as true, as required, we are to draw from the facts all reasonable inferences in favor of the Plaintiffs. One such inference, clearly supported

[2] The majority opinion does, however, insert in its analysis section one "fact" that is outside the pleading, declaring that the museum at which the President spoke was private property. Although this may (or may not) be correct, it is outside the record in this appeal, as far as I can determine.

by these facts, is that being publicly and prominently ejected from the audience in this manner caused extreme embarrassment and humiliation to the Plaintiffs. Our duty is to determine whether such treatment was justified.

III

The majority correctly notes that the Supreme Court has recently rejected the framework for analysis in cases involving the defense of qualified immunity that required lower federal courts to decide first whether a plaintiff has pleaded a violation of constitutional right before deciding whether the right so infringed was clearly established. *Pearson v. Callahan*, __ U.S. __, 129 S.Ct. 808 (2009) (overruling, in part, *Saucier v. Katz*, 533 U.S. 194 (2001)). Nevertheless, the Court, while partially overruling *Saucier*, was careful to point out that *Saucier* "was certainly correct in noting that the two-step procedure promotes the development of constitutional precedent and *is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." Pearson v. Callahan*, 129 S.Ct. at 818 (emphasis added).

I am persuaded that this is a case in which the issue of whether a right has been violated should be addressed at the outset. In recent years there have been several cases across the nation in which citizens have sought redress for alleged infringement of their fundamental liberties under

somewhat similar circumstances.[3] Because the right of free speech on matters of public concern is so vital to our democracy, these are important cases, and the judiciary has a valid and vital role in our society's response. The importance of the issues raised in this appeal should weigh heavily in favor of our consideration of them on the merits.

Furthermore, in this case the district court was still operating under the rule of *Saucier* and so analyzed and resolved the constitutional issue. That ruling, although unpublished and not precedential, is a significant one. It is also, in my view, deeply misguided. As a consequence, I conclude that the need to decide the constitutional question is especially pressing here.

Accordingly, I dissent from the majority's course of forgoing this opportunity to consider an

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[3] *See, e.g.*, *McCabe v. Macaulay*, 551 F.Supp.2d 771 (N.D. Iowa 2007) (rally for incumbent President at a public park; protestors arrested on public property while trying to comply with law enforcement orders; persons in the same area demonstrating views favorable to the President were not confronted); *Rank v. Hamm*, 2007 WL 894565 (S.D.W.Va. Mar 21, 2007) (Presidential address on July 4 on the grounds of the state Capitol; plaintiffs arrested for wearing shirts with messages critical of the President). Other cases and incidents are cited in the briefs herein and in various legal journals. *See, e.g.*, Kimberly Albrecht-Taylor, Note, *Giving Dissenters Back Their Rights: How the White House Presidential Advance Manual Changes the First Amendment and Standing Debates*, 17 Wm. & Mary Bill Rts. J. 539 (2008).

issue of great importance to our country. I would address this issue, and I would decide it in favor of the Plaintiffs.

IV

A

The district court determined that there had been no constitutional violation. The judge reasoned that the focus of the Complaint was that Plaintiffs had not been permitted "to participate *in the President's speech.*" (Emphasis in original.) To the contrary, however, the Complaint makes it quite clear that the Plaintiffs here did *not* wish to participate in the President's speech but only to attend it. *See* Complaint at 4, 7. Thus, the district court's analysis was based on a patently erroneous reading of the Complaint: Plaintiffs' claim is surely not based on denial of the opportunity to participate in the President's speech, an opportunity that they never sought nor claimed to have sought.

Relying primarily on *Sistrunk v. City of Strongsville*, 99 F.3d 194, 196-200 (6th Cir. 1996), which he termed "particularly instructive," the district judge held that the controlling principle is that when the President chooses to speak, he has the right to control his message, including the right to exclude another's viewpoint:

"President Bush had the right, at his own speech, to ensure that only his message was conveyed."[4]

Not only did the district court base its analysis on an erroneous reading of the Complaint, but its reliance on *Sistrunk* was misplaced. In *Sistrunk*, a majority of a divided panel held that a *private* entity, the Bush-Quayle election committee, could exclude from its *private* rally a person *who was wearing a button expressing support for an opposing candidate*. Our case deals with a public event, and Plaintiffs did not attempt to express *any* opinion in the course of their attendance.[5] These two very significant differences in the underlying circumstances result in *Sistrunk* being of very limited relevance to this appeal. Moreover, the unfounded notion of equivalence between mere attendance at a public event and attempting to participate in the message being delivered at the event is very troubling to me, as I shall explain *infra*.

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[4] In discussing *Sistrunk*, the district court noted that case had relied on *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). Besides those two cases, the only one cited in his brief discussion of the issue was *Wells v. City and County of Denver*, 257 F.3d 1132, 1143 (10th Cir. 2001).

[5] Indeed, this case is almost a polar opposite of *Sistrunk* with regard to the Plaintiffs' behavior. Their only expression of opinion was on the bumper sticker, about as far removed from trying to express themselves at the event as can be.

B

I would hold that Plaintiffs have sufficiently alleged that the Defendants violated Plaintiffs' rights under the First Amendment by ejecting them from the President's speech. Plaintiffs aver that Defendants agreed "to expel persons with viewpoints opposed to the President's . . . . They also conspired to seize plaintiffs . . . ." Complaint at 7.[6] Defendants took this action solely "as a result of the bumper sticker on Ms. Weise's vehicle." *Id.*

The issue thus framed is stark: Defendants excluded Plaintiffs from the President's public speech – after they had obtained tickets, cleared security screening and been seated in the audience – due to the protected expression by one of them outside the event.[7] The question, then, is whether the Constitution permitted Defendants to take this action against Plaintiffs for this

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[6] Plaintiffs pleaded a violation of their rights under the First and Fourth Amendments, but on appeal argue only that their First Amendment free speech rights were violated.

[7] The majority appears to place some importance on the facts that "Defendants did not suppress Plaintiffs' bumper sticker speech nor did the government prosecute Plaintiffs for the speech." Maj. op. at 10. Of course the suggestion that the government could have done either is far outside the pale. More importantly, the significant fact is that the Defendants did assault, embarrass and publicly humiliate the Plaintiffs in response to this protected conduct by one of them.

reason. The answer, informed by decades of free speech jurisprudence – must be a resounding "no."

More than 35 years ago, the Supreme Court said:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even thought the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. *It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech.* For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. . . . . Such interference with constitutional rights is impermissible.

Perry v. Sinderman, 408 U.S. 593, 597 (1972) (emphasis added). The Court went on to note that (as of 1972) it had applied this principle to denials of tax exemptions, unemployment benefits and welfare payments, and denial of public employment. *Id.*

The Court recently reiterated this bedrock and longstanding principle of First Amendment adjudication: "Official reprisal for protected

speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right,' and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (quoting *Crawford- El v. Britton*, 523 U.S. 547, 588 n.10, 592 (1998)). "A more invidious classification than that between persons who support government officials and their policies and those who are critical of them is difficult to imagine." *Glasson v. City of Louisville*, 518 F.2d 899, 912 (6th Cir. 1975).

Although it is Plaintiffs' burden of persuasion to show that they have alleged a violation of their rights, it is nevertheless useful to turn the question around: On what basis could a representative of the executive branch have thought, on seeing Plaintiffs alight from Ms. Weise's car with its bumper sticker, that they could be excluded from a public event solely because Ms. Weise had chosen to exercise her most fundamental First Amendment right *outside* of the event and in the complete absence of *any* indication that Plaintiffs intended to even speak at the event, much less any indication of any intent to disrupt the event?

Because the Plaintiffs' speech was on a matter of great public concern, it was entitled to the utmost in Constitutional protection. Because the prohibition on viewpoint discrimination is so well established, Defendants violated Plaintiffs'

established rights by excluding them from the President's speech solely on the basis of the protected message of the bumper sticker.

C

Defendants rely heavily on the contention that Plaintiffs' attendance at the President's speech would have constituted participation in the speech. Thus, one brief states that "the President has the right to control the message of his own speech, which includes the right to exclude *speakers* who express disagreement with that message." Response Brief of Appellee Michael Casper at 4 (emphasis added). The other Defendant's brief includes the statement that "Plaintiffs have no constitutional right to require the President, at his own speech, to adopt or even allow *their dissenting speech* . . . ." Brief for Appellee Klinkerman at 12 (emphasis added). Clearly this is a red herring. Plaintiffs averred, and again we must accept as fact, that they had no intention to disrupt the speech or even to express themselves at the speech.[8]

Defendants go further in their advocacy of this position. They argue that Plaintiffs' mere

[8] Appellant Young intended to attempt to be recognized to ask a question *if* the President, in his sole discretion, opted to take questions from the audience. Because that intention was unknown to the Defendants, they have not suggested that their actions were motivated by this possibility which, in any event, was something which would not have occurred unless the President decided to open the floor to questions.

attendance at the President's speech is somehow equivalent to expression of their opinions at the speech. As noted, the district court accepted this contention. And although the majority does not expressly endorse this view, and indeed seems to reject it expressly at one point, the majority's reference to *Sistrunk* as the "most similar case" is a troubling echo of the contention.

Accordingly, I think it important to say, with some emphasis, that I reject this proposition. "Merely being present at a public event does not make one part of the organizer's message for First Amendment purposes." *Gathright v. City of Portland*, 439 F.3d 573, 577 (9th Cir. 2006).[9] It simply makes no sense to suppose that the mere presence in the audience of persons who might have some disagreement with the President on some issues would have any effect on the President's message. Moreover, it is fanciful to suppose that an audience could have been assembled that did not include any persons who disagreed with the President on any issue. And if the violation of these Plaintiffs' rights was based on an assumption that one who disagrees with the President on one issue is likely to disrupt or embarrass the President when he speaks, that is

[9] The Ninth Circuit was quoting, with approval, the opinion of the district judge in the case it was reviewing. *Gathright v. City of Portland*, 315 F.Supp.2d 1099, 1103 (D. Ore. 2004). The same language was quoted with approval in *Wickersham v. City of Columbia*, 371 F.Supp.2d 1061, 1084 (W.D. Mo. 2005), *aff'd*, 481 F.3d 591 (8th Cir. 2007).

an assumption that cannot stand in the face of the First Amendment.

As already noted, Defendants persuaded the district court that *Sistrunk v. City of Strongsville*, 99 F.3d 194 (6th Cir. 2006), was "persuasive." Defendants rely heavily on that case again in this appeal, and the majority here finds it the "most similar" case. Consequently, additional comment on my view of that case seems appropriate.

In *Sistrunk*, the event in question was deemed by the court to be a private affair, and the opinion is very clear that this was essential to the court's reasoning. Although the event was to be held on municipal property, the city had granted a permit to the Strongsville Republican Organization for use of the property for a political rally on a certain date for the nominal sum of one dollar. "The permit specifically provided that the use of the facilities and grounds was limited to the members of the organization and their invitees." 99 F.3d at 196.[10]

The facts in the appeal before us are quite different. The event was not sponsored by a private group but by the Article II executive branch of the United States. Plaintiffs' Complaint alleges that the event was open to all members of

[10] The dissenting judge in *Sistrunk* was not convinced that a traditional public forum had been transformed into a private forum through the use of a permit. 99 F.3d at 202-203 (Spiegel, D.J., dissenting).

the public who were able to obtain tickets. Tickets were distributed on a first come-first-served basis, and Plaintiffs obtained their tickets merely by showing identification.

Moreover, the plaintiff in *Sistrunk* had attempted to attend the Bush-Quayle campaign's event while wearing a button expressing support for their opponent, so that the assertion that the plaintiff was attempting to participate in the rally by expressing her own message had at least some factual basis in that case.[11] The district court apparently found these distinctions unimportant, but I conclude that they are of considerable significance in the constitutional analysis and effectively undercut the district court's entire rationale.

D

In this appeal, the majority goes awry in another way. Plaintiffs have clearly based their claim on the protected speech that was on the bumper sticker. Yet the majority notes,

[11] The dissenter, however, was not persuaded, rejecting the majority's conclusion that "being a member of the rally's audience" was like marching in the parade, the expressed wish of the plaintiff in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995). The dissent said that one who marches in a parade "is an active participant . . . while one in attendance at a political rally is merely a spectator. In actuality, marching in a parade is equivalent to speaking at a rally since both are involved in conveying the message." *Sistrunk*, 99 F.3d at 201 (Spiegel, D.J., dissenting).

apparently as a factor that somehow weighs against the Plaintiffs, that no authority is cited to suggest that attendance "is transformed into speech or even expressive activity because of their speech elsewhere." Maj. op. at 10. No authority is given for that suggestion, I venture to say, because that is not the Plaintiffs' theory of their case.[12]

The majority, however, seems to find this notion significant, as the opinion goes on to say that the cases relied on by Plaintiffs all concern "speech that is protected for some reason." Maj. op. at 11. The implication seems to be that this case is only about Plaintiffs' attempted attendance at the President's speech, which the majority does not find to be protected. *But that is not the case that has been brought before us.* Instead, the Plaintiffs have been quite clear in basing their cause of action on the exercise of First Amendment rights embodied in Ms. Weise's bumper sticker.

Thus, we address here speech that is unquestionably protected, or more accurately, entitled to be protected under the First Amendment. It is severely distressing that such protection is not forthcoming from this court.

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[12] Indeed, in the same paragraph, the majority recognizes that "the speech at issue [is] the bumper sticker on Ms. Weise's car."

V

I would also hold that the rights which were violated by the Defendants were so well established that a reasonable officer should have known that this conduct was unlawful. For a court to find that a constitutional right was clearly established, "its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . . [I]n the light of pre-existing law[,] the unlawfulness must be apparent." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal citations and quotation marks omitted).

It is not necessary for Plaintiffs to identify a precedent involving the same factual situation:

> [G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and . . . *a general constitutional rule* already identified in the decisional law *may apply with obvious clarity* to the specific conduct in question, even though the very action in question has not previously been held unlawful.

Id. at 741 (emphasis added; internal quotations and citations omitted). Thus, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.*

The prohibition against viewpoint discrimination is unquestionably well established. A particularly articulate expression of the rule is that

> there are some purported interests – such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas – that are so plainly illegitimate [that they cannot be tolerated]. The general principle that has emerged from this line of cases is that the 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 City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

It has been similarly well established for years that taking action against a person for exercise of the protected rights is prohibited in most circumstances. Considering action taken against a deputy sheriff that, for purposes of summary judgment, was assumed to have been based on his exercise of protected speech about the political philosophy of an incumbent and a potential challenger, we held that the law had been well established in January 1998 that freedom of expression includes the freedom to opine on issues of public concern. "Consequently, a reasonable official would understand that removing [the deputy's] commission based on his expressed preference for one individual's philosophy over another . . . violated [the deputy's] free speech rights." *Bass v. Richards*, 308 F.3d 1081, 1090 (10th Cir. 2002).

The only question, then, is whether there is something in the factual context in which the issue arises in the instant appeal that would raise doubt about the application of the prohibition on viewpoint discrimination. I firmly believe that there is no such uncertainty. The Plaintiffs (or one of them) engaged in protected speech. Quite separate from that, in time and location, they were admitted to the audience for a Presidential address, having satisfied all conditions for admission.

I see no basis whatsoever for any doubt about the impropriety of this conduct. Instead, I would firmly hold that the right of freedom of speech and the prohibition on taking adverse actions against a speaker based solely on her point of view "apply with obvious clarity"[13] to the facts of this case.

****

Accordingly, I respectfully dissent.

[13] *Hope v. Pelzer*, 536 U.S. at 741.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Judge Wiley Y. Daniel

Civil Action No. 05-cv-02355-WYD-CBS

LESLIE WEISE and

ALEX YOUNG,

Plaintiffs,

v.

MICHAEL CASPER, in his individual capacity;

JAY BOB KLINKERMAN, in his individual capacity;

STEVEN A ATKISS, in his individual capacity;

JAMES A. O'KEEFE, in his individual capacity; and

JOHN/JANE DOES 1-5, all in their individual capacities,

Defendants.

ORDER

THIS MATTER is before the Court on Defendant Jenkins' Motion to Dismiss or in

the Alternative for Summary Judgment[1], filed February 1, 2008 (docket #99); Defendant Klinkerman's Motion to Dismiss Based on Qualified Immunity, filed February 4, 2008 (docket #105); and Defendant Casper's Motion to Dismiss Plaintiffs' Complaint for Failure to State a Claim Upon Which Relief May Be Granted on the Basis of Qualified Immunity, filed February 1, 2008 (docket # 102).

I. FACTUAL BACKGROUND

This case arises from the March 21, 2005 appearance by President George W. Bush at the Wings Over the Rockies Air and Space Museum in Denver, Colorado. On that date, President Bush delivered a speech at the Museum on the topic of Social Security. Plaintiffs obtained tickets to attend the event. Plaintiffs arrived at the event in a vehicle owned and driven by Plaintiff Weise. The vehicle had a bumper-sticker on it that read "No More Blood for Oil." While Plaintiff Young was admitted into the Museum without incident, Plaintiff Weise was initially

[1] Defendant Klinkerman incorrectly filed this motion as both and Motion to Dismiss and a Motion for Summary Judgment. These motions should have been filed in two separate pleadings. Plaintiffs, in their response, treated the motions as a motion to dismiss and did not address the motion for summary judgment as such. In the interest of fairness and to preserve a clear record, I will only address Defendant's motion to dismiss. Defendant may file a separate motion for summary judgment if he wishes to do so. Therefore, Defendant's Motion for Summary Judgment is denied with leave to refile.

prevented from entering the Museum. At a security check-point, an unnamed person prevented Plaintiff Weise and a friend from entering the Museum.

Soon thereafter, Defendant Micheal Casper approached the place where Plaintiff Weise and her friend were standing with Defendant Klinkerman. Defendant Casper told Plaintiff Weise that she had been "ID'd," and stated that Plaintiff Weise and her friend would be arrested if they had "any ill intentions" or "if they tried any 'funny stuff.'" Defendant Casper then let Plaintiff Weise and her friend enter the Museum.

Defendant Casper approached Plaintiffs and instructed them to leave the Museum. Defendant Casper escorted Plaintiffs toward a Museum exit, and then instructed another person to escort the Plaintiffs out of the Museum. At some point after the event, the Secret Service informed the Plaintiffs that they had been removed based on the bumper-sticker on Plaintiff Weise's vehicle.

I also note the procedural history of this case. On October 30, 2006, I denied Defendants Michael Casper's and Jay Klinkerman's Motions to Dismiss without prejudice, allowing Plaintiffs limited discover related to Defendants' assertion of the qualified immunity defense in this case. Defendants appealed to the Tenth Circuit. The appeal was dismissed for lack of appellate jurisdiction. Plaintiffs were allowed to take

depositions of Casper and Klinkerman for the limited purpose of identifying other potential defendants so Plaintiffs could file claims against them within the relevant statute of limitations. See Order, Feb. 15, 2007. As a result of the information obtained during those depositions, Plaintiffs now agree that Defendants were closely supervised by public officials and are entitled to assert qualified immunity. Plaintiffs also agreed on the record at the status conference on January 7, 2008, that Defendants were closely supervised by government officials.

II. ANALYSIS OF MOTIONS TO DISMISS

A. Defendant Jenkins

i. The Parties Positions

Defendant Jenkins asserts that I should dismiss Plaintiffs' claims against him because Plaintiffs cannot satisfy their burden of establishing that he is subject to personal jurisdiction. Jenkins asserts that his alleged establishment of a national policy is insufficient to establish a jurisdictional nexus in a state where the policy is applied. Defendant Jenkins served as Director of the White House Office of Advance from January 15, 2003 to November 30, 2004. Defendant Jenkins asserts that after departing the Advance Office, he played no role in organizing, planning or supervising any domestic or international trips by the President. Further, Defendant Jenkins asserts

that he played no role in planning, organizing or supervising the March 21, 2005, presidential event in Denver. Defendant Jenkins did not attend the presidential event in Denver, and asserts that he had no knowledge of the event until after it occurred. Defendant asserts that he had no communications with the other Defendants concerning the event or during its occurrence. Defendant Jenkins is currently a resident of Texas. He has never been a resident of Colorado, nor has he owned property or assets in Colorado. Jenkins asserts that he has never engaged in any transactions or activities in Colorado during the time he was Director of the Advance Office, and that he has not visited Colorado for any reason since at least 2001.

Plaintiffs allege that Jenkins, by promulgating the policy that resulted in the alleged violation of Plaintiffs' Constitutional rights, took personal actions that caused the Plaintiffs' unconstitutional viewpoint-based ejection from a public forum in Colorado. Further, Plaintiffs assert that the fact that Defendant Jenkins was not in Colorado on March 21, 2008 and the fact that he was no longer in office does not prevent the exercise of personal jurisdiction since the allegations in the complaint are that he enacted the policy that was implemented when the Plaintiffs were ejected.

ii. Personal Jurisdiction Analysis

The plaintiff bears the burden of establishing personal jurisdiction, although at the preliminary stages of the litigation this burden is light. *Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc.*, 205 F.3d 1244, 1247 (10th Cir. 2000). "Where . . . there has been no evidentiary hearing, and the motion to dismiss for lack of jurisdiction is decided on the basis of affidavits and other written material, the plaintiff need only make a prima facie showing that jurisdiction exists." *Id.* "The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits." *Id.* "If the parties present conflicting affidavits, all factual disputes must be resolved in the plaintiff's favor, and the plaintiff's prima facie showing is sufficient notwithstanding the contrary presentation by the moving party." *Id.* However, only the well pled facts of plaintiff's complaint, as distinguished from mere conclusory allegations, must be accepted as true." *Id.*

The Court must engage in a two-step analysis in determining whether the exercise of personal jurisdiction is appropriate. *Wenz v. Memery Crystal,* 55 F.3d 1503, 1507 (10th Cir. 1995). The Court "must initially determine whether the exercise of jurisdiction is sanctioned by the Colorado long-arm statute, which is a question of state law, . . . and then determine whether the exercise of jurisdiction comports with the due process requirements of

the Constitution." *Id.* at 1506-07. Because Colorado's long-arm statute has been construed by the Colorado Supreme Court as allowing personal jurisdiction to the full extent permitted under federal law, *Safari Outfitters, Inc. v. Superior Ct.*, 448 P.2d 783, 784 (Colo.1968), "[the court's] analysis collapses into a single inquiry, whether the exercise of personal jurisdiction over [the defendant] comports with due process." *Nat. Business Brokers, Ltd. v. Jim Williamson Prods., Inc.*, 115 F. Supp. 2d 1250, 1253 (D. Colo. 2000), *aff'd*, 16 Fed. Appx. 959 (10th Cir. 2001).

"[D]ue process requires only that ... [the defendant] have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Trierweiler v. Croxton and Trench Holding Corp.*, 90 F.3d 1523, 1532 (10th Cir. 1996) (quotation omitted). Critical to the due process analysis "'is that the defendant's conduct and connection with the forum State are such that [it] should reasonably anticipate being haled into court there.'" *Id.* (quotations omitted). The reasonable anticipation requirement is satisfied if the defendant has engaged in "some act by which [it] purposefully avails itself of the privilege of conducting activities with the forum State, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

The "minimum contacts" requirement of due process may be met in two ways, through showing the existence of either specific jurisdiction or general jurisdiction. *Trierweiler*, 90 F.3d at 1532. It appears that Plaintiffs are relying upon the doctrine of specific jurisdiction. Thus, I must address whether the exercise of specific personal jurisdiction over Defendant would offend due process. The specific jurisdiction inquiry involves two steps. *Id.* First, the court must "ask whether the nonresident defendant has 'minimum contacts' with the forum state such that 'he should reasonably anticipate being haled into court there.'" *Id*. (quotation omitted). "A defendant may reasonably anticipate being subject to suit in the forum state 'if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities.'" *Id*. (quotation and internal quotation marks omitted). Second, if the defendant has sufficient minimum contacts, "we ask whether the court's 'exercise of personal jurisdiction over the defendant offends traditional notions of fair play and substantial justice.'" *Id*. (quotation and internal quotation marks omitted). "This question turns on whether the exercise of personal jurisdiction is 'reasonable' under the circumstances of a given case." *Id*. (quotation omitted).

Plaintiffs' argument has been rejected in a case that is directly on point to the instant case. In *Rank v. Hamm*, 2007 WL 894565 *12 (S.D.W. Va. March 21, 2007), a case involving a factual situation strikingly similar to this one wherein Defendant Jenkins was also a defendant, plaintiffs were asked to leave an event at which the President was speaking for wearing t-shirts that displayed messages expressing disagreement with the President and his policies. The court held that the adoption of a nationwide policy did not result in the policymaker directing personal activities toward the forum state. *Id*. The court, in a footnote, also noted that such an argument appears to attempt to "capture of Jenkins in an overreaching, positional manner more akin to what one might expect in an official capacity suit." *Id*.

In this case, although not explicit, it appears that Plaintiffs also assert that Jenkins purposefully availed himself to the forum because his agents committed the deprivation. They rely heavily upon, *Elmaghraby v. Aschcroft*, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005), rev'd on other ground sub nom. *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), emphasizing the *Elmaghraby* language where the court explained, a court may constitutionally exercise jurisdiction over a non-domiciliary "if a person or *through an agent*, he ... commits a tortuous act within the state.... *Id*. at *9 (emphasis added by Plaintiffs). I do not find that case to be

persuasive. It is distinguishable from the instant case because Defendant Jenkins had left the White House prior to March 21, 2005 and had no ability to control the conduct of the other Defendants.

Finally, Plaintiffs contend that *Calder v. Jones*, 465 U.S. 783 (1984) directs that jurisdiction is appropriate here. In *Calder*, the Supreme Court held that California had jurisdiction over Florida reporters who had written an allegedly libelous article for the National Enquirer about a California actress. The Court noted that California "[was] the focal point both of the story and the harm suffered." *Id.* at 789. Here, it is clear that Colorado was not the focal point of policy at issue. It is undisputed that Defendant Jenkins had no knowledge of Plaintiffs or the event until afterwards. I find that Plaintiffs have not established a prima facie showing of minimum contacts with Colorado and Defendant Jenkins Motion to Dismiss is granted. B.

Defendants Casper and Klinkerman

i. Standard of Review

In ruling on a Motion to Dismiss pursuant to 12(b)(6), the standard used to be that the court "'must accept all the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff.'" *David v. City and County of Denver*, 101 F.3d 1344, 1352 (10th Cir. 1996), *cert. denied*, 522 S.Ct. 858 (1997) (quoting

Gagan v. Norton, 35 F.3d 1473, 1474 n. 1 (10th Cir. 1994)). Thus, until recently, a dismissal was only warranted where "it appear[ed] beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *The Ridge at Red Hawk, L.L.C. v.Schneider*, 2007 WL 1969681 at *3 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). "However, the Supreme Court recently decided that 'this observation has earned its retirement,' and it has prescribed a new inquiry for us to use in reviewing a dismissal: whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *Id*. (quoting *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1969 (2007)). "The Court explained that a plaintiff must 'nudge [][his] claims across the line from conceivable to plausible' in order to survive a motion to dismiss." *Id*. (quoting *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. at 1974). "Thus, the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." *Id*.

ii. The Positions of the Parties as to Qualified Immunity

Defendant Klinkerman asserts that he is entitled to qualified immunity because (1) he acted as an agent of, and was substantially supervised by the White House, (2) he was

acting as a volunteer, and (3) his conduct did not violate a constitutional right.

Defendant Casper asserts that he is entitled to qualified immunity because (1) he acted as an agent of, and was closely supervised by, the White House; and (2) his conduct did not violate Plaintiffs' constitutional rights.

Plaintiffs, in response to both Defendants Klinkerman and Casper Motions state that they do not object to Defendants' invocation of the qualified immunity doctrine, and instead argue that Casper and Klinkerman's actions, in excluding Plaintiffs on the basis of their viewpoint, violated the First Amendment.

iii. Analysis

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court held that government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known. *Harlow* places a presumption in favor of immunity of public officials acting in their individual capacities. *Schalk v. Gallemore*, 906 F.2d 491 (10th Cir. 1990). The Tenth Circuit has indicated that the defense of qualified immunity should be raised in the answer or in a motion to dismiss or for summary judgment. *Quezada v. County*

of Bernalillo, 944 F.2d 710, 718 (10th Cir. 1991). "Defendants who are unsuccessful in having a lawsuit dismissed on qualified immunity grounds before trial may reassert the defense at trial or after trial."

Id.

Once the defense is raised by a defendant, the burden shifts to the plaintiff to come forward with facts or allegations sufficient to show both "'that the defendant's actions violated a constitutional or statutory right'" and that the right "was clearly established at the time of the defendant's unlawful conduct." *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001) (quoting *Albright v. Rodriguez*, 51 F.3d 15531, 1534 (10th Cir 1995)). *See also Workman v. Jordan*, 32 F.3d 457, 479 (10th Cir. 1994); *Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996).

> A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. . . . In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the

> basis for a holding that a law is clearly established.

Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2131, 2156 (2001) (citations omitted). In other words, once a defendant pleads a defense of qualified immunity, the judge should consider "not only the applicable law, but whether that law was clearly established at the time an action occurred . . . ." *Siegert v. Gilley*, 500 U.S. 226, 231 (1991) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert*, 500 U.S. at 232.

A plaintiff cannot defeat a defense of qualified immunity merely by alleging a violation of "extremely abstract rights." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Rather, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized sense." *Id.* at 640. "'To be clearly established, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Brewer*, 76 F.3d at 1134 (quotation omitted); *see also Snell v. Tunnell*, 920 F.2d 673, 696 (10th Cir. 1990)(quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)), *cert.*

denied, 111 S.Ct. 1622 (1991). *See also Cram*, 252 F.3d at 1128. Ordinarily, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Id.* (quoting *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992)); *see also Patrick v. Miller*, 953 F.2d 1240 (10th Cir. 1992). This requires "'some, but not necessarily precise, factual correspondence" between cases predating the alleged violation and the facts in question in this case. *Calhoun v. Gaines*, 1992 WL 387385 at 4 (10th Cir. 1992). In essence, this standard requires officials to know well developed legal principles and to relate and apply them to analogous factual situations." *Id.* However, "a single case from another circuit is not sufficient to clearly establish the law of this circuit." *Stump v. Gates*, 986 F.2d 1429 (10th Cir. 1993) (unpublished opinion)(1993 WL 33875); *see Woodward v. City of Worland*, 977 F.2d 1392, 1397 (10th Cir. 1992). The burden is on the plaintiffs to show that the law was clearly established at the time of the alleged violation. *Patrick,* 953 F.2d at 1243; *Dixon v. Richer*, 922 F.2d 1456, 1460 (10th Cir. 1991).

If the law is clearly established, the question becomes whether the Defendants' conduct was objectively reasonable in light of the clearly established law. *Breidenbach v. Bolish*, 126 F.3d 1288, 1291 (10th Cir. 1997). The test is one of objective reasonableness, in

light of the law at the time of the alleged violation. *Juntz v. Muci*, 976 F.2d 623, 627 (10th Cir. 1992). The issue of whether the law is clearly established is not a jury question. *Lutz v. Weld County School Dist.*, 784 F.2d 340, 343 (10th Cir. 1986); *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988). Plaintiff's failure to show that the law is clearly established "calls for the entry of judgment in favor the defendants who raised the defense." *Id.* Where the court concludes that the law controlling the constitutional violations alleged is "murky", the proper conclusion is that a reasonably objective person would not necessarily have known that the acts complained of were clearly violative of constitutional rights. *Eckhart v. Crofoot*, 1988 WL 10440 at *4 (D. Colo. 1988).

On the other hand, if the law was clearly established, the defense "ordinarily should fail, since a reasonably competent public official should know the law concerning his conduct." *Lutz*, 784 F.2d at 342; *Street v. Parham*, 929 F.2d 537, 540 (10th Cir. 1991). The only exception to this is where the official pleading an immunity defense "'claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard.'" *Stree*t, 929 F.2d at 540 (quoting *Harlow*, 457 U.S. at 819. According to *Lutz*, this issue would be the only fact issue that could be submitted to the jury. *Lutz*, 784 F.2d at 343; *see also Walker v.*

Elbert, 75 F.3d 592, 598-99 (10th Cir. 1996) (noting that qualified immunity is a jury question only when special circumstances are presented, i.e., when the defendant raises the defense of exceptional circumstances); *Street,* 929 F.2d at 540 ("[w]hen the jury decided Instruction No. 18 in the affirmative, it decided that the force used by the officer was unreasonable under the circumstances. There could, therefore, be no 'extraordinary circumstances' excusing the defendant's conduct").

Thus, if the court finds that the law was clearly established, then generally the defense fails and the jury is left with the issue of whether the law was violated, as given in the regular instructions. *See Skevofilax v. Quigley*, 586 F. Supp. 532, 541 (D. N.J. 1984). The only issue that could be submitted to the jury on a qualified immunity defense would then be if a defendant raises exceptional circumstances where he is trying to prove that he neither knew or should have known of the relevant legal standard. *Id.*

Here, both Defendants assert that they are entitled to qualified immunity because their conduct did not violate Plaintiffs' constitutional rights. In this case, Plaintiffs assert that Defendants Klinkerman and Casper violated their First Amendment rights by committing viewpoint discrimination. Defendants argue that, when the President chooses to speak, he need not allow any person

the opportunity to express a contrary viewpoint during his speech. Defendants cite to *Sistrunk v. City of Strongville*, 99 F.3d 194, 196-200 (6th Cir. 1996), for the proposition that when the government itself is speaking it not only has the right to speak, but also the complementary right to exclude from its speech those who express a contrary message.

In *Sistrunk*, which I find to be persuasive, the plaintiff obtained a ticket to a Bush-Quayle rally but was denied entry because she wore "a political button endorsing Bill Clinton for President." *Id.* at 196. She was not allowed to enter the rally until she relinquished her button. *Id.* Relying on the Supreme Court's decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 132 L. Ed. 2d 487, 115 S. Ct. 2338 (1995), the *Sistrunk* court held that there was no constitutional violation, since "even if plaintiff has alleged sufficient facts to establish that the city authorized the committee to exclude members of the public who sought to express a discordant message, plaintiff has not alleged that the city violated plaintiff's free speech rights; rather plaintiff has only established that the city permitted the committee to exercise its free speech rights and autonomy over the content of its own message." *Id.*

The court reasoned that " Plaintiff's only claim is that she was not permitted to participate *in the committee's speech* while

expressing her own discordant views." *Id.* at 199 (emphasis in the original). Further, "[t]o require that the organizers include the buttons and signs for Bill Clinton in the demonstration would alter the message the organizers sent to the media and other observers, even if the holders of the signs and wearers of buttons did not otherwise interfere with the pro-Bush rally." *Id.*

I find the court's reasoning particularly instructive in this case. Here, as in *Sistrunk*, Plaintiffs complaint is essentially that they were not permitted to participate *in the President's speech*. President Bush had the right, at his own speech, to ensure that only his message was conveyed. When the President speaks, he may choose his own words. See *Well v. City and County of Denver*, 257 F.3d 1132, 1143 (10th Cir. 2001)(holding that "the City of Denver is entitled to present a holiday message to its citizens without incurring a constitutional obligation to incorporate the message of any private party with something to say." "Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist."). As such, I find that there has been no constitutional violation.

Finally, even assuming *arguendo* that Plaintiffs' constitutional rights were violated, they have failed to demonstrate that those rights were "clearly established." Plaintiffs do

not cite any Tenth Circuit or Supreme Court case that defines the contours of this right as it applies to a situation in which the President, speaking in a limited private forum or limited nonpublic forum, excludes persons for the reasons identified in this Order. As such, I find that Defendants Casper and Klinkerman are entitled to qualified immunity.

Based on the foregoing, it is

ORDERED that Defendant Jenkins' Motion to Dismiss or in the Alternative for Summary Judgment, filed February 1, 2008 (docket #99) is **GRANTED** as to the Motion to Dismiss. It is

FURTHER ORDERED that Defendant Klinkerman's Motion to Dismiss Based on Qualified Immunity, filed February 4, 2008 (docket #105) is **GRANTED**. It is

FURTHER ORDERED that Defendant Casper's Motion to Dismiss Plaintiffs' Complaint for Failure to State a Claim Upon Which Relief May Be Granted on the Basis of Qualified Immunity, filed February 1, 2008 (docket # 102) is **GRANTED**.

Dated: November 6, 2008

BY THE COURT:

s/ Wiley Y. Daniel

Wiley Y. Daniel

Chief Judge

FILED
United States Court of Appeals
Tenth Circuit
April 20, 2010
Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LESLIE WEISE; ALEX YOUNG,

Plaintiffs - Appellants,

v. No. 09-1085
(D.C. No.1:05-CV-02355-WYD-CBS)

MICHAEL CASPER, in his individual capacity,
JAY BOB KLINKERMAN, in his individual capacity,

Defendants - Appellees,

and

GREG JENKINS, in his individual capacity; STEVEN A. ATKISS, in his individual capacity; JAMES A. O'KEEFE, in his individual capacity and JOHN/JANE DOES 1-2, both in their individual capacities,

Defendants.

ORDER

Before **HENRY**, Chief Judge, **TACHA, KELLY**, **BRISCOE**, **LUCERO, MURPHY**, **HARTZ**, **O'BRIEN, TYMKOVICH**, and **HOLMES**, Circuit Judges.*

This matter is before the court on appellants' Petition For Rehearing En Banc. We also have a response from the appellees. Both pleadings were transmitted to all of the judges of the court who are in regular active service and who are not disqualified. *See* Fed. R. App. P. 35(a). The implicit request for panel rehearing is denied. A poll was called on the en banc suggestion. On an equally divided vote, the petition for en banc rehearing is likewise denied. *See id* (noting "[a] majority of the circuit judges who are in regular active service and who are not disqualified may order" rehearing en banc).

Chief Judge Henry, and Judges Briscoe, Lucero, Hartz, and O'Brien would grant rehearing en banc.

Entered for the Court,

/s/
ELISABETH A. SHUMAKER
Clerk of Court

* The Honorable Neil M. Gorsuch is recused in this matter.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Wiley Y. Daniel

Civil Action No. 05-cv-02355-WYD-CBS

LESLIE WEISE and
ALEX YOUNG,

Plaintiffs,

v.

MICHAEL CASPER, in his individual capacity;
JAY BOB KLINKERMAN, in his individual capacity;
STEVEN A ATKISS, in his individual capacity;
JAMES A. O'KEEFE, in his individual capacity; and
JOHN/JANE DOES 1-5, all in their individual capacities,

Defendants.

ORDER

THIS MATTER is before the Court on the parties' Joint Motion for Certification Pursuant to Rule 54(b) [doc. #113, filed January 22, 2009]. The Court having reviewed the joint motion and being fully advised in the premises, it is hereby

ORDERED that the parties' Joint Motion for Certification Pursuant to Rule 54(b)[doc. #113, filed

January 22, 2009] is **GRANTED**. The Court, finding no just reason for delay, hereby certifies as a final judgment the Court's November 6, 2008 Order granting Defendant Casper's and Defendant Klinkerman's Motions to Dismiss [doc. #112]. It is

FURTHER ORDERED that the proceedings as to the remaining parties are hereby **STAYED** pending the outcome of Plaintiffs' appeal of the November 6, 2008 Order.

Dated: January 29, 2009.

BY THE COURT:

s/ Wiley Y. Daniel

WILEY Y. DANIEL,
CHIEF UNITED
STATES DISTRICT
JUDGE