No. 13-115

In the Supreme Court of the United States

TIM WOOD AND ROB SAVAGE, PETITIONERS

v.

MICHAEL MOSS, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners are Secret Service agents who, while protecting President George W. Bush, are alleged to have required that a group of 200 to 300 anti-Bush demonstrators be moved away from an alley next to an outdoor patio where the President was making a last-minute, unscheduled stop to dine. After they were moved, the anti-Bush demonstrators were less than one block farther from the alley than a group of pro-Bush demonstrators (who had not been adjacent to the alley at the outset). They were also two blocks farther from the route that the President's motorcade subsequently took when he left the restaurant. The court of appeals held that petitioners are not entitled to qualified immunity from a claim under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), of viewpoint discrimination in violation of the First Amendment. The questions presented are as follows:

1. Whether the court of appeals erred in denying qualified immunity to Secret Service agents protecting the President by evaluating the claim of viewpoint discrimination at a high level of generality and concluding that pro- and anti-Bush demonstrators needed to be positioned an equal distance from the President while he was dining on the outdoor patio and then while he was travelling by motorcade.

2. Whether respondents have adequately pleaded viewpoint discrimination in violation of the First Amendment when no factual allegations support their claim of discriminatory motive and there was an obvious security-based rationale for moving the nearby anti-Bush group and not the farther-away pro-Bush group.

PARTIES TO THE PROCEEDING

Petitioners Tim Wood and Rob Savage were defendants-appellants in the court of appeals.

Ron Ruecker, Eric Rodriguez, Tim F. McClain, and Randie Martz were defendants-appellants in the court of appeals.

Michael Moss, Lesley Adams, Beth Wilcox, Richard Royer, Lee Frances Torelle, Mischelle Elkovich, Anna Vine (formerly known as Anna Boyd), and the Jackson County Pacific Green Party were plaintiffs-appellees in the court of appeals.

Several other individuals and entities were defendants in the district court but did not file notices of appeal and were neither appellants nor appellees in the court of appeals. See App., *infra*, 1a-3a.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Tim Wood and Rob Savage, two agents of the United States Secret Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, as modified upon denial of rehearing en banc (App., *infra*, 1a-59a), is reported at 711 F.3d 941. The order of the district court and the recommendation and report of the magistrate judge (App., *infra*, 60a-157a) are reported at 750 F. Supp. 2d 1197. The opinion of the court of appeals following an earlier appeal is reported at 572 F.3d 962. The previously appealed order of the district court, and the recommendation and report of the magistrate judge, are unreported but available at 2007 WL 2915608.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2012. A petition for rehearing was denied on February 26, 2013 (App., *infra*, 8a). On May 16, 2013, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including June 27, 2013. On June 20, 2013, Justice Kennedy further extended the time to July 26, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law * * * abridging the freedom of speech."

STATEMENT

As relevant to this petition, this is a suit brought by seven of respondents under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The suit was filed against petitioners, two individual agents of the United States Secret Service, for actions they allegedly took while serving on a protective detail for the President of the United States. In 2009, the court of appeals reversed the district court's initial denial of petitioners' motion to dismiss. See *Moss* v. *United States Secret Serv.*, 572 F.3d 962 (9th Cir.) (*Moss I*). After remand, however, plaintiffs filed an amended complaint (App., *infra*, 158a-222a), and the district court denied in relevant part petitioners' motion to dismiss on qualified-immunity grounds (*id.* at 89a-121a). That decision was affirmed by the court of appeals (*id.* at 33a-50a), which also denied rehearing en banc (*id.* at 8a) over the dissent of eight judges (*id.* at 8a-23a).

1. On the evening of October 14, 2004, President Bush was expected to stay at a cottage located a short distance from the Jacksonville Inn in Jacksonville, Oregon. App., *infra*, 24a-25a. Seven of respondents were among a group of 200 to 300 anti-Bush demonstrators who had assembled on the street and sidewalks in the block of California Street immediately adjacent to the Inn, while a group of pro-Bush demonstrators had assembled in the next block.[1] *Ibid.*; see *id.* at 212a (map of the Inn's vicinity, including the demonstrators' initial locations). After the two groups had assembled, the President decided to make a previously unscheduled stop to dine on an outdoor patio at the Inn. *Id.* at 25a. As relevant here, the gravamen of the Second Amended Complaint (*id.* at 158a-222a) is that petitioners engaged in unconstitutional viewpoint discrimination by requiring respondents to be moved away from the alley leading to the President's dining area. After they were moved, respondents (and the other anti-Bush demonstrators) were farther from the President than the pro-Bush demonstrators (who were farther from that alley at the outset); farther from the President than diners and guests at the Inn; and farther from the President's motorcade when it departed the Inn than were the pro-Bush demonstrators. See *id.* at 36a-43a & n.5.

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[1] Respondents in this Court include the anti-Bush demonstrators, the Jackson County Pacific Green Party, and state police officers. See Sup. Ct. R. 12.6; App., *infra*, 1a-3a (caption identifying parties to the proceeding in the court of appeals). Because the court of appeals instructed the district court to dismiss the claim appealed by the state police officers (*id.* at 58a), and because the Jackson County Pacific Green Party did not join the *Bivens* claim against petitioners (*id.* at 198a-199a), this petition henceforth uses the term "respondents" to refer to the seven individual anti-Bush demonstrators who were plaintiffs-appellees in the court of appeals. See p. II, *supra*.

Respondents allege that petitioners "were Secret Service agents at the scene of the demonstration" who were "assigned to provide security for the President." App., *infra*, 165a. Just before the President arrived at the Inn, state and local police officers, acting on Secret Service direction, cleared the alley next to the Inn and prevented those in front of the Inn from crossing the street or leaving the sidewalks. *Id.* at 175a-176a. Guests and diners already at the Inn and restaurant patio were allowed to remain. *Id.* at 177a.

The complaint alleges that, when the President arrived at the Inn, the assembled groups of anti- and pro-Bush demonstrators "had equal access" to him because both groups were on California Street but on opposite sides of Third Street. App., *infra*, 174a-175a. Shortly after the President arrived at the outdoor patio behind the Inn, however, the Secret Service agents directed state and local police to "clear California Street of all persons between Third and Fourth Streets"—the block immediately adjacent to the alley leading to the patio—by "mov[ing] them to the east side of Fourth Street and subsequently to the east side of Fifth Street." *Id.* at 177a. Respondents allege that police officers "us[ed] clubs, pepper spray bullets, and forceful shoving" to move them. *Id.* at 180a.

Respondents allege that the "agents told [the police] that the reason for the Secret Service's request or direction was that they did not want anyone within handgun or explosive range of the President." App., *infra*, 177a. Respondents claim that this "assertion was false * * * because there was no significant security difference between the two groups of demonstrators." *Id.* at 177a-178a. In respondents' view, if that security rationale had been the agents' actual reason for moving the anti-

Bush demonstrators, petitioners "would have requested or directed that all persons dining, staying at, or visiting the Inn who had not been screened * * * be removed from the Inn," and would also "have requested or directed that the pro-Bush demonstrators * * * be moved further to the west so that they would not be in range of the President as [his motorcade] travelled from the Inn to the" nearby cottage where he would spend the night. *Id.* at 178a.

Respondents acknowledge that the Secret Service has promulgated "written guidelines, directives, instructions and rules" that prohibit discrimination against demonstrators on the basis of their speech. App., *infra*, 184a. Respondents allege, however, that those documents "do not represent the actual policy and practice of the Secret Service." *Ibid.* They further allege that the Secret Service has a history of "discriminating against First Amendment expression," *id.* at 181a (capitalization modified), and that "[t]he White House under President George W. Bush * * * sought to prevent or minimize the President's exposure to dissent or opposition during his public appearances and travels," *id.* at 182a-183a. In support of that allegation, respondents invoke portions of a manual for the White House Advance Team and published reports of "numerous other occasions" on which the Secret Service purportedly sought to shield President Bush from "anti-government expressive activity." *Id.* at 189a-194a, 213a-217a. They allege that petitioners' actions "on October 14, 2004, were an implementation of this actual policy and practice" of viewpoint discrimination in violation of the First Amendment. *Id.* at 185a-186a.

With respect to petitioners, the Second Amended Complaint's first claim for relief alleges a violation of

respondents' First, Fourth, and Fifth Amendment rights. App., *infra*, 198a.[2] On that claim, respondents seek compensatory and punitive damages, pre- and post-judgment interest, costs, and attorney's fees. *Id.* at 199a-201a, 205a-207a, 210a.

2. In 2007, the district court dismissed most of the claims against petitioners and other defendants that respondents had asserted in an earlier version of their complaint. App., *infra*, 66a-67a. The court denied petitioners' motion to dismiss the First Amendment claim against them, however, and denied their defense of qualified immunity. *Id.* at 67a-68a. On petitioners' interlocutory appeal, the court of appeals in *Moss I* reversed the district court's denial of petitioners' motion to dismiss the First Amendment claim against them on qualified-immunity grounds, concluding that "[t]he factual content contained within the complaint does not allow us to reasonably infer that [petitioners] ordered the relocation of [respondents'] demonstration because of its anti-Bush message." 572 F.3d at 972. On remand, respondents filed their Second Amended Complaint, and petitioners (and other defendants) again filed motions to dismiss on qualified-immunity and other grounds. App., *infra*, 71a.

In 2010, the district court, adopting the report and recommendation of the magistrate judge, granted the motions to dismiss in part and denied them in part. App., *infra*, 60a-62a. With respect to respondents' "claims for First Amendment violations against [petitioners]," the court found that the Second Amended Complaint "meets the stricter pleading standards im-

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[2] The other claims in the complaint—against state and local officials and entities, against other Secret Service defendants, and against petitioners in their official capacity—are not at issue in this Court.

posed by [*Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009)]." App., *infra*, 61a; see *id.* at 89a-114a. The court also held that petitioners "have not shown, at least at this stage of the litigation, that they are entitled to qualified immunity." *Id.* at 61a; see *id.* at 114a-121a.

3. Petitioners again filed an interlocutory appeal. This time, however, the court of appeals affirmed in relevant part. App., *infra*, 1a-59a.

a. The court of appeals recognized that government officials cannot be denied qualified immunity at the pleading stage unless (1) the plaintiffs have alleged facts that "make out a violation of a constitutional right," and (2) "the right at issue was clearly established at the time of [the] defendant's alleged misconduct." App., *infra*, 31a-32a (quoting *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009)) (alteration in quotation).

b. Turning to the claim in question, the court of appeals stated that "[a] restriction on speech is viewpoint-based if (1) on its face, it distinguishes between types of speech or speakers based on the viewpoint expressed; or (2) though neutral on its face, the regulation is motivated by the desire to suppress a particular viewpoint." App., *infra*, 35a. The court first found that respondents have adequately alleged facial viewpoint discrimination. *Id.* at 37a. The court explained that, after the anti-Bush group was moved, those demonstrators were "more than a block farther from where the President was dining than [were] the pro-Bush demonstrators, and, one can infer, were therefore less able to communicate effectively with the President, media, or anyone else inside or near the Inn." *Ibid.* The court also found it "critical[]" that, as a result of the move, "the anti-Bush protestors were two blocks away from the [post-dinner] motorcade

route, while the pro-Bush demonstrators remained along it." *Ibid.* The court dismissed petitioners' contention that the President's "armored limousine" "had far greater security than the open-air patio where the President dined," stating that this contention "rests on facts outside of the complaint" and that "a viewpoint-neutral rationale cannot transform a facially discriminatory policy * * * into a valid one." *Id.* at 37a-38a.

The court of appeals further held that respondents have adequately alleged that petitioners "acted with an impermissible motive of shielding the President from those expressing disapproval of him or his policies." App., *infra*, 38a. The court concluded that respondents have "plead[ed] facts that make plausible their claim that they were moved because of their viewpoint—that the security rationale, if indeed offered by the agents at all, was pretextual." *Id.* at 39a. That conclusion was based on respondents' "asser[tion]" that, because they were separated from the outdoor patio by a six-foot-high fence and from the alley by police officers clad in riot gear, "they posed no threat to the President, and there was thus no reason for them to be moved from their initial location." *Id.* at 40a. The court also concluded that the Second Amended Complaint "elaborates in much more detail" on respondents' allegation of the Secret Service's "'officially authorized pattern and practice' of shielding the President from dissent," an allegation the court in *Moss I* had found to be merely conclusory in the First Amended Complaint. *Id.* at 41a. The additional detail came in the form of 12 "similar instances of viewpoint discrimination against protestors expressing negative views of the President," as well as excerpts from a Presidential Advance Manual which "direct[] the President's advance team to 'work with the

Secret Service * * * to designate a protest area * * *, preferably not in view of the event site or motorcade route.'" *Id.* at 41a-42a (emphasis omitted).

c. The court of appeals further held that petitioners are not entitled to qualified immunity. App., *infra*, 43a-47a. The court reiterated that the anti-Bush group was "moved over a block farther from the Inn than the pro-Bush demonstrators," and that "based on the facts alleged, there are relevant ways" in which the two groups' "distances [from the President while he was dining] were not comparable." *Id.* at 44a. The court also found it "quite relevant" that "the pro-Bush demonstrators were permitted to remain along the President's motorcade route, while the anti-Bush protestors were kept away." *Ibid.* The court stated that, taking respondents' "allegation of discriminatory motive as true, it is clear that no reasonable agent would think that it was permissible under the First Amendment to direct the police to move protestors farther from the President because of the critical viewpoint they sought to express." *Id.* at 45a; see *ibid.* (finding it "'beyond debate' that, particularly in a public forum, government officials may not disadvantage speakers based on their viewpoint") (quoting *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2083 (2011)).

d. In response to a dissent from denial of rehearing en banc (discussed below), the court of appeals amended its opinion to expand its discussion of qualified immunity. App., *infra*, 4a-7a, 47a-50a. The court stated that "any explanation for the agents' differential treatment of the pro-[ ]and anti-Bush demonstrators would have to be so obviously applicable as to render the assertion of unconstitutional viewpoint discrimination implausible." *Id.* at 47a. The court believed, however, that "there is simply *no* apparent explanation for why the Secret Ser-

vice agents permitted only the pro-Bush demonstrators, and not the anti-Bush protestors, to remain along the President's after-dinner motorcade route." *Ibid.* The court rejected the suggestion that "the pro-Bush demonstrators were not moved because they were ostensibly further than the protestors from the patio where President Bush was dining." *Ibid.* In the court's view, that explanation was "non-responsive" to the fact that the anti-Bush group was moved "a considerable distance, to a location" that was "not comparable to the place where the pro-Bush group was allowed to remain." *Id.* at 48a (internal quotation marks omitted).

Finally, the court of appeals viewed decisions like *Hill* v. *Colorado*, 530 U.S. 703 (2000), which have upheld "certain buffer zones" near abortion clinics, as illustrating why respondents have alleged "a plausible claim of a violation of clearly established law regarding impermissible viewpoint discrimination." App., *infra*, 49a. The court had "no doubt" that any ordinance "establish[ing] a one-hundred foot buffer zone for pro-abortion demonstrators and a three-hundred foot buffer zone for anti-abortions protestors" would have been "summarily invalidated." *Ibid.* The court believed that respondents have "plausibly allege[d] just such a significant *difference* in the buffer zone in a public forum." *Id.* at 50a.

4. Petitioners sought rehearing en banc, which the court of appeals denied. App., *infra*, 8a. In an opinion joined by seven other judges, Judge O'Scannlain dissented from the denial of rehearing. *Id.* at 8a-23a. In the dissenters' view, the court of appeals' opinion "once again commits many familiar qualified immunity errors" by, *inter alia*, "afford[ing] unwarranted deference to legal conclusions in [respondents'] complaint" and "defin[ing] the right at issue too broadly." *Id.* at 22a;

see *id.* at 12a-15a, 15a-18a. In light of the complaint's cognizable factual allegations, the dissenting judges concluded that two legal propositions were not clearly enough established for respondents to defeat petitioners' claim of qualified immunity. *Id.* at 18a. First, the dissenters found that moving respondents "to a location one block farther from the President than [the pro-Bush demonstrators] when creating a Presidential security perimeter" did not violate any clearly established First Amendment right because "before this decision, no law appeared to require Secret Service agents to ensure that groups of differing viewpoints were positioned in locations exactly equidistant from the President at all times." *Id.* at 18a, 19a. Second, the dissenters stated that it "seems absurd" to construe the First Amendment as requiring Secret Service agents "to return a group of demonstrators to their original location before the President could leave in his motorcade." *Id.* at 20a.

The dissenting judges concluded that the court of appeals' decision "renders the protections of qualified immunity toothless" and "hamstrings Secret Service agents, who must now choose between ensuring the safety of the President and subjecting themselves to First Amendment liability." App., *infra*, 22a-23a. Recognizing that the Ninth Circuit's "track record in deciding qualified immunity cases is far from exemplary," the dissenters expressed "concern[]" that, "with this decision, * * * our storied losing streak will continue." *Id.* at 22a (citing four qualified-immunity cases in which this Court has reversed the Ninth Circuit).

REASONS FOR GRANTING THE PETITION

As the eight judges who dissented from the denial of rehearing en banc recognized, the court below "commit[ted] many familiar qualified immunity errors."

App., *infra*, 22a. Most egregiously, the court disregarded this Court's repeated admonitions against "defin[ing] clearly established law at a high level of generality." *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2084 (2011). The Ninth Circuit's application of First Amendment and qualified-immunity principles is in significant tension with a recent decision of the Tenth Circuit, which recognized the challenges faced by Secret Service agents dealing with multiple groups of demonstrators near the President.

Respondents allege two distinct (though complementary) theories in support of their claim of unconstitutional viewpoint discrimination. See App., *infra*, 35a. First, respondents allege that petitioners' "actions were facially viewpoint discriminatory" because "the agents explicitly treated pro- and anti-Bush demonstrators differently" by allowing the former to remain in closer proximity to the President. *Ibid.* In a multitude of circumstances, however, legitimate crowd-control measures may have the practical effect of placing different speakers expressing different views at different distances from the President or other high-level officials whom Secret Service agents are assigned to protect. Nothing in this Court's decisions even suggests, much less clearly establishes, that such disparate impact standing alone violates the First Amendment.

Second, respondents allege that petitioners' "actions, even if facially neutral, were motivated by an impermissible purpose to discriminate against the anti-Bush viewpoint [respondents] expressed." App., *infra*, 35a. When the defendant's invidious motive is a necessary element of a constitutional claim, however, the plaintiff cannot defeat a motion to dismiss simply by alleging in conclusory terms that the defendant acted with the

requisite unlawful motive. Rather, the plaintiff must allege specific facts that, taken as true, raise a sound inference of unconstitutional motivation. Respondents did not satisfy that requirement here. The court of appeals found respondents' factual allegations sufficient only by effectively requiring petitioners to negate the *possibility* of invidious intent. This Court has made clear, however, that even when unconstitutional motive is a *conceivable* explanation for the facts alleged in a plaintiff's complaint, a motion to dismiss should be granted if a *more likely* innocent explanation for the alleged facts exists.

The Ninth Circuit's errors are sufficiently important to warrant this Court's review because of the particular threats that the decision below poses to the sensitive and important work of the Secret Service in protecting high-level officials. Indeed, as in previous qualified-immunity cases from the Ninth Circuit—including one involving Secret Service agents—summary reversal would be appropriate. See *Brosseau* v. *Haugen*, 543 U.S. 194 (2004) (per curiam); *Hunter* v. *Bryant*, 502 U.S. 224 (1991) (per curiam).

A. The Court Of Appeals Erroneously Defined The Right Against Viewpoint Discrimination At A High Level Of Generality, Without Accounting For The Specific Context Of The Allegations In This Case

The court of appeals held that petitioners are not entitled to qualified immunity on respondents' claim, under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), of viewpoint discrimination in violation of the First Amendment.[3]

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[3] This Court has "never held that *Bivens* extends to First Amendment claims." *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 n.4

That claim is based on actions that petitioners allegedly took while protecting the President. The decision below flouts this Court's repeated exhortations that, for purposes of qualified immunity, the court must consider the specific circumstances of the alleged violation rather than describing at an abstract or general level the constitutional right that is alleged to have been violated. The Ninth Circuit's error is highlighted by a recent Tenth Circuit decision, which dismissed a viewpoint-discrimination claim against a Secret Service agent in similar (though not identical) circumstances.

1. For the past 25 years, this Court has "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality" in conducting qualified-immunity analysis. *Al-Kidd*, 131 S. Ct. at 2084; see *Brosseau*, 543 U.S. at 199, 201 (summarily reversing the Ninth Circuit for evaluating qualified immunity "at a high level of generality"); *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001) (reversing the Ninth Circuit because "whether the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals"); *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999) (explaining that "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established"); *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987) (noting that evaluating a claim at an abstract level of generality would transform "a guarantee of immunity into a rule of pleading"). The Court

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(2012). No argument that *Bivens* remedies are unavailable in this context, however, was either pressed or passed upon in the court of appeals. For purposes of this petition, petitioners therefore assume that *Bivens* liability extends to First Amendment claims of viewpoint discrimination.

reiterated this precise point just last year. See *Reichle* v. *Howards*, 132 S. Ct. 2088, 2094 (2012) ("[T]he right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause."); *id.* at 2094 n.5 ("[W]e do not define clearly established law at such a 'high level of generality.'") (quoting *al-Kidd*, 131 S. Ct. at 2084).

As the Court explained in *al-Kidd*, "[t]he general proposition * * * that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." 131 S. Ct. at 2084. The same holds true for the viewpoint-discrimination claim at issue in this case. "[S]tating that the government cannot engage in viewpoint discrimination is just about as general as stating that the government cannot engage in unreasonable searches and seizures—an approach that is too general for the qualified immunity analysis." *Weise* v. *Casper*, 593 F.3d 1163, 1168 n.1 (10th Cir.), cert. denied, 131 S. Ct. 7 (2010).

The court below committed exactly that mistake, however, by defining the right alleged to have been violated as the right to be free of "viewpoint discrimination in a public forum." App., *infra*, 49a. The court ignored this Court's repeated admonitions that the pertinent constitutional right must be defined by reference to the specific context of the case, and that a right is clearly established for qualified-immunity purposes only if either "controlling authority" or "a robust 'consensus of cases of persuasive authority'" made clear that the defendant officer's own conduct was impermissible. *Al-Kidd*, 131 S. Ct. at 2084 (quoting *Wilson*, 526 U.S. at 617). Instead, the court of appeals simply proclaimed,

without regard to context, that it is "'beyond debate' that, particularly in a public forum, government officials may not disadvantage speakers based on their viewpoint." App., *infra*, 45a.

When stated at that general and abstract level, the court of appeals' proposition is correct. But it is insufficient to establish that petitioners' own alleged conduct constituted impermissible viewpoint discrimination, much less that the illegality of that conduct was clearly established at the time petitioners acted. The proper question for qualified-immunity purposes is whether the "'contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Al-Kidd*, 131 S. Ct. at 2083 (quoting *Anderson*, 483 U.S. at 640) (alterations in original). In other words, it must be "clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Saucier*, 533 U.S. at 202 (emphasis added).

2. Until the court of appeals issued the decision below, no decision of this Court or of the Ninth Circuit had "appeared to require Secret Service agents to ensure that groups of differing viewpoints were positioned in locations exactly equidistant from the President at all times." App., *infra*, 19a (O'Scannlain, J., dissenting from the denial of rehearing en banc). Respondents seek to hold petitioners liable for (a) "moving one group to a location one block farther from the President than another when creating a Presidential security perimeter," and (b) declining "to move the group back to their original location before the President could leave in his motorcade." *Id.* at 18a. The court of appeals identified no sound reason for viewing that course of conduct as a constitutional *violation*, much less for regarding it as a violation of a *clearly established* constitutional

right. In particular, the general rule against "viewpoint discrimination" is of no help in determining whether the relatively trivial disparate impact alleged in this case violates the First Amendment.

The court of appeals identified no decisions indicating, in remotely similar contexts, that Secret Service agents have an affirmative First Amendment obligation to equalize the distances from the President of groups engaged in competing forms of expressive activity. Reasonable agents could have readily believed that it was permissible to move the anti-Bush group across Fifth Street without moving the pro-Bush group. The two groups posed different security concerns at the outset because the anti-Bush group was initially located significantly closer to, and at a site less screened from, the patio than was the pro-Bush group. Respondents' map makes clear that, even after the anti-Bush group was moved across Fourth Street, it was still closer to, and less screened from, the patio.[4] At that point, the decision to move the anti-Bush group another block across Fifth Street did result in its being less than one block farther from the President than the pro-Bush group.[5] But the ability of the law-enforcement officers

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[4] At the corner of Fourth and California Streets, the anti-Bush group was closer than the pro-Bush group to the California Street entrance of the alley leading to the patio. From that corner, there were also fewer physical obstacles between the anti-Bush group and the patio, because the "Sterling Savings" building on the corner of Fourth and California did not extend nearly as far north as the "US Hotel" building on the corner of Third and California (next to the pro-Bush group). See App., *infra*, 212a.

[5] The court of appeals described the anti-Bush group as being separated from the President "by more than a full square block[] and two roadways," and it characterized that distance as "more than a block farther * * * than the pro-Bush protestors." App., *infra*, 37a,

on the scene to engage in crowd control would be enhanced by using a cross-street as the line of demarcation, which could reasonably be thought to outweigh any desire to calibrate distances more precisely under the circumstances.

The court of appeals also attached substantial weight to the fact that moving the anti-Bush demonstrators away from the alley next to the outdoor patio while the President was dining later resulted in their being two blocks farther than the pro-Bush group from the post-dinner motorcade route. See App., *infra*, 37a-38a, 44a, 47a, 48a. The court cited no cases, however, suggesting that petitioners were required to let the anti-Bush group move back to Third Street before the agents allowed the President's motorcade to depart the Inn, simply to ensure that the pro- and anti-Bush groups were equidistant (as they had been when the motorcade initially arrived). In fact, respondents' complaint does not allege that the anti-Bush group had any reasonable opportuni-

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48a. That calculation is belied by respondents' own map, which reveals that the pro-Bush group was itself separated from the alley leading to the patio by most of one block and one roadway. *Id.* at 212a. Because that distance was *longer* than the distance from the alley to the east side of Fourth Street, the addition of precisely one more block (*i.e.*, the distance from the east side of Fourth Street to the east side of Fifth Street) necessarily resulted in a difference of less than one block between the two groups' distances from the alley. Since the pro-Bush group was itself nearly a block from the alley, the less-than-one-block difference casts serious doubt on the court of appeals' willingness to "infer" that the anti-Bush group was materially "less able" than the pro-Bush group "to communicate effectively with the President" while he was dining. *Id.* at 37a. So, too, does the failure of the Second Amended Complaint to remedy a pleading deficiency identified in *Moss I*: that respondents did not allege they had been "moved to an area where the President could not hear their demonstration." 572 F.3d at 971.

ty to move back to Third Street between the time when the President left dinner and the time when his motorcade traveled down that street; nor does it allege that the motorcade should have been required to wait for the protestors to move. That alone should suffice to answer the court of appeals' puzzlement about "why the Secret Service agents permitted only the pro-Bush demonstrators, and not the anti-Bush protestors, to remain along the President's after-dinner motorcade route." *Id.* at 47a.[6]

"[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). Under the objective circumstances that petitioners faced, and given the comparatively small differences in the relative distances between the pro- and anti-Bush groups and the President, there is no sound reason to conclude that any First Amendment violation occurred, much less that petitioners violated any clearly established constitutional right. As in *al-Kidd*, "eight Court of Appeals judges" concluded that petitioners' alleged conduct was not illegal, which strongly bolsters their entitlement to qualified immunity. 131 S. Ct. at 2085; see *Wilson*, 526 U.S. at 618 ("If

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[6] Although the court of appeals described the D.C. Circuit's decision in *Mahoney* v. *Babbitt*, 105 F.3d 1452 (1997), as "closely on point," App., *infra*, 46a, the facts of *Mahoney* were quite different from the circumstances of this case. *Mahoney* involved concededly viewpoint-based decisions about whether to grant permits to demonstrators who wished to protest along an Inaugural Parade route. See 105 F.3d at 1455-1456. This case, by contrast, involves snap decisions about how, without the benefit of advance security work, to deal with two groups of demonstrators who were near an outdoor area where the President was dining.

judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.").

3. The Tenth Circuit recently rejected a viewpoint-discrimination claim involving a similar crowd-control situation. In *Pahls* v. *Thomas*, Nos. 11-2055 & 11-2059, 2013 WL 2398559 (10th Cir. June 4, 2013), a Secret Service agent was presumed to have known that anti-Bush protestors had been required by local police to be approximately 150 yards down a public road from a driveway that would be used by the President's motorcade; yet the agent allowed a group of Bush supporters to remain on private property at a location directly across the road from the driveway. *Id.* at *1, *22. In the course of reversing the denial of qualified immunity on summary judgment, the Tenth Circuit held that "[t]he First Amendment does not impose upon public officials an affirmative duty to ensure a balanced presentation of competing viewpoints." *Id.* at *23. Even though the Secret Service agent had allowed the Bush supporters to remain much closer than the protestors to the motorcade route, the court concluded that the First Amendment "did not impose upon him a corresponding duty to relocate Bush protesters to a more favorable location." *Ibid.* The involvement of local police in situating the anti-Bush protestors and the distinction between public and private property keep *Pahls* from being on all fours with this case. The Tenth Circuit's reasoning, however, further undermines the Ninth Circuit's suggestion that respondents had a clearly established constitutional right to be placed no further from the President than the pro-Bush demonstrators who were in the same general area.

B. The Court Of Appeals Erred In Holding That Respondents Adequately Pleaded The Discriminatory Motive Necessary For Their Claim Of Unconstitutional Viewpoint Discrimination

For the reasons stated above, respondents could not establish a violation of any clearly established constitutional right simply by proving that they were placed farther away from the President than were a competing group of demonstrators. Rather, a necessary element of respondents' viewpoint-discrimination claim is that they were placed at greater remove from the President *because of* the anti-Bush views they sought to express. In *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), this Court held that a complaint alleging discrimination in violation of the First Amendment (there, religious discrimination) must plead the defendant's discriminatory purpose or intent in factual, nonconclusory terms. *Id.* at 680-681.

The court below, however, effectively accepted the truth of respondents' conclusory allegations of discriminatory motive—allegations that, as the dissenters recognized, were "almost identical" with those in *Iqbal*. App., *infra*, 12a. As a result, the court of appeals "turn[ed] *Iqbal* on its head." *Ibid.* If the decision below is left uncorrected, it will be much more difficult for defendants in the Ninth Circuit to defeat claims involving allegations of illegal motive at the motion-to-dismiss stage, notwithstanding this Court's "repeated[]" emphasis on "the importance of resolving immunity questions at the earliest possible stage in litigation." *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009) (quoting *Hunter*, 502 U.S. at 227).

1. The complaint alleges that petitioners ordered "all persons" (a viewpoint-neutral category) to be moved from the block adjacent to the outdoor patio in order to

get them beyond "handgun or explosive range of the President" (a viewpoint-neutral justification). App., *infra*, 177a. Respondents nevertheless allege that petitioners "had no valid security reason to request or order the eviction of [respondents] from the north and south sidewalks of California Street between Third and Fourth Streets," *id.* at 186a, and that petitioners were instead motivated by a desire to discriminate against respondents on account of their expressive activity, *id.* at 185a. The only allegations in support of those conclusory statements about petitioners' alleged motive consist in two strands of the Second Amended Complaint. Neither of those strands, however, creates a plausible inference that petitioners acted with a discriminatory purpose.

First, respondents allege that, if security concerns had been "the true reason" for moving the anti-Bush demonstrators from their initial location, petitioners would likewise have removed "all persons dining, staying at, or visiting the Inn who had not been screened," and would have required that the pro-Bush group be moved away from the President's post-dinner motorcade route. App., *infra*, 178a. Both of those other groups, however, were readily distinguishable from the group of 200 to 300 persons who were located between Third and Fourth Streets. Any crowd in that location, whether pro- or anti-Bush, could have provided cover for someone who planned to do the President harm, and the crowd's presence would have made it more difficult for law-enforcement officers to look out for someone with weapons or explosives.

The security concerns arising from the presence of a large group of people near the outdoor patio where the President was dining were plainly different from those

associated with permitting a group (like the pro-Bush demonstrators) to remain along Third Street while the President's *motorcade* travelled by. Similarly, the other diners and guests to whom respondents refer were at the Inn before it was known that the President would dine there. Those individuals therefore were differently situated from (as well as much fewer in number than) the crowd outside, which had gathered in specific anticipation of seeing the President.[7] Petitioners' failure to move additional groups who were differently situated from the group including respondents does not indicate that the security-based rationale was pretextual or inconsistently applied.

Second, respondents invoke excerpts from a "Presidential Advance Manual" and published reports of other occasions on which the Secret Service supposedly acted to keep protestors (but not others) away from the President. App., *infra*, 189a-194a, 213a-217a. Those allegations shed no meaningful light on petitioners' own actions at issue in this case. None of the other incidents is alleged to have involved petitioners, and most of respondents' capsule descriptions of them apparently refer to pre-arranged protest zones associated with events where the President was expected to speak, or to protestors who might have disrupted such events—not to spur-of-the-moment decisions precipitated by unscheduled stops and multiple groups of differently situated people. See *id.* at 190a-194a. As the dissenters below noted, such events did not involve "the same agents or the same circumstances" and "do not show a

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[7] Because of serious law-of-the-case concerns arising from its previous decision in *Moss I*, the court of appeals expressly refrained from relying on respondents' references to the diners and guests at the Inn. App., *infra*, 43a n.5.

pattern pervasive enough to establish an unspoken policy of discrimination, especially in light of the explicit Secret Service policy prohibiting such conduct." *Id.* at 13a-14a.

Similarly, the "Presidential Advance Manual" on which respondents rely was, as the court of appeals acknowledged, "designed to guide the President's political advance team, not the Secret Service." App., *infra*, 42a. As the dissent below noted, the manual "clearly refers to ticketed presidential events, from which demonstrators can be excluded without violating the First Amendment." *Id.* at 14a. Indeed, the manual specifically distinguishes between the Secret Service's responsibility for demonstrators who "appear to be a security threat" and the advance team's responsibility for handling demonstrators who "appear likely to cause only a political disruption." *Id.* at 220a. There are accordingly no nonconclusory factual allegations that plausibly support respondents' naked assertions of discriminatory motive.

2. In cases like this one, where the legality of the defendants' conduct depends in part on their subjective reasons for acting as they did, a mere conclusory allegation of retaliatory (or otherwise improper) intent does not satisfy applicable pleading requirements. See *Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Respondents therefore could not have defeated a motion to dismiss in this case simply by alleging, in purely conclusory terms, that petitioners sought to retaliate against them for expressing anti-Bush views. The rule that such conclusory allegations are insufficient, however, would be of little value in protecting defendants against unsupported claims if a

plaintiff could carry its burden by pleading specific facts that, while "consistent with" an inference of unlawful conduct, are "more likely explained by[] lawful * * * behavior." *Id.* at 680.

Rather, to create an inference of unlawful motivation sufficient to defeat a motion to dismiss, the plaintiff must plead specific facts that, taken as true, refute any "obvious alternative explanation" for the defendant's conduct. *Iqbal*, 556 U.S. at 682 (citation omitted). In *Iqbal*, the obvious alternative explanation for Iqbal's detention was that "the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.* at 683. There, Iqbal failed to make a plausible case that discrimination, rather than this alternative explanation, was the reason for his treatment. *Id.* at 682 ("To prevail on that theory, the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as 'of high interest' because of their race, religion, or national origin."). And in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), the obvious alternative explanation to anti-competitive conspiracy was that the defendant companies were simply former government-sanctioned monopolists engaging in parallel but independent conduct, "sitting tight, expecting their neighbors to do the same thing." *Id.* at 568. The Court concluded that "[w]ithout more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Id.* at 556-557.

Here, in contrast, the court of appeals gave no meaningful weight to the common-sense inference that peti-

tioners, two Secret Service agents charged by statute with protecting the President (see 18 U.S.C. 3056(a)(1)), actually considered it important to move everyone between Third and Fourth Streets away from the restaurant patio (out of handgun or explosive range) in order to protect the President. Rather, the court stated that, "[a]s this case arises on a motion to dismiss, any explanation for the agents' differential treatment of the pro- and anti-Bush demonstrators would have to be *so obviously applicable* as to render the assertion of unconstitutional viewpoint discrimination implausible." App., *infra*, 47a (emphasis added). The practical effect of the court's approach is to preclude dismissal of a *Bivens* complaint whenever an innocent explanation for the defendant's conduct is not obviously the correct one—*i.e.*, whenever an inference of unlawful motivation is "consistent with" the facts alleged in the complaint. But see *Iqbal*, 556 U.S. at 680-682.

In both *Iqbal* and *Twombly*, this Court recognized that a good deal more than that is needed to bring the plaintiff's factual allegations "across the line from conceivable to plausible." *Iqbal*, 556 U.S. at 680 (quoting *Twombly*, 550 U.S. at 570). In particular, when a plaintiff's factual allegations are susceptible to "more likely [innocent] explanations," those allegations "do not plausibly establish [an invidious] purpose." *Id.* at 681. By requiring the defendant to negate any realistic possibility that he acted with an unconstitutional motive, the court of appeals' test all but precludes dismissal of a complaint in a case in which the plaintiff alleges an improper motive. That is particularly so because the record on a motion to dismiss typically consists of the complaint alone.

3. In *Crawford-El* v. *Britton*, 523 U.S. 574 (1998), this Court suggested that trial courts could weed out insubstantial motive-based cases by "insist[ing] that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment." *Id.* at 598. That suggestion anticipated, and is fully consistent with, the requirements subsequently announced in *Twombly* and *Iqbal*. The court of appeals in this case, however, allowed the complaint to survive a motion to dismiss without "specific, nonconclusory factual allegations" giving rise to a sound inference of unlawful motive.

The court of appeals suggested that petitioners could yet prevail by refuting respondents' allegations of unlawful motive "[a]fter discovery or trial." App., *infra*, 46a. This Court has repeatedly explained, however, that "the basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" *Iqbal*, 556 U.S. at 685 (quoting *Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)). "Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government." *Ibid.* Here, in a case that has made two trips to the court of appeals, the Secret Service and two of its agents have already borne the burdens of litigation for more than seven years since respondents filed their initial complaint. See 1:06-cv-03045 Docket entry No. 1 (D. Or. July 6, 2006).

By making it much more difficult to get cases dismissed at the pleadings-stage, the court of appeals'

decision diminishes government employees' ability to use qualified immunity as "an immunity from suit rather than a mere defense to liability." *Pearson*, 555 U.S. at 231 (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985)). That fundamental disruption in the doctrine warrants this Court's review.

C. The Decision Below Is Sufficiently Important To Warrant This Court's Review, Particularly In Light Of The Threats That It Poses To The Work Of The Secret Service

1. This Court and its members have repeatedly recognized the importance and sensitivity of the Secret Service's work in protecting the President and other high-level officials. In *Hunter*, the Court summarily reversed the Ninth Circuit's denial of qualified immunity to Secret Service agents who had been investigating threats to the President. 502 U.S. at 224-229. The Court explained that a core justification for qualified immunity—*i.e.*, that "'officials should not err always on the side of caution' because they fear being sued"—"is nowhere more important than when the specter of Presidential assassination is raised." *Id.* at 229 (quoting *Davis* v. *Scherer*, 468 U.S. 183, 196 (1984)). Justice Scalia, concurring in the judgment, concluded that the court of appeals' error involved the misapplication of the governing legal standard to the facts before the court, but found it "worthwhile to establish that this Court will not let such a mistake stand with respect to those who guard the life of the President." *Ibid.*; see *Reichle*, 132 S. Ct. at 2097 (Ginsburg, J., concurring in the judgment) (concluding that "ordinary law enforcement officers" would not be protected from the retaliatory-arrest claim at issue in that case, but that a different standard should apply to Secret Service agents evaluating a potential

"threat to the Vice President's physical security"); *Rubin* v. *United States*, 525 U.S. 990, 990-991 (1998) (Breyer, J., dissenting from denial of certiorari) ("The physical security of the President of the United States has a special legal role to play in our constitutional system.").

2. Although the decision below is not limited to the Secret Service context, its unduly permissive standard for allowing *Bivens* suits alleging viewpoint discrimination poses particularly great risks to the Secret Service's work. In protecting the physical safety of high-ranking public officials, Secret Service agents must often make spur-of-the-moment judgments in circumstances where the cost of a mistake may be very high. In determining whether particular individuals pose a threat to public officials, moreover, Secret Service agents "rightly take into account words spoken to, or in the proximity of, the person whose safety is their charge." *Reichle*, 132 S. Ct. at 2097 (Ginsburg, J., concurring in the judgment); cf. *Hunter*, 502 U.S. at 229-230 (Stevens, J., dissenting) ("Those 'who guard the life of the President' properly rely on the slightest bits of evidence—nothing more than hunches or suspicion—in taking precautions to avoid the ever-present danger of assassination."). As a result, distinguishing between permissible and impermissible content-based distinctions is a particularly delicate task. And even when the actions of Secret Service agents are subjectively motivated not by the content of anyone's speech, but merely by a large group's proximity to the President, agents' crowd-control measures may often have disparate impacts on the location of different individuals who are expressing different viewpoints.

During a typical year, the President alone makes hundreds of stops or appearances in public areas around the country. Impromptu or unscheduled visits, like the 2004 visit to the restaurant patio in Jacksonville, are not uncommon. Such stops often require agents to make quick, on-the-spot decisions to safeguard the President in the presence of large groups of people. Cf. *Scheuer* v. *Rhodes*, 416 U.S. 232, 246-247 (1974) (qualified immunity protects officials who need to "act swiftly and firmly" when faced with "an atmosphere of confusion, ambiguity, and swiftly moving events").

Agents should not be forced—as respondents suggested in the court of appeals—to keep the President away from a destination simply because a group of protesters may need to be moved to ensure the President's safety.[8] Nor should Secret Service agents be compelled to inquire into the political views of various groups and take additional steps to interfere with even more speech than security concerns would require in an attempt to keep opposing groups at roughly equal distances from the President, even as his own location changes. Cf. App., *infra*, 37a, 44a, 47a (deeming it "critical[]" that the dinner-time relocation of the anti-Bush group meant

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[8] At oral argument in the court of appeals, when asked what petitioners should have done when they arrived at the patio restaurant and discovered 200 to 300 people crowding the block immediately adjacent to the Inn, respondents' counsel stated that the agents should have "prevailed upon the President not to dine at the Inn" at all, or, in order to have "a basis to move the anti-Bush protestors a block east," "they should have moved the pro-Bush demonstrators a block west." Recording of Oral Argument at 42:22 to 43:36, http://www.ca9.uscourts.gov/media/view.php?pk_id=0000008129. But see, *e.g.*, *Frisby* v. *Schultz*, 487 U.S. 474, 485 (1988) (noting that a time, place, or manner regulation of speech should "target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy").

that it was farther than the pro-Bush group from the President's post-dinner motorcade route).

As the dissenting judges below explained, the court of appeals' decision effectively requires Secret Service agents "to act like concert ushers—ensuring with tape-measure accuracy that everyone who wants to demonstrate near the President has an equally good view of the show." App., *infra*, 8a. In protecting officials throughout the Nation, Secret Service agents are already required to make speedy decisions regarding the potential security implications of multifarious and rapidly evolving factual circumstances. They should not, while working in the Ninth Circuit, be distracted from those security-related assessments by the threat of personal liability if they fail to ensure comparable proximity to the President or other high-level officials of diverse groups who seek to express competing views.

3. Although the court of appeals' errors are sufficiently important to warrant plenary review, this Court may also wish to consider the possibility of summary reversal. In *Hunter*, this Court summarily reversed a Ninth Circuit decision that had erroneously denied qualified immunity to the defendant Secret Service officers. See 502 U.S. at 227-229. In *Brosseau*, the Court summarily reversed a Ninth Circuit decision that had denied qualified immunity based on rules of constitutional law "cast at a high level of generality." 543 U.S. at 199; see *id.* at 198-201. Since then, the Court has recently and repeatedly reiterated the need to consider the alleged unlawfulness of the defendants' conduct at an appropriate level of specificity when evaluating qualified immunity. See *Reichle*, 132 S. Ct. at 2094; *al-Kidd*, 131 S. Ct. at 2084. Summary reversal would likewise be amply justified here, since the decision below implicates *both* the

Secret Service's ability to protect the President *and* the Ninth Circuit's repeated failure, in conducting qualified-immunity analysis, to define the right in question at an appropriate level of specificity.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may also wish to consider summary reversal of the court of appeals' judgment.

Respectfully submitted.

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AUGUST 2013

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 10-36152, 10-36172

MICHAEL MOSS; LESLEY ADAMS; BETH WILCOX; RICHARD ROYER; LEE FRANCES TORELLE; MISCHELLE ELKOVICH; ANNA VINE, FKA ANNA BOYD, INDIVIDUALLY AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED; JACKSON COUNTY PACIFIC GREEN PARTY, PLAINTIFFS-APPELLEES

v.

UNITED STATES SECRET SERVICE, OF THE DEPARTMENT OF HOMELAND SECURITY; RALPH BASHAM, FORMER DIRECTOR OF THE UNITED STATES SECRET SERVICE, IN HIS INDIVIDUAL CAPACITY; TIM WOOD, UNITED STATES SECRET SERVICE AGENT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; ROB SAVAGE, UNITED STATES SECRET SERVICE AGENT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; JOHN DOE, 1, UNITED STATES SECRET SERVICE AGENT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, PARTICIPATING IN THESE ACTIONS AND KNOWN TO THE DEFENDANT SECRET SERVICE, BUT UNKNOWN AT THIS TIME TO PLAINTIFFS; DAVID TOWE, CHIEF OF POLICE OF JACKSONVILLE, OREGON, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION OF THE STATE OF OREGON; MIKE WINTERS, SHERIFF OF JACKSON COUNTY, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; JACKSON COUNTY, A MUNICIPAL CORPORATION OF THE STATE OF OREGON; JOHN DOES, 2-20 THAT IS, THE COMMANDING OFFICERS IF OTHER LAW ENFORCEMENT AGENCIES OF PUBLIC BODIES PARTICIPATING IN THESE ACTIONS, IN THEIR OFFICIAL

AND INDIVIDUAL CAPACITIES, KNOWN TO THE IDENTIFIED DEFENDANTS, BUT UNKNOWN AT THIS TIME TO PLAINTIFFS; MUNICIPAL DOES, THE PUBLIC BODIES EMPLOYING DEFENDANTS JOHN DOES 2-20; MARK SULLIVAN, DIRECTOR OF THE UNITED STATES SECRET SERVICE, IN HIS OFFICIAL CAPACITY, DEFENDANTS

AND

RON RUECKER, SUPERINTENDENT OF THE OREGON STATE POLICE, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; ERIC RODRIQUEZ, FORMER CAPTAIN OF THE SOUTHWEST REGIONAL HEADQUARTERS OF THE OREGON STATE POLICE, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; TIM F. MCCLAIN, SUPERINTENDENT OF THE OREGON STATE POLICE, IN HIS OFFICIAL CAPACITY; RANDIE MARTZ, CAPTAIN OF THE SOUTHWEST REGIONAL HEADQUARTERS OF THE OREGON STATE POLICE, IN HIS OFFICIAL CAPACITY, DEFENDANTS-APPELLANTS

MICHAEL MOSS; LESLEY ADAMS; BETH WILCOX; RICHARD ROYER; LEE FRANCES TORELLE; MISCHELLE ELKOVICH; ANNA VINE, FKA ANNA BOYD, INDIVIDUALLY AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED; JACKSON COUNTY PACIFIC GREEN PARTY, PLAINTIFFS-APPELLEES

v.

UNITED STATES SECRET SERVICE, OF THE DEPARTMENT OF HOMELAND SECURITY; RALPH BASHAM, FORMER DIRECTOR OF THE UNITED STATES SECRET SERVICE, IN HIS INDIVIDUAL CAPACITY; JOHN DOE, 1, UNITED STATES SECRET SERVICE AGENT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, PARTICIPATING IN THESE ACTIONS AND KNOWN TO THE DEFENDANT SECRET SERVICE, BUT UNKNOWN AT THIS TIME TO PLAINTIFFS; DAVID TOWE, CHIEF OF POLICE OF JACKSONVILLE, OREGON, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES;

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION OF THE STATE OF OREGON; MIKE WINTERS, SHERIFF OF JACKSON COUNTY, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; JACKSON COUNTY, A MUNICIPAL CORPORATION OF THE STATE OF OREGON; JOHN DOES, 2-20 THAT IS, THE COMMANDING OFFICERS IF OTHER LAW ENFORCEMENT AGENCIES OF PUBLIC BODIES PARTICIPATING IN THESE ACTIONS, IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES, KNOWN TO THE IDENTIFIED DEFENDANTS, BUT UNKNOWN AT THIS TIME TO PLAINTIFFS; MUNICIPAL DOES, THE PUBLIC BODIES EMPLOYING DEFENDANTS JOHN DOES 2-20; MARK SULLIVAN, DIRECTOR OF THE UNITED STATES SECRET SERVICE, IN HIS OFFICIAL CAPACITY; RON RUECKER, SUPERINTENDENT OF THE OREGON STATE POLICE, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; ERIC RODRIQUEZ, FORMER CAPTAIN OF THE SOUTHWEST REGIONAL HEADQUARTERS OF THE OREGON STATE POLICE, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; TIM F. MCCLAIN, SUPERINTENDENT OF THE OREGON STATE POLICE, IN HIS OFFICIAL CAPACITY; RANDIE MARTZ, CAPTAIN OF THE SOUTHWEST REGIONAL HEADQUARTERS OF THE OREGON STATE POLICE, IN HIS OFFICIAL CAPACITY, DEFENDANTS

AND

TIM WOOD, UNITED STATES SECRET SERVICE AGENT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; ROB SAVAGE, UNITED STATES SECRET SERVICE AGENT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, DEFENDANTS-APPELLANTS

Argued and Submitted: Oct. 11, 2011
Filed: Apr. 9, 2012
Amended: Feb. 26, 2013

ORDER

Before: DAVID M. EBEL[*], MARSHA S. BERZON, and N. RANDY SMITH, Circuit Judges.

Dissent to Order by Judge O'SCANNLAIN; Opinion by Judge BERZON.

The opinion filed on April 9, 2012, and appearing at 675 F.3d 1213, is amended as follows:

At slip opinion page 3846, 675 F.3d at 1229, immediately before the heading "C. Fourth Amendment," add the following text:

<* * *

As this case arises on a motion to dismiss, any explanation for the agents' differential treatment of the pro- and anti-Bush demonstrators would have to be so obviously applicable as to render the assertion of unconstitutional viewpoint discrimination implausible. The Dissent from the Denial of Rehearing En Banc ("En Banc Dissent") maintains otherwise, so we briefly respond to its analysis:

Our opinion makes clear that there is simply *no* apparent explanation for why the Secret Service agents permitted only the pro-Bush demonstrators, and not the anti-Bush protestors, to remain along the President's after-dinner motorcade route, *see* Op. at 1225, 1228; the En Banc Dissent suggests

[*] The Honorable David M. Ebel, Senior Circuit Judge for the Tenth Circuit, sitting by designation.

none. And the explanation proffered in the En Banc Dissent for the agents' actions in moving the anti-Bush demonstrators in the first place—namely that the pro-Bush demonstrators were not moved because they were ostensibly further than the protestors from the patio where President Bush was dining, *see* En Banc Dissent at 14—is not a basis for granting the agents qualified immunity at the pleadings stage, for several reasons:

First, the En Banc Dissent's speculative explanation is non-responsive to the protestors' viewpoint discrimination claim. The question is not why the agents moved the anti-Bush protestors *somewhere,* but rather why the agents moved the protestors a considerable distance, to a location that, as we have explained, was in "relevant ways . . . not comparable" to the place where the pro-Bush group was allowed to remain. *See* Op. at 1228. No "tape[ ] measure" is required, *see* En Banc Dissent at 12, to appreciate that demonstrators separated by more than a full square block, and two roadways, from the public official to whom and about whom they wish to direct a political message will be comparatively disadvantaged in expressing their views. Nor does one need a noise dosimeter to know that the President will be able to hear the cheers of the group left alongside his travel route but unable to hear the group restricted to an area about two square blocks away.

Perhaps there was a reason for the considerable disparity in the distance each group was allowed to

stand from the Presidential party—for example, traffic, or an obstruction on the square block adjacent to the Inn, requiring that the anti-Bush demonstrators be moved more than a block further away. But, as matters now stand, nothing in the En Banc Dissent's entirely hypothetical "explanation is so convincing" as to render "*im*plausible" the plaintiffs' claim of viewpoint discrimination. *See Starr v. Baca,* 652 F.3d 1202, 1216 (9th Cir. 2011), *cert. denied*, — U.S. —, 132 S. Ct. 2101, 182 L. Ed. 2d 882 (2012). It is therefore premature at this stage to credit the En Banc Dissent's theory instead of the protestors'. *See id.* For the same reason, the En Banc Dissent's assertion, *see* En Banc Dissent at 12, that the panel has "second[ ] guess[ed]" the Secret Service agents' judgment about how best to protect the President fails to account for the fact that at this stage of the case, the record is devoid of *any* explanation for the substantial difference in where the two groups of demonstrators were allowed to stand relative to the President's locations.

Finally, the En Banc Dissent's invocation of the case law upholding certain buffer zones, *see id.* at 22, actually illustrates well why the complaint *does* establish a plausible claim of a violation of clearly established law regarding impermissible viewpoint discrimination in a public forum. Such buffers have been upheld *only,* and expressly, on the understanding that the restrictions are content and viewpoint neutral. For example, in *Hill v. Colorado,* 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d

597 (2000), the Supreme Court upheld the buffer zone ordinance there at issue only after emphasizing that it applied "to all 'protest,' to all 'counseling,' and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made an abortion decision. That is the level of neutrality that the Constitution demands." *Id.* at 725, 120 S. Ct. 2480. Had the ordinance in *Hill* established a one-hundred foot buffer zone for pro-abortion demonstrators and a three-hundred foot buffer zone for anti-abortion protestors, there is no doubt such a viewpoint discriminatory ordinance would have been summarily invalidated.

The protestors here plausibly allege just such a significant *difference* in the buffer zone in a public forum. And *Hill* was, of course, decided before the events in this case. The protestors therefore allege a plausible case of impermissible viewpoint discrimination as of the time this case arose.>

An amended opinion is filed concurrently with this order.

With this amendment, the panel has unanimously voted to deny appellants' petition for rehearing. Judge Berzon and Judge N.R. Smith have voted to deny the petition for rehearing en banc, and Judge Ebel so recommended.

The full court has been advised of the petition for rehearing en banc. A judge of the court requested a vote on en banc rehearing. The majority of the active

judges have voted to deny rehearing the matter en banc. Fed. R. App. P. 35(f).

The petition for rehearing and the petition for rehearing en banc are **DENIED**. Judge O'Scannlain's dissent from the denial of en banc rehearing is filed concurrently herewith.

No further petitions shall be entertained.

O' SCANNLAIN, Circuit Judge, joined by KOZINSKI, Chief Judge, and GOULD, TALLMAN, BYBEE, CALLAHAN, BEA, and IKUTA, Circuit Judges, dissenting from the denial of rehearing en banc:

To quote from the Government's brief, "[t]he panel's decision in this case is a textbook case-study of judicial second-guessing of the on-the-spot judgment that Secret Service agents assigned to protect the President have made about security needs." In effect, the panel holds today that the Constitution requires Secret Service agents to subsume their duty to protect the President to their newly created duty to act like concert ushers—ensuring with tape-measure accuracy that everyone who wants to demonstrate near the President has an equally good view of the show. This cannot be the law. With respect, I must therefore dissent from our unfortunate failure to rehear this case en banc.

I

This is a *Bivens* action brought by Michael Moss and numerous others (the "protesters" or "anti-Bush demonstrators") against United States Secret Service agents Tim Wood and Rob Savage, who were assigned

to protect President George W. Bush during a 2004 campaign appearance in Oregon.[1] The protestors' second amended complaint alleges that the agents engaged in viewpoint discrimination in violation of their First Amendment rights when the agents moved them to create a security perimeter around the President. To clarify the allegations pertinent to this claim, one must focus on the relevant facts as set forth in the protesters' operative complaint.

Anticipating the President's appearance at an event in Jacksonville, Oregon, both pro-Bush and anti-Bush demonstrators gathered approximately two blocks from the President's hotel there and conducted demonstrations with chants, slogans, and signs. Spread out along California Street, the pro-Bush demonstrators were located just west of Third Street, and the anti-Bush demonstrators were located between Third and Fourth Streets.

While en route to the event, the President decided to eat dinner at the Jacksonville Inn, a restaurant on California Street between Third and Fourth Streets. He arrived in his motorcade via Third Street, and both the pro-Bush and anti-Bush demonstrators "had equal access" to him; the anti-Bush demonstrators were not moved from the President's motorcade route prior to his arrival at the Inn even though a Secret Service agent was already on site and could have ordered the police to do so.

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[1] The panel opinion resolves claims against other officers under 42 U.S.C. § 1983 which are not at issue here.

Upon his arrival, the President entered the back patio of the Inn and was seated in the outdoor patio dining area. Shortly thereafter, the Secret Service directed local police to move "all persons between Third and Fourth streets"—immediately in front of the Inn—two blocks east to the east side of Fifth Street because "they did not want anyone within handgun or explosive range of the President." As it happened, these "persons" were the anti-Bush demonstrators. The pro-Bush demonstrators were not moved because they were already located one block west of the outdoor patio where the President was dining.

Alleging that the Secret Service agents' security rationale for moving them was "false" and that the agents were, in actuality, "tak[ing] action to stifle and suppress" their protest, the anti-Bush demonstrators brought this action, claiming that the Secret Service agents violated their First Amendment rights and seeking damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). Their claim boils down to two grievances. First, after the security perimeter around the President was established, they were forced to demonstrate from an area approximately one block farther from the President than the pro-Bush demonstrators. And second, they were farther from the President's motorcade route than the pro-Bush demonstrators when he left the Inn because they were not returned to their original location before the President left.

The protestors' first amended complaint, alleging substantially similar facts, was dismissed for failure to plead a plausible claim. *See Moss v. U.S. Secret Serv. (Moss I),* 572 F.3d 962 (9th Cir. 2009). After the anti-Bush demonstrators filed their (now operative) second amended complaint, the Secret Service agents again moved to dismiss, arguing that the demonstrators still failed to plead a plausible claim or, alternatively, that they were entitled to qualified immunity. *Moss v. U.S. Secret Serv. (Moss II),* 675 F.3d 1213, 1221-22 (9th Cir. 2012). The district court denied their motion. *Id.* at 1219, 1222. The panel now affirms that denial, problematically holding that it is "clearly established" in a broad sense that "government officials may not disadvantage speakers based on their viewpoint" and denying the agents qualified immunity. *Id.* at 1228. It is in reaching this conclusion that the panel regrettably errs.

II

The panel's qualified immunity analysis in this case is wrong—doubly wrong. First, the panel fails to separate the factual allegations that it must credit from the legal conclusions that it may not. *See Ashcroft v. Iqbal,* 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Second, the panel defines the right at issue at an impermissibly high level of generality, asking whether it is "clearly established" in a broad sense that "the government" may not engage in "viewpoint discrimination" and concluding that it is. *See Moss II,* 675 F.3d at 1228. Having started with the wrong assumptions and asked the wrong question,

it is no surprise that the panel arrives at the wrong answer.

A

Beginning with the assumption that it must "tak[e] the protestors' allegation of discriminatory motive [on the part of the Secret Service agents] as true," the panel quickly reaches the conclusion that it is "'beyond debate' that, particularly in a public forum, government officials may not disadvantage speakers based on their viewpoint." *Id.* By using the protestors' allegations about the agents' discriminatory motive as a starting point, however, the panel turns *Iqbal* on its head and places its analysis on shaky ground from the start.

1

As the panel notes, the protestors' complaint did indeed allege that the Secret Service agents engaged in viewpoint discrimination—reciting specifically that "[v]iewpoint discrimination by the Secret Service in connection with President Bush was the official policy of the White House." But, contrary to the panel's view, this allegation, which amounts to a legal conclusion about the agents' viewpoint-discriminatory motives, should not have been afforded a presumption of truth. "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937. Here, the allegation of a discriminatory motive contained in the protestors' complaint is almost identical to the "legal conclusion" to which the Supreme Court refused to afford a presumption of

truthfulness in *Iqbal*. *Id.* at 680-81, 129 S. Ct. 1937 (rejecting the allegation that government officials "knew of, condoned, and wilfully and maliciously agreed to subject [Iqbal] to harsh conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest" as a legal conclusion (internal quotation marks omitted) (second alteration in original)). Like in *Iqbal*, the bare allegation of a discriminatory motive contained in the protestors' complaint is "disentitle[d] to the presumption of truth." *Id.* at 681, 129 S. Ct. 1937; *cf. Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1050 (9th Cir. 2002). The panel should not have accorded it any weight in its qualified immunity analysis.

2

Setting aside such a bald assertion, only two factual allegations remain to support the protesters' claims about the Secret Service agents' discriminatory motives, neither of which is sufficient to establish plausibly that the agents harbored a subjective animus towards their viewpoint. The first—the protestors' description of purportedly similar Secret Service "actions against anti-government expressive activity"—does not tend to make plausible their claim that the named Secret Service agents sued *in this case* acted with the subjective purpose to suppress their message; none involve these same agents or the same circumstances, and the allegations do not show a pattern pervasive enough to establish an unspoken policy of discrimination, especially in light of the explicit Secret

Service policy prohibiting such conduct. *Cf. Iqbal*, 556 U.S. at 682-83, 129 S. Ct. 1937; *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) ("Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy.").

The second—an out-of-context statement taken from the Presidential Advance Team Manual—both lacks the nefarious meaning that the anti-Bush demonstrators, and the panel, would ascribe to it, and is irrelevant. For one, when viewed in context, the statement appears in a section of the manual entitled "Crowd Raising and Ticket Distribution" and clearly refers to ticketed presidential events, from which demonstrators can be excluded without violating the First Amendment. *See Weise v. Casper*, 593 F.3d 1163, 1168 (10th Cir. 2010). But more importantly, the protestors never allege that the Secret Service agents were bound to follow this instruction, which is found in the Advance Team Manual—a guide written for the Presidential Advance Team and *not* the Secret Service. Indeed, the demonstrators have admitted that written Secret Service guidelines, which *do* apply to Secret Service agents, expressly "prohibit Secret Service agents from discriminating between anti-government and pro-government demonstrators."[2] The

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[2] An "advance man" is "[o]ne who arranges for publicity, protocol, transportation, speaking schedules, conferences with local government officials, and minute details of a visit, smoothing the way

manual, therefore, not only lacks a nefarious meaning but also fails to have any bearing whatsoever on the motives of the Secret Service agents at issue in this case.

Given the lack of factual allegations to support the anti-Bush demonstrators' claim of subjective viewpoint animus, the panel should not have afforded this animus allegation a presumption of truth. The panel's subsequent failure to define properly the right at issue for purposes of qualified immunity further compounds this misstep.

B

Taking into account the absence of allegations plausibly demonstrating subjective viewpoint animus, the panel's opinion should have proceeded to determine separately whether the facts as pleaded showed (1) a constitutional violation and (2) a violation of clearly established law. *See Saucier v. Katz,* 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), *overruled on other grounds by Pearson v. Callahan,* 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009);

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for a political figure." William Safire, Safire's Political Dictionary 8 (5th ed. 2008). By contrast, the Secret Service agents work for the Department of Homeland Security under the direction of the Secretary of Homeland Security, and are tasked with protecting the President. *See* 18 U.S.C. § 3056, *amended by* Pub. L. No. 112-257, 126 Stat. 2413 (2013). Given the very different roles of the advance team and the Secret Service—the former to "smooth[ ] the way" for a candidate and the latter to ensure his security—it is no wonder that their manuals contain different guidelines regarding demonstrators.

Estate of Ford, 301 F.3d at 1049 ("*Saucier*'s key point is that the qualified immunity inquiry is separate from the constitutional inquiry."). Instead, the panel erroneously collapses these two inquiries into one. Concluding that the objective factual events alleged in the complaint established a plausible claim of viewpoint discrimination, it eviscerates the clearly established prong—of course, the panel concludes, it is clearly established that officials may not engage in viewpoint discrimination. *See Moss II,* 675 F.3d at 1223-28.

1

Contrast the panel's approach with the leading qualified immunity cases. One easily could say, for example, in a Fourth Amendment case in which the facts alleged showed that officers used excessive force, that the use of excessive force violates clearly established Fourth Amendment principles. Or in an Eighth Amendment case in which the facts alleged showed deliberate indifference, one could say that deliberate indifference violates clearly established Eighth Amendment principles. But both those statements would be fatally insufficient. *See Saucier,* 533 U.S. at 201-03, 121 S. Ct. 2151; *Estate of Ford,* 301 F.3d at 1050-51. It is equally fatal merely to say that if the protestors have alleged sufficient facts to make a plausible claim of viewpoint discrimination, they have also shown a violation of clearly established law, because viewpoint discrimination is clearly prohibited. *See Weise,* 593 F.3d at 1167 (citing *Anderson v. Creighton,* 483 U.S. 635, 639-41, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). Put another way, "when it comes

to qualified immunity, merely stating that the government cannot engage in viewpoint discrimination is just about as general as stating that the government cannot engage in unreasonable searches and seizures —an approach that is too general for the qualified immunity analysis where a plaintiff has the burden of demonstrating not only a constitutional violation, but also a violation of clearly established law." *Weise,* 593 F.3d at 1168 n.1 (citing *Anderson,* 483 U.S. at 639-41, 107 S. Ct. 3034).

To avoid this analytical pitfall, the Supreme Court has mandated that, in qualified immunity cases, the contours of the right must be clearly established in "a more particularized, and hence more relevant, sense," meaning that it must be "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier,* 533 U.S. at 202, 121 S. Ct. 2151. Contrary to this Supreme Court precedent, the panel in this case simply fails to perform that analysis. It fails to consider whether, in a more particularized sense, the alleged conduct of the Secret Service agents violated clearly established law. *See Ashcroft v. al-Kidd,* — U.S. —, 131 S. Ct. 2074, 2084, 179 L. Ed. 2d 1149 (2011). In so doing, it commits an error all too common to this circuit—one we have been specifically warned not to commit again. *See id.; see also Brosseau v. Haugen,* 543 U.S. 194, 199, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (per curiam); *Saucier,* 533 U.S. at 200, 121 S. Ct. 2151.

It is clear that had the panel properly applied *Iqbal* and *al-Kidd,* it would have upheld qualified immunity.

Absent the assumption that the Secret Service agents were purposefully engaging in viewpoint discrimination—which the panel should not have made in conducting the clearly established inquiry—the agents' actions did not violate "clearly established" law. *See Estate of Ford*, 301 F.3d at 1050 ("We do not assume that [the officers] acted with deliberate indifference, as that would assume the answer.").

2

Once properly framed in light of the factual allegations in the complaint, two questions of clearly established law are raised in this case: First, was it clearly established that moving one group to a location one block farther from the President than another when creating a Presidential security perimeter constituted a violation of that group's First Amendment rights? And second, was it clearly established that Secret Service agents, who moved a group to maintain a consistent security perimeter around the President, had to move the group back to their original location before the President could leave in his motorcade (or at least had to alter the motorcade route so that all involved got an equal chance to see the President)? The answer to these qualified immunity questions—the questions that the panel should have asked—is a clear "no."

a

In response to the first question, it should be noted that before this decision neither our precedent nor Supreme Court case law prevented Secret Service agents from establishing a security perimeter around the President. Indeed, prior Supreme Court prece-

dent had upheld analogous buffer zones to protect vulnerable patients attempting to enter healthcare facilities and to prevent targeted protests of an abortion doctor's home. *See, e.g., Hill v. Colorado,* 530 U.S. 703, 719-30, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000); *Frisby v. Schultz,* 487 U.S. 474, 479-88, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988). Certainly, one would think, securing the safety of the President ranked as an interest at least on par with preventing harassment of patients and doctors. *Cf. Hunter v. Bryant,* 502 U.S. 224, 229, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam) (noting that proper application of the qualified immunity standard is "nowhere more important than when the specter of Presidential assassination is raised"). Yet in denying the Secret Service agents qualified immunity in this case, our court holds today that it *is* not—and, even more egregiously, it was *clearly established* law that it *was* not, at least as early as 2004.

Moreover, before this decision, no law appeared to require Secret Service agents to ensure that groups of differing viewpoints were positioned in locations exactly equidistant from the President at all times. But again, in this case, our court invents such a requirement and determines that it was long since "clearly established" in our First Amendment jurisprudence. As the Government correctly points out, such a rule will be troublesome in application. As of today, shall Secret Service agents carry tape measures when they engage in crowd control to ensure that groups with different viewpoints are at comparable locations at all

times? If they don't, they will now risk being subject to First Amendment lawsuits in nine Western states.

b

Turning to the second question—whether it was clearly established law that Secret Service agents had to return a group of demonstrators to their original location before the President could leave in his motorcade—one is again at a loss to identify any First Amendment principle that clearly demands such an action. *Cf. United States v. Grace,* 461 U.S. 171, 177-78, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983) ("We have regularly rejected the assertion that people who wish to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." (internal quotation marks omitted)); *Menotti v. City of Seattle,* 409 F.3d 1113, 1139 n.49 (9th Cir. 2005) ("[W]e hold that there is no constitutional requirement that protestors be allowed to reach their designated audience in the precise manner of their choosing. . . . "). Indeed, the assertion that some First Amendment doctrine would so require seems absurd. But the panel's holding today bizarrely assures us that this, too, is a "clearly established" ground for bringing a suit alleging infringement of one's First Amendment freedoms. It is hard to imagine how, in light of today's decision, Secret Service agents will navigate the treacherous path between the Scylla of our court's holdings in this case and the Charybdis of their duty to protect the President.

C

One final note: The operative complaint's lack of plausible allegations showing that the Secret Service agents in this case explicitly acted with a subjective intent to suppress the protestors' message differentiates this case from the one on which the panel relies in their qualified immunity analysis. *See Mahoney v. Babbitt,* 105 F.3d 1452, 1458-59 (D.C. Cir. 1997) ("The government has conceded that if appellants were carrying no signs or, indeed, if they were carrying signs favorable to the administration whose second Inaugural was being celebrated, their 'physical intrusion' would be welcomed. It is only the 'purpose of injecting [their] own convictions or beliefs' that causes the government to exclude them."). In light of the allegations in *Mahoney,* which expressly showed a subjective discriminatory purpose on the part of the National Park Service in denying a permit to a group of demonstrators, it is no wonder that the courts were able to find qualified immunity inapplicable and to conclude that the officials there violated clearly established law prohibiting viewpoint discrimination. *See id.* But in this case, where the anti-Bush demonstrators admit that the Secret Service agents offered a neutral security rationale for their actions, the panel should have assessed their objective conduct as alleged in the complaint to determine whether it plausibly demonstrated a violation of clearly established law. *See Estate of Ford,* 301 F.3d at 1050. Sadly, it did not do so; instead, it misstates the law and, ultimately, reaches the wrong result.

"[I]n light of the specific context of this case" the Secret Service agents did not violate any "clearly established" law. *See Saucier*, 533 U.S. at 201, 121 S. Ct. 2151. As such, they were entitled to qualified immunity, and the panel erred in denying it to them. *Id.*

III

Our court's track record in deciding qualified immunity cases is far from exemplary, and with this decision, I am concerned that our storied losing streak will continue.[3] Although we may not have been able to rectify our past mistakes by rehearing this case en banc, we certainly *should have* used this opportunity to avoid repeating them. Alas, the panel here once again commits many familiar qualified immunity errors. It affords unwarranted deference to legal conclusions in the protestors' complaint. It collapses the two-pronged qualified immunity inquiry. It defines the right at issue too broadly. And it fails to give sufficient latitude to those charged with protecting the life of the President. This decision renders the protections of qualified immunity toothless. But even more devastating, this decision hamstrings Secret Service agents, who must now choose between ensur-

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[3] *See, e.g., al-Kidd*, 131 S. Ct. at 2084 (reversing the Ninth Circuit) (warning "the Ninth Circuit in particular" to avoid "defin[ing] clearly established law at a high level of generality"); *Brosseau*, 543 U.S. at 199, 125 S. Ct. 596 (same); *Saucier*, 533 U.S. at 200, 121 S. Ct. 2151 (same); *Hunter*, 502 U.S. at 227-29, 112 S. Ct. 534 (same).

ing the safety of the President and subjecting themselves to First Amendment liability.

I respectfully dissent from our failure to rehear this case en banc.

OPINION

BERZON, Circuit Judge:

During the 2004 presidential campaign, Plaintiff-Appellees, Michael Moss and others who opposed President Bush ("protestors" or "anti-Bush protestors"), organized a demonstration at a campaign stop in Jacksonville, Oregon. They contend that Secret Service agents, Defendant-Appellants Tim Wood and Rob Savage ("agents" or "Secret Service agents"), engaged in unconstitutional viewpoint discrimination in violation of the First Amendment, by requiring the protestors to demonstrate at a distance from the President because they were protesting—rather than supporting—his policies. In addition, the protestors maintain that the police officers who carried out the Secret Service agents' directions, supervised by Defendant-Appellants Ron Ruecker, Superintendent of the Oregon State Police, and Eric Rodriguez, Captain of the Southwest Regional Headquarters of the Oregon State Police ("police supervisors"), used excessive force in violation of the Fourth Amendment. They seek to hold Ruecker and Rodriguez liable for the use of this force.

We hold that the protestors have stated a claim against the Secret Service agents for violation of the First Amendment. The protestors have not, however,

pleaded sufficient facts to sustain their Fourth Amendment claim against the police supervisors. We therefore hold that the excessive force claim should be dismissed.

I. Factual and Procedural Background

A. Facts

During the 2004 presidential campaign, President George W. Bush was scheduled to spend the evening of October 14, 2004 in Jacksonville, Oregon at the Jacksonville Inn Honeymoon Cottage.[1] A group of people opposed to President Bush organized a demonstration to protest his policies. They discussed their plans with the Chief of the Jacksonville Police and with the Jackson County Sheriff, informing both law enforcement officials that the planned demonstration was to be multigenerational, peaceful, and law-abiding. The Jackson County Sheriff agreed to the proposed protest route and stated that officers in riot gear would not be deployed unless necessary. The Jacksonville Police Chief similarly stated that he did not plan to use riot-gear-clad police.

At about 5:00 p.m. on October 14, 2004, between two and three hundred anti-Bush protestors gathered in Griffin Park in Jacksonville. An hour later, the protestors, in accordance with the demonstration route they had pre-cleared with local law enforcement, left the park and proceeded to California Street between

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[1] Because this is an appeal from an order denying Defendants' motion to dismiss, the facts described are taken from Plaintiffs' complaint and are assumed to be true.

Third and Fourth Streets. They stood in front of the main building of the Jacksonville Inn, approximately two blocks south of the Inn's Honeymoon Cottage where the President planned to stay.[2] A similarly-sized group of pro-Bush demonstrators gathered across Third Street from the anti-Bush protestors.

After the two groups had gathered, the President decided to stop for dinner at the restaurant at the Jacksonville Inn, located in the main building. Neither group was aware that the President would not proceed directly to the Honeymoon Cottage until approximately 7:00 p.m., an hour after the demonstrations in front of the Inn began. After learning the President would be stopping at the restaurant, both pro- and anti-Bush demonstrators clustered on the side of the street on which the Inn's main building is located. The anti-Bush demonstrators allege that at that point, "[b]oth sets of demonstrators had equal access to the President during his arrival at the Jacksonville Inn."

Shortly before the President was to arrive at the restaurant, the Secret Service agents on the scene requested that state and local police officers clear the alley from Third Street to the patio dining area behind the Inn, as well as the California Street alley running alongside the Inn. Police officers, dressed in riot gear, cleared these alleys. They also blocked Third Street, north of California Street, and began prevent-

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[2] A map of the area of Jacksonville in which the relevant events occurred is attached as an appendix to this opinion.

ing demonstrators (both pro- and anti-Bush) from crossing the street at the intersection of Third and California Streets.

President Bush arrived at the Jacksonville Inn at approximately 7:15 p.m. and ate dinner on the Inn's outdoor patio, which was enclosed by a 6-foot-high wooden fence. This fence, along with the buildings along California Street, made it impossible for the anti-Bush protestors to see the President. In addition, these obstacles, as well as police officers stationed around the perimeter of the Inn, prevented anyone from walking from the demonstration site to the President's location on the patio.

There were several other diners on the patio in addition to the President's party. In addition, upstairs from the restaurant was a group of approximately thirty people at a medical conference, some of whom ventured downstairs and, finding an unguarded door to the patio, were able to observe the President from a distance of approximately fifteen feet.

At about 7:30 p.m., the Secret Service agents directed state and local police to clear California Street between Third and Fourth Streets, where the anti-Bush protestors had been standing. They first directed the police to move the protestors to the east side of Fourth Street. Subsequently, the agents asked that the protestors be moved to the east side of Fifth Street. The agents assert that they told the police that the reason for these requests was to prevent anyone from being within handgun or explosive range of the President. The protestors allege that

any security rationale provided by the agents to the police was false. Neither the pro-Bush demonstrators nor anyone staying at or visiting the Inn was required to move or to undergo security screening. The protestors maintain that, in fact, the real motive for the agents' action was the suppression of the protestors' anti-Bush viewpoint—that is, that the agents sought to prevent the President or the media from seeing or hearing the protestors' message.

In accordance with the Secret Service directive, police officers in riot gear formed a line across California Street, facing the anti-Bush demonstrators and with their backs to the pro-Bush demonstrators. The officers made amplified announcements, unintelligible to many of the protestors, stating that the protestors' assembly was now unlawful, and ordering them to move. The protestors allege that the police failed to ascertain whether the protestors had heard and understood the direction to move, let alone give them time to move of their own accord. Instead, officers forcibly moved the protestors, in some cases violently shoving them, striking them with clubs, and firing pepper spray bullets.

Once the anti-Bush protestors had been moved to the east side of Fifth Street, the police officers divided them into two groups and encircled the groups, preventing some protestors from leaving the area and separating some families. The defendant police supervisors Ruecker and Rodriguez were not present at the protest, but the protestors allege that the two supervisors nevertheless supervised and directed the

police action and that they were responsible for the training, or lack thereof, that led to the force used against the protestors.

B. Procedural History

At issue in this appeal is the protestors' second amended complaint ("SAC"). Their first amended complaint ("FAC") contained several claims for relief arising out of the facts detailed above. Only two of these claims remain at issue here: (1) a claim for damages under *Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), against Secret Service Agents Wood and Savage in their individual capacities for viewpoint discrimination in violation of the First Amendment; and (2) a claim for damages under 42 U.S.C. § 1983 against police supervisors Ruecker and Rodriguez in their personal capacities for excessive force in violation of the Fourth Amendment.

After the protestors filed the FAC, the Secret Service agents moved to dismiss. The district court denied their motion and also denied them qualified immunity. The agents appealed to this court. *See Moss v. U.S. Secret Service,* 572 F.3d 962 (9th Cir. 2009) ("*Moss I*"). We held that although the facts the protestors pleaded in the FAC did "not rule out the possibility of viewpoint discrimination," they were insufficient to allege such a claim with the degree of precision required by *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S. Ct. 1937, 173

L. Ed. 2d 868 (2009), both of which had been decided after the protestors filed the FAC. *Id.* at 971-72.

In particular, we held in *Moss I* that the protestors' unsupported allegations of "impermissible motive on the Agents' part," a "*sub rosa* Secret Service policy of suppressing speech critical of the President," and "systematic viewpoint discrimination at the highest levels of the Secret Service" were, under the post-*Iqbal* pleading standards, "conclusory and . . . therefore not entitled to an assumption of truth." *Moss I,* 572 F.3d at 970. We further determined that the protestors' allegation that the agents directed the police to move the protestors to the east side of Fourth Street was insufficient to support a claim of viewpoint discrimination. We explained that the Fourth Street location was "comparable" to the location of the pro-Bush demonstrators in terms of its proximity to the President when he was dining at the Inn's restaurant. *Id.* at 971. Finally, *Moss I* held that the protestors' allegations concerning the guests and diners at the Inn who were within close range of the President but not subject to screening or required to move "offer[ed] little if any support for" the protestors' viewpoint discrimination claim, because these guests and diners were not seeking to communicate their views and therefore were not similarly situated to the protestors. *Id.* For these reasons, we concluded that the protestors had "fail[ed] to plead facts plausibly suggesting a colorable *Bivens* claim against the Agents." *Id.* Recognizing, however, that the FAC had been filed before the Supreme Court decided *Twombly* and *Iqbal,* and that it was possible the complaint could be

amended to meet the standards articulated in those cases, we granted the protestors leave to amend. *Id.* at 972.

Accordingly, the protestors amended their complaint. The SAC, the complaint at issue here, raises the same claims as the FAC but supports these claims with more—and more detailed—factual allegations.

After the protestors filed the SAC, the Secret Service agents again sought to dismiss the First Amendment claim. Reviewing the agents' motion to dismiss, the magistrate judge to whom the case was referred concluded that the allegations in the FAC, held by *Moss I* to be conclusory, were in the SAC "supported by factual allegations and . . . thus entitled to an assumption of truth" and that "[v]iewing all the factual allegations entitled to assumption of truth in the SAC," the protestors had "pled a plausible claim." The state police supervisors also filed a motion to dismiss. The magistrate recommended that this motion also be denied, explaining that under the framework set forth by this court in *al-Kidd v. Ashcroft,* 580 F.3d 949 (9th Cir. 2009), *overruled on other grounds by Ashcroft v. al-Kidd,* — U.S. —, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011), the protestors had pled a plausible § 1983 Fourth Amendment claim against the supervisors. The magistrate determined that neither the Secret Service agents on the First Amendment claim nor the police supervisors on the Fourth Amendment claim are entitled to qualified immunity at this stage.

The district court adopted the magistrate's report and recommendation in full. Before us now are the

Secret Service agents' and police supervisors' appeals of the district court's denial of qualified immunity.

We begin by briefly discussing the framework for evaluating whether qualified immunity is appropriate, as that framework is pertinent to both of the claims at issue. We then address the First Amendment and Fourth Amendment claims in turn.

II. Discussion

A. Qualified Immunity Framework

"[Q]ualified immunity protects government 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*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). The purpose of such immunity is to ensure that public officials may be held "accountable when they exercise power irresponsibly," while "shield[ing]" them "from harassment, distraction, and liability when they perform their duties reasonably." *Id.*

To determine whether a government official is entitled to qualified immunity, we conduct a two-prong analysis. *See, e.g., Mattos v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011). Government officials are denied qualified immunity only if (1) "the facts that a plaintiff has alleged . . . make out a violation of a constitutional right"; and (2) "the right at issue was clearly established at the time of [the] defendant's alleged

misconduct." *Pearson,* 555 U.S. at 232, 129 S. Ct. 808 (internal quotation marks omitted); *see Mattos,* 661 F.3d at 440. These prongs need not be addressed in order; rather courts may "exercise their sound discretion in deciding which of the two prongs . . . should be addressed first in light of the circumstances in the particular case at hand." *Pearson,* 555 U.S. at 236, 129 S. Ct. 808.

The first prong assesses whether the wrong a plaintiff alleges is, in fact, a constitutional violation. The second prong assesses the objective reasonableness of the official's conduct in light of the decisional law at the time: A right is clearly established for purposes of qualified immunity only where the contours of the right are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Dunn v. Castro,* 621 F.3d 1196, 1200 (9th Cir. 2010) (internal quotation marks omitted). "Because qualified immunity is an immunity from suit rather than a mere defense to liability, courts have also evaluated the sufficiency of the allegations of the defendant's personal involvement in the deprivation of the right at the second stage of the qualified immunity analysis." *Al-Kidd v. Ashcroft,* 580 F.3d at 964 (internal citation, quotation marks, and emphasis omitted); *see Iqbal,* 129 S. Ct. at 1946.

In analyzing the protestors' First Amendment claim against the Secret Service agents, we begin by addressing the first prong of the qualified immunity framework—whether the facts the protestors have alleged make out a constitutional violation—and then

move to the next prong—whether the right the protestors allege was violated was clearly established at the time of the protest. We proceed in this order because, in this instance, one cannot sensibly determine the reasonableness of the agents' actions without carefully identifying the right they are alleged to have violated and the conduct by which they are alleged to have done so.

With respect to the excessive force claim, we ultimately hold that the protestors have alleged insufficient facts to state a claim against the defendant police supervisors in particular. We nevertheless conduct both prongs of the qualified immunity analysis to clarify which parts of the SAC are sufficient and in what respects it must be amended to state a claim.

B. First Amendment

1.

The anti-Bush protestors claim that the Secret Service agents sought to suppress political speech undertaken on a public street based on the viewpoint of that speech. This claim strikes at the core of the First Amendment.

Public streets are "the archetype of a traditional public forum." *Frisby v. Schultz,* 487 U.S. 474, 480, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988), as they have "immemorially been held in trust for the use of the public," *id.* at 481, 108 S. Ct. 2495 (quoting *Hague v. CIO,* 307 U.S. 496, 515, 59 S. Ct. 954, 83 L.Ed. 1423 (1939)). In such "traditional public fora, the government's ability to permissibly restrict expressive con-

duct is very limited. . . . First Amendment protections are strongest, and regulation is most suspect." *Long Beach Area Peace Network v. City of Long Beach,* 574 F.3d 1011, 1022 (9th Cir. 2009) (internal quotation marks and citations omitted). Moreover, "[p]olitical speech is core First Amendment speech, critical to the functioning of our democratic system." *Id.* at 1021. "Traditional public fora," such as the public streets upon which the anti-Bush protestors sought to demonstrate "gain even more importance when they are host to core First Amendment speech." *Id.* at 1022.

As the Supreme Court has repeatedly reiterated, government regulation of political speech in a public forum based on its content is presumptively unconstitutional. *See United States v. Playboy Entm't Group,* 529 U.S. 803, 817, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000); *Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 828, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995); *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger,* 515 U.S. at 829, 115 S. Ct. 2510. "Viewpoint discrimination is thus an egregious form of content discrimination," one from which "[t]he government must abstain." *Id.* The government may not regulate speech based on "the specific motivating ideology or the opinion or perspective of the speaker," *id.;* nor may it "favor some viewpoints or ideas at the expense of others," *Members of City Council v. Taxpayers for*

Vincent, 466 U.S. 789, 804, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984). We recently summarized these long-standing principles as instructing that "government may not favor speakers on one side of a public debate." *Hoye v. City of Oakland*, 653 F.3d 835, 849 (9th Cir. 2011).[3]

A restriction on speech is viewpoint-based if (1) on its face, it distinguishes between types of speech or speakers based on the viewpoint expressed; or (2) though neutral on its face, the regulation is motivated by the desire to suppress a particular viewpoint. *See Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (en banc) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642-43, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994)); *ACLU v. City of Las Vegas*, 466 F.3d 784, 793 (9th Cir. 2006) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)). The anti-Bush protestors allege both that the agents' actions were facially viewpoint discriminatory—that is, that the agents explicitly treated pro- and anti-Bush demonstrators differently —and that their actions, even if facially neutral, were motivated by an impermissible purpose to discriminate against the anti-Bush viewpoint the protestors expressed.

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[3] *Hoye* was, of course, decided after the incident giving rise to this case. We cite it only for its succinct précis of many years of precedents on viewpoint discrimination.

a.

In the FAC, the anti-Bush protestors alleged that the Secret Service directed police to move them to the east side of Fourth Street, approximately the same distance from where the President was dining as the pro-Bush demonstrators. *Moss I*, 572 F.3d at 971. *Moss I* held this allegation insufficient to support a plausible claim of viewpoint discrimination, explaining:

> If the Agents' motive in moving Plaintiffs away from the Inn was . . . suppression of Plaintiffs' anti-Bush message, then presumably, they would have ensured that demonstrators were moved to an area where the President could not hear their demonstration, or at least to an area farther from the Inn then [sic] the position that the pro-Bush demonstrators occupied. Instead, according to the complaint, the Agents simply instructed state and local police to move the anti-Bush protestors to a location situated a comparable distance from the Inn as the other demonstrators, thereby establishing a consistent perimeter around the President.

Id.

Now, in the SAC, the protestors allege that the agents did indeed direct that the anti-Bush demonstration be moved farther from the Inn than the pro-Bush demonstration. The SAC avers that the Secret Service agents not only directed the police to move the anti-Bush protestors "to the east side of Fourth Street," but that the agents "subsequently" directed that the protestors be moved "to the east side of Fifth

Street." The pro-Bush demonstrators were left in place on the west side of Third Street. As a result, the anti-Bush protestors were more than a block farther from where the President was dining than the pro-Bush demonstrators, and, one can infer, were therefore less able to communicate effectively with the President, media, or anyone else inside or near the Inn.

The agents object to the protestors' failure to plead specifically that the President could no longer hear their protests once they were moved. While such an allegation would strengthen the protestors' complaint, its absence does not make their claim implausible. Regardless of whether the President and those near him could actually hear the protestors after they had been moved, it is a plausible inference from the facts alleged that the protestors' chants would be less intelligible from two blocks away.

In addition, and critically, if allowed to remain in their initial locations, members of both the pro- and anti-Bush groups would have been standing along the motorcade route by which the President left the restaurant. However, once the Secret Service agents moved them, the anti-Bush protestors were two blocks away from the motorcade route, while the pro-Bush demonstrators remained along it, and, according to the SAC, could "cheer for President Bush as he traveled to the Honeymoon Cottage."

In their brief, the agents insist that the President's motorcade route between the restaurant and the Honeymoon Cottage is "irrelevant," because the "ar-

mored limousine" in which the President was traveling had far greater security than the open-air patio where the President dined. This argument is unavailing for two reasons: First, it rests on facts outside of the complaint and is therefore not properly cognizable at this stage. Second, the assertion of a viewpoint-neutral rationale cannot transform a facially discriminatory policy—allowing one group of demonstrators access to the President while moving protestors with the opposing view further away—into a valid one. *See ACLU,* 466 F.3d at 793.

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

b.

In addition to these allegations of facial viewpoint discrimination, the anti-Bush protestors also allege in the SAC that the Secret Service agents acted with an impermissible motive of shielding the President from those expressing disapproval of him or his policies. As the Supreme Court has explained,

> [t]he principal inquiry in determining content [or viewpoint] neutrality . . . is whether the government has adopted a regulation of speech *because of* disagreement with the message it conveys.

> . . . The government's purpose is the controlling consideration.

Ward, 491 U.S. at 791, 109 S. Ct. 2746 (emphasis added) (internal citations omitted). Thus, if true, the motive allegation would be sufficient in and of itself to support a claim of viewpoint discrimination in violation of the First Amendment. That is, it would be adequate to establish a First Amendment violation even if there had been no pro-Bush demonstrators and therefore no differential treatment.

As noted, the Secret Service agents ostensibly told the police on the scene that their reason for moving the anti-Bush protestors was to ensure that nobody was within handgun or explosive range of the President. The protestors allege that even if the agents did give the police such an explanation, it was merely a pretext and that the agents were in actuality motivated by the determination to suppress the protestors' anti-Bush message. "[A] restriction on expressive activity is" only content- or viewpoint-neutral if it is "based on a non-pretextual reason divorced from the content of the message attempted to be conveyed." *United States v. Griefen*, 200 F.3d 1256, 1260 (9th Cir. 2000). At this stage, the protestors need only plead facts that make plausible their claim that they were moved because of their viewpoint—that the security rationale, if indeed offered by the agents at all, was pretextual. The protestors, in the SAC, have met this burden.

First, the SAC states that it would have been impossible from where the protestors were initially located—and certainly from the east side of Fourth

Street, where the Secret Service agents initially directed they be moved—for anyone to reach the President with a handgun or an explosive. The police cleared the alley between where the protestors were demonstrating and the Inn where the President dined, and officers, clad in riot gear, blocked any access to that alley. In addition, there were buildings and a six-foot high fence blocking any contact between the anti-Bush protestors and the President. None of the protestors attempted to surmount these obstacles to get access to the President. The protestors therefore assert they posed no threat to the President, and there was thus no reason for them to be moved from their initial location, and certainly no reason for them to be pushed beyond the east side of Fourth Street to the east side of Fifth Street. Moreover, according to the SAC, the obstacles between the anti-Bush protestors and the President were similar to those faced by the pro-Bush demonstrators. If the location of the anti-Bush protestors had been a significant security risk, they reason, so too would have been that of the pro-Bush demonstrators.

Second, the Secret Service agents allowed the pro-Bush demonstrators to gather along the motorcade route, well within handgun or explosive "range of the President as he traveled from the Inn to the Honeymoon Cottage where he was staying," As noted, the Secret Service agents argue that this distinction does not indicate that their security rationale was pretextual, because the "armored limousine" in which the President traveled "provide[d] a substantially higher degree of protection from potential external threats"

than did the open-air patio where he ate dinner. But one could view this explanation as further evidence of an impermissible motive: Even where there admittedly was no security threat, the anti-Bush demonstrators were forcibly located farther away from the President than the pro-Bush demonstrators, such that the pro-Bush demonstrators were within sight and hearing range of the President while the anti-Bush protestors were two blocks away.

Finally, the SAC elaborates in much more detail a conclusory allegation in the FAC that the Secret Service maintains "an officially authorized pattern and practice" of shielding the President from dissent. *Moss I* held that the pattern and practice allegation in the FAC, "without *any* factual content to bolster it, is just the sort of conclusory allegation that the *Iqbal* Court deemed inadequate." *Moss I,* 572 F.3d at 970. The SAC provides this additional factual content.

The SAC provides twelve detailed allegations, relying on published reports, of similar instances of viewpoint discrimination against protestors expressing negative views of the President. For example, during a speech given by President Bush, those expressing critical views of the President were sequestered approximately "one-third of a mile away from where [he] was speaking," while those supporting the President were permitted "to stand alongside the motorcade route right up to where the President" was located.

In addition, the SAC alleges that a policy and practice of suppressing criticism of the President is set forth in the Presidential Advance Manual, a redacted

copy of which was attached to the complaint. The Advance Manual directs the President's advance team to "work with the Secret Service and have them ask the local police department to designate a protest area where demonstrators can be placed, *preferably not in view of the event site or motorcade route*."[4] (emphasis added). Removal of protestors opposed to the President, is, of course, precisely what the anti-Bush protestors allege happened to them. While the Advance Manual is designed to guide the President's political advance team, not the Secret Service, it itself suggests that the Secret Service may play a part in ensuring that protestors are contained to an area away from the President. Furthermore, the protestors allege that, in this instance, because of the sudden change in the President's plans, the advance team had insufficient time to "suppress the protest. Instead," they "relied on the Secret Service to do so."

The protestors' allegations that the agents' conduct in this case accords with viewpoint discriminatory practices instituted in other, similar, circumstances and encouraged by the President's Advance Manual support the plausibility of the inference that, in this case, the Secret Service agents directed that the anti-Bush protestors be moved because of their viewpoint.

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[4] It is clear from the context that the manual is referring only to demonstrators opposed to the President. The following paragraph, for example, suggests that while demonstrators ought to be moved to a protest area out of view of the event or motorcade route, "rally squads" of supporters "countering" the protestors' message ought to be strategically placed in view of the media.

In sum, the anti-Bush protestors have pleaded non-conclusory factual allegations that they were treated differently than the pro-Bush demonstrators; that any security-based explanation for this differential treatment offered by the Secret Service agents was pretextual; and that the agents' directives in this case accord with a pattern of Secret Service action suppressing the speech of those opposed to the President.[5] These allegations, taken together, are sufficient to allow the protestors' claim of viewpoint discrimination to proceed.

2.

Even if they acted unconstitutionally, the Secret Service agents are entitled to qualified immunity unless the "contours" of the First Amendment right they violated were "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier v. Katz,* 533 U.S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) (internal quota-

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[5] The SAC also contains allegations that there were bystanders at the Inn where the President ate who were neither screened for weapons nor required to move farther from the President. The presence of these unscreened bystanders, the protestors argue, is further evidence that the security rationale offered by the Secret Service agents was pretextual. The agents argue that we are foreclosed, on law of the case grounds, by our previous decision in *Moss I* from considering the way in which the agents treated bystanders at the Inn. Whether this is so is a difficult question. Because we hold that the protestors other allegations are sufficient to support a plausible claim of viewpoint discrimination, we do not decide at this juncture whether *Moss I* prevents us from considering the protestors' bystander allegations.

tions and citations omitted). The Secret Service agents contend that even if the protestors have established a plausible claim of viewpoint discrimination, they have failed to demonstrate "that the right they claim was infringed was clearly established in the specific context at issue here." They characterize the qualified immunity question as whether

> every reasonable officer . . . would have understood that moving the [anti-Bush protestors] only a half block farther from the President than his supporters were located constituted viewpoint discrimination in violation of the First Amendment.

This statement inaccurately characterizes both the protestors' allegations and the governing law.

First, as a factual matter, the parties contest the relevant distances. The protestors allege that they were moved over a block farther from the Inn than the pro-Bush demonstrators. Further, although the agents repeatedly characterize the locations of the pro- and anti-Bush protestors as "comparable," we have already noted that based on the facts alleged, there are relevant ways in which the distances were not comparable.

In addition, the Secret Service agents focus solely on the distance between the protestors and the President while he was dining. They do not address the allegation that the pro-Bush demonstrators were permitted to remain along the President's motorcade route, while the anti-Bush protestors were kept away. This additional discrepancy is quite relevant in assessing whether a reasonable agent could have be-

lieved the direction to relocate the anti-Bush protestors was consistent with the First Amendment.

More fundamentally, the protestors' claim is not simply that they were moved, but that they were relocated *because* they criticized the President. The protestors allege that if the agents asserted a security rationale for moving the protestors, that rationale was false. That is, they allege that the agents' action was both facially discriminatory *and* driven by an improper motive. We must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). Therefore, taking the protestors' allegation of discriminatory motive as true, it is clear that no reasonable agent would think that it was permissible under the First Amendment to direct the police to move protestors farther from the President because of the critical viewpoint they sought to express.

The agents suggest that because there are no cases with similar fact patterns, a reasonable agent could not have known that their conduct was unconstitutional. But the denial of qualified immunity does "not require a case directly on point." *Ashcroft v. al-Kidd*, — U.S. —, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011). Rather, it requires that "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* It is "beyond debate" that, particularly in a public forum, government officials may not disadvantage speakers based on their viewpoint.

As decades of Supreme Court doctrine make clear, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger,* 515 U.S. at 828, 115 S. Ct. 2510; *see, e.g., R.A.V.,* 505 U.S. at 391-92, 112 S. Ct. 2538; *Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 95-96, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972); *see also Metro Display Adver. v. City of Victorville,* 143 F.3d 1191, 1195 (9th Cir. 1998). The "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views," for "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Mosley,* 408 U.S. at 95-96, 92 S. Ct. 2286. Indeed, in a case closely on point, the D.C. Circuit held in *Mahoney v. Babbitt* that the government could not grant permits to demonstrate along the Inaugural Parade route to those supportive of the President and refuse permits to those opposed. 105 F.3d 1452, 1459 (D.C. Cir. 1997).

The anti-Bush protestors have plausibly alleged that the Secret Service agents acted *with the sole intent* to discriminate against them because of their viewpoint; this intent can never be objectively reasonable. After discovery or trial, the evidence could demonstrate that the agents did not, in fact, act with viewpoint discriminatory intent or that, notwithstanding some discriminatory motivation, they acted with the primary intent to protect the President and therefore would have taken the same actions absent any

discriminatory motive. In that case, they are, of course, free to renew their qualified immunity motion. *See Behrens v. Pelletier,* 516 U.S. 299, 306, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996); *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). However, the agents are not entitled to qualified immunity at this stage.

* * *

As this case arises on a motion to dismiss, any explanation for the agents' differential treatment of the pro-and anti-Bush demonstrators would have to be so obviously applicable as to render the assertion of unconstitutional viewpoint discrimination implausible. The Dissent from the Denial of Rehearing En Banc ("En Banc Dissent") maintains otherwise, so we briefly respond to its analysis:

Our opinion makes clear that there is simply *no* apparent explanation for why the Secret Service agents permitted only the pro-Bush demonstrators, and not the anti-Bush protestors, to remain along the President's after-dinner motorcade route, *see* Op. at 1225, 1228; the En Banc Dissent suggests none. And the explanation proffered in the En Banc Dissent for the agents' actions in moving the anti-Bush demonstrators in the first place—namely that the pro-Bush demonstrators were not moved because they were ostensibly further than the protestors from the patio where President Bush was dining, *see* En Banc Dissent at 948 is not a basis for granting the agents qualified immunity at the pleadings stage, for several reasons:

First, the En Banc Dissent's speculative explanation is non-responsive to the protestors' viewpoint discrimination claim. The question is not why the agents moved the anti-Bush protestors *somewhere,* but rather why the agents moved the protestors a considerable distance, to a location that, as we have explained, was in "relevant ways . . . not comparable" to the place where the pro-Bush group was allowed to remain. *See* Op. at 1228. No "tape[ ] measure" is required, *see* En Banc Dissent at 947, to appreciate that demonstrators separated by more than a full square block, and two roadways, from the public official to whom and about whom they wish to direct a political message will be comparatively disadvantaged in expressing their views. Nor does one need a noise dosimeter to know that the President will be able to hear the cheers of the group left alongside his travel route but unable to hear the group restricted to an area about two square blocks away.

Perhaps there was a reason for the considerable disparity in the distance each group was allowed to stand from the Presidential party—for example, traffic, or an obstruction on the square block adjacent to the Inn, requiring that the anti-Bush demonstrators be moved more than a block further away. But, as matters now stand, nothing in the En Banc Dissent's entirely hypothetical "explanation is so convincing" as to render "*im*plausible" the plaintiffs' claim of viewpoint discrimination. *See Starr v. Baca,* 652 F.3d 1202, 1216 (9th Cir. 2011), *cert. denied,* — U.S. —, 132 S. Ct. 2101, 182 L. Ed. 2d 882 (2012). It is therefore premature at this stage to credit the En Banc Dissent's

theory instead of the protestors'. *See id.* For the same reason, the En Banc Dissent's assertion, *see* En Banc Dissent at 947, that the panel has "second[ ] guess[ed]" the Secret Service agents' judgment about how best to protect the President fails to account for the fact that at this stage of the case, the record is devoid of *any* explanation for the substantial difference in where the two groups of demonstrators were allowed to stand relative to the President's locations.

Finally, the En Banc Dissent's invocation of the case law upholding certain buffer zones, *see id.* at 952, actually illustrates well why the complaint *does* establish a plausible claim of a violation of clearly established law regarding impermissible viewpoint discrimination in a public forum. Such buffers have been upheld *only,* and expressly, on the understanding that the restrictions are content and viewpoint neutral. For example, in *Hill v. Colorado,* 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000), the Supreme Court upheld the buffer zone ordinance there at issue only after emphasizing that it applied "to all 'protest,' to all 'counseling,' and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made an abortion decision. That is the level of neutrality that the Constitution demands." *Id.* at 725, 120 S. Ct. 2480. Had the ordinance in *Hill* established a one-hundred foot buffer zone for pro-abortion demonstrators and a three-hundred foot buffer zone for anti-abortion protestors, there is no doubt such a viewpoint discriminatory ordinance would have been summarily invalidated.

The protestors here plausibly allege just such a significant *difference* in the buffer zone in a public forum. And *Hill* was, of course, decided before the events in this case. The protestors therefore allege a plausible case of impermissible viewpoint discrimination as of the time this case arose.

C. Fourth Amendment

To succeed on their Fourth Amendment claim, the protestors must allege facts from which we could plausibly infer: (1) that excessive force was used against them; (2) that the law at the time of the protest clearly established that the force used was unconstitutionally excessive; and (3) that even though they were not present at the demonstration, Superintendent Ruecker and Captain Rodriguez played a sufficient role in the use of excessive force that they may be held liable for it. While the protestors' allegations are sufficient to support a claim of excessive force and to deny qualified immunity to those who might be liable for the use of that force, they have pleaded no facts that would allow us to make a plausible inference that Ruecker and Rodriguez were in any way involved in the use of excessive force such that they may be held liable for it.

1.

Fourth Amendment claims of excessive force are evaluated according to the framework established by *Graham v. Connor,* 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). *See Davis v. City of Las Vegas,* 478 F.3d 1048, 1053-54 (9th Cir. 2007). Under *Graham,*

> [d]etermining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.

Graham, 490 U.S. at 396, 109 S. Ct. 1865 (internal quotation marks and citations omitted). *Graham* cautioned that reasonableness is to be judged not "with the 20/20 vision of hindsight," but "from the perspective of a reasonable officer on the scene." *Id.*

We first "assess the quantum of force used" and then "measure the governmental interests at stake by evaluating a range of factors," including: (1) "the severity of the crime at issue"; (2) the extent to which "the suspect poses an immediate threat to the safety of the officers or others"; (3) and "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Davis,* 478 F.3d at 1054 (internal quotation marks and citations omitted). In considering whether, from the perspective of an officer on the scene, "the totality of the circumstances justifie[d]" the force used, additional factors may also be relevant. *Forrester v. City of San Diego,* 25 F.3d 804, 806 n.2 (9th Cir. 1994). For example, we may look to the alternatives available to the officer at the time. *See Davis,* 478 F.3d at 1054.

There is little doubt that under this framework, the force alleged here was excessive. The protestors allege that without ensuring that they heard the police warning that instructed them to move, and without

giving them time to move of their own accord, the police, "including officers clad in riot gear, forced the anti-Bush demonstrators to move . . . , in some cases by violently shoving" them, "striking them with clubs and firing pepper spray bullets at them." Once on the east side of Fifth Street, the police "divided the [anti-Bush protestors] into two groups, encircling each group," and "separat[ing]" families, "including children, some of whom were lost, frightened and traumatized." Although some protestors attempted to leave the area, they were prevented from doing so.

To be sure, the government interest at stake—the protection of the President—is of the highest significance. *See, e.g., Hunter v. Bryant,* 502 U.S. 224, 229, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991). However, an examination of the *Graham* factors indicates that the force used was excessive even to protect this interest.

"[T]he most important single element" of the *Graham* framework is "whether the suspect poses an immediate threat to the safety of the officers or others." *Chew v. Gates,* 27 F.3d 1432, 1441 (9th Cir. 1994). There is no indication that the anti-Bush protestors posed such a threat to the President, the police officers, or anyone else. The SAC alleges that the protestors were not close enough to the President to harm him and that their protest was entirely peaceful.

The other two *Graham* factors also favor the protestors. They were not committing, and had not committed, any crime. Instead, they were engaging in a peaceful demonstration, the location and timing of which had previously been approved by local police.

Nor is there any indication that they were disobeying the commands of the officers or resisting in any way.

Furthermore, it is a plausible inference from the facts alleged that there were less harmful alternatives available that a reasonable officer on the scene should have considered. According to the SAC, the police did not attempt to contact the protest's organizers, whose contact information they had, nor did they give the group sufficient notice or time to move on their own before being forcibly moved.

The protestors allege that the police used violent physical force and pepper spray on a group of obedient, peaceful protestors. As compared to similar cases, the force used was at least as violent, with no greater justification. For example, we held in *Headwaters Forest Defense v. County of Humboldt,* 276 F.3d 1125, 1131 (2002), that the use of pepper spray against peaceful protestors, even when those protestors linked themselves together and refused to release the locks, was unreasonable. In *P.B. v. Koch,* 96 F.3d 1298, 1304 (9th Cir. 1996), we held that "slapping, punching, and choking" students when there was no reason to use force was excessive. Under these precedents, the protestors' allegations indubitably support a plausible claim of excessive force.

As the cases just discussed indicate, the unreasonableness of this use of force was clearly established at the time of the protest. That conclusion is inescapable even if we focus only on one aspect of the force used. The protestors allege that the police officers used pepper spray bullets, even though the demon-

strators were peaceful and cooperative. It was clearly established at the time of the protest that the use of pepper spray on an individual who is already under control constitutes excessive force in violation of the Fourth Amendment. *See Headwaters Forest Def.,* 276 F.3d at 1130; *LaLonde v. County of Riverside,* 204 F.3d 947, 961 (9th Cir. 2000).

2.

The protestors have not, however, provided sufficient allegations to establish a plausible claim against Ruecker and Rodriguez, in particular, for the use of the excessive force. Ruecker and Rodriguez were not on the scene at the time of the demonstration, but they were the supervisors of the officers who were on the scene. Supervisors may not be held liable under § 1983 for the unconstitutional actions of their subordinates based solely on a theory of respondeat superior. *Iqbal,* 129 S. Ct. at 1948.

We recently summarized the circumstances under which supervisors may be held liable under § 1983 as follows:

> (1) for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence in the constitutional deprivation by subordinates; or (4) for conduct that shows a "reckless or callous indifference to the rights of others."

al-Kidd, 580 F.3d at 965 (quoting *Larez v. City of L.A.*, 946 F.2d 630, 646 (9th Cir. 1991)).[6] The SAC is inadequate to establish that any of these circumstances apply here. The allegations regarding Ruecker and Rodriguez's role in the use of excessive force are conclusory; none is supported by sufficient—or, for that matter, any—factual content that would allow it to meet the pleading standard articulated in *Iqbal.*

First, the protestors allege that Ruecker, as "Superintendent of the Oregon State Police" was "responsible for directing the operations of the Oregon State Police and supervising the law enforcement officers and agents acting under his authority." Similarly, they allege that Rodriguez, as Captain of the Southwest Regional Headquarters of the Oregon State Police, was "responsible for directing the operations of said Headquarters and supervising the law enforcement officers and agents acting under his authority." These allegations are merely recitations of the *organizational* role of these supervisors. The protestors make no allegation that the supervisors took any specific action resulting in the use of excessive force by

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[6] *Al-Kidd* was decided after *Iqbal*. The extent to which its supervisory liability framework is consistent with that decision and remains good law has been debated. *See, e.g., Al-Kidd v. Ashcroft*, 598 F.3d 1129, 1141 (9th Cir. 2010) (O'Scannlain, J., dissenting from denial of rehearing en banc); *see also Bayer v. Monroe Cnty. Children & Youth Servs.*, 577 F.3d 186, 191 n.5 (3d Cir. 2009); *Maldonado v. Fontanes*, 568 F.3d 263, 274 n.7 (1st Cir. 2009). Because the protestors do not allege sufficient facts to meet the standard set forth in *al-Kidd*, we need not consider that debate.

police officers on the scene of the anti-Bush demonstration.

We have "never required a plaintiff to allege that a supervisor was physically present when the injury occurred." *Starr v. Baca,* 652 F.3d 1202, 1205 (9th Cir. 2011). But § 1983 plaintiffs nevertheless must allege *some* "culpable action or inaction" for which a supervisor may be held liable. *Larez,* 946 F.2d at 645. In an effort to meet this requirement, the protestors allege that Rodriguez "and other individual State and Local Police Defendants," including, we assume for present purposes, Ruecker, "personally directed and approved of the actions of the police." But they do not specify which actions Ruecker or Rodriguez directed and approved. In particular, they do not allege that the supervisors directed or approved the tactics—the shoving, use of clubs, and shooting of pepper spray bullets—employed by the officers in moving the protestors.

Finally, the protestors claim that "the use of overwhelming and constitutionally excessive force against them" was "the result of inadequate and improper training, supervision, instruction and discipline . . . under the personal direction . . . of the State and Local Police Defendants." However, this allegation is also conclusory. The protestors allege no facts whatsoever about the officers' training or supervision, nor do they specify in what way any such training was deficient.

The protestors' reliance on *Connick v. Thompson,* — U.S. —, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011), is

misplaced. *Connick* reaffirmed the possibility—left open in *Canton v. Harris,* 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)—that there are circumstances in which a need for training is so obvious that a city that fails to provide it may be held to have been deliberately indifferent even without a pattern of constitutional violations by city employees. *Id.* at 1361 (citing *Canton,* 489 U.S. at 390 n.10, 109 S. Ct. 1197). This concept is inapposite here. There is no debate in this case about the need for training police officers on the constitutional use of force. The questions here are whether any such training they received was deficient, and, if so, whether the defendant police supervisors were responsible for that deficiency. The protestors have alleged no facts that would demonstrate either.

We hold that the protestors have not pleaded sufficient allegations to support a claim of excessive force against Ruecker and Rodriguez. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal,* 129 S. Ct. at 1949. It is possible, however, that the complaint could be saved by amendment. Because the district court held that the SAC was sufficient to state a claim against the police supervisors, it did not, of course, consider whether the protestors ought to be given leave to amend to cure any deficiencies. For us to decide that question, ordinarily addressed to the district court's sound discretion, *see, e.g., Mir v. Fosburg,* 646 F.2d 342, 347 (9th Cir. 1980), would be to usurp the district court's authority. *Cf. Iqbal v. Ashcroft,* 574 F.3d 820, 821 (2d Cir. 2009). We therefore

remand to the district court for dismissal of the protestors' excessive force claim and for a determination in the first instance of whether the protestors ought to be given leave to amend their complaint.

III. Conclusion

In sum, we hold that the protestors have alleged a plausible First Amendment claim and that Agents Wood and Savage are not, at this time at least, entitled to qualified immunity. We therefore **AFFIRM** the district court's ruling, denying the Secret Service agents' motion to dismiss that claim. However, we hold that the protestors have not alleged sufficient facts to support a plausible Fourth Amendment claim against police supervisors Ruecker and Rodriguez. Therefore, we **REVERSE** the district court's denial of the supervisors' motion to dismiss and **REMAND** to that court with instructions to dismiss protestors' Fourth Amendment claim and to determine whether the protestors ought to be given leave to amend.

APPENDIX

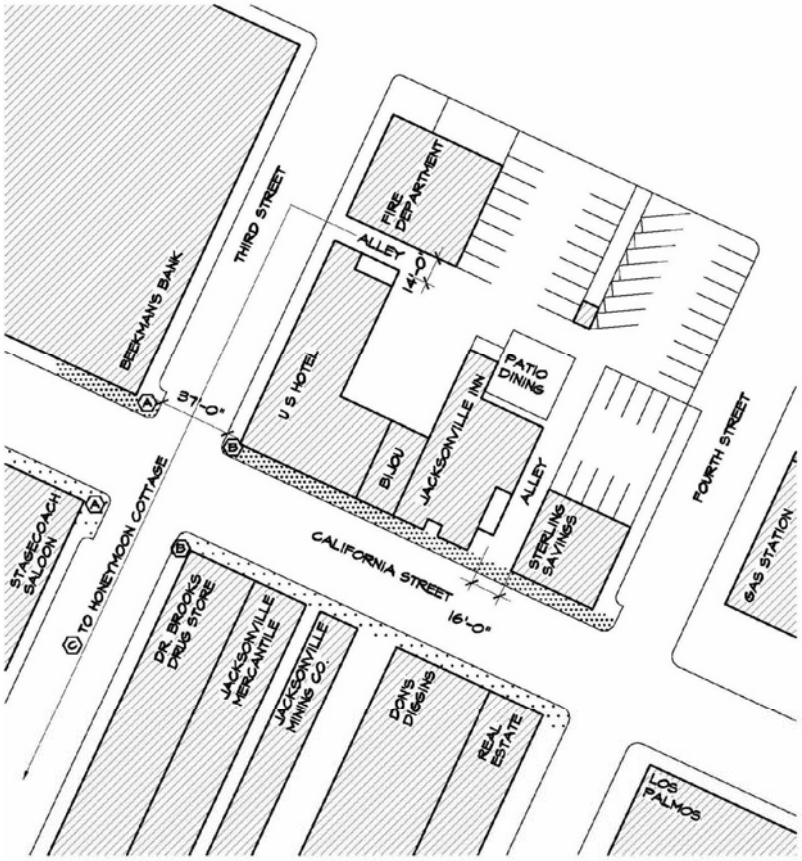

EXHIBIT A TO SECOND AMENDED COMPLAINT
Page 1 of 1

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON,
MEDFORD DIVISION

Case No. CV 06-3045-CL

MICHAEL MOSS, ET AL., PLAINTIFFS

v.

UNITED STATES SECRET SERVICE, DEPARTMENT OF HOMELAND SECURITY, ET AL., DEFENDANTS

Oct. 29, 2010

ORDER

PANNER, District Judge.

Magistrate Judge Mark D. Clarke has filed a Report and Recommendation, and the matter is now before this court. *See* 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b). When either party objects to any portion of a Magistrate Judge's Findings and Recommendation, the district court reviews that portion of the Magistrate Judge's report *de novo*. 28 U.S.C. § 636(b)(1)(C); *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). Here, defendants have filed timely objections, so I have reviewed the file *de novo*.

DISCUSSION

On interlocutory appeal, the Ninth Circuit reversed and remanded this court's rulings on defendants' motions to dismiss plaintiffs' first amended complaint. *Moss v. U.S. Secret Serv.,* 572 F.3d 962 (9th Cir. 2009). The Ninth Circuit ruled that plaintiffs "should be granted leave to amend their complaint so that they have the opportunity to comply with [*Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) and *Ashcroft v. Iqbal,* — U.S. —, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)]." *Moss,* 572 F.3d at 965.

After remand, plaintiffs have filed a second amended complaint. Defendants move to dismiss based on qualified immunity and failure to state a claim. Judge Clarke's comprehensive Report and Recommendation concludes that defendants' motions should be denied in part.

I agree with Judge Clarke that the second amended complaint meets the stricter pleading standards imposed by *Twombly* and *Iqbal* as to plaintiffs' claims for First Amendment violations against the federal defendants; for First and Fourth Amendment violations and common law claims against the County defendants; for Fourth Amendment violations against the State defendants; and for Fourth Amendment violations and common law claims against the City defendants. R & R at 71.

I also agree with Judge Clarke that defendants have not shown, at least at this stage of the litigation, that they are entitled to qualified immunity. De-

fendants cite *Dunn v. Castro,* 621 F.3d 1196 (9th Cir. 2010), as supplemental authority for their argument that Judge Clarke defined the First Amendment right at issue here too broadly. The *Dunn* opinion, which concerned an incarcerated father's right to receive visits from his children, does not undercut Judge Clarke's analysis of the qualified immunity issue.

Judge Clarke recommends dismissing plaintiffs' remaining claims. For the reasons stated in Judge Clarke's prior Report and Recommendation, I agree that plaintiffs' remaining claims should be dismissed. Accordingly, I ADOPT the current Report and Recommendation in its entirety.

CONCLUSION

Magistrate Judge Clarke's Report and Recommendation (# 178) is adopted. Defendants' motions (# 154, # 156, # 162, and # 164) are granted in part and denied in part as set forth in the Report and Recommendation.

IT IS SO ORDERED.

REPORT & RECOMMENDATION

CLARKE, United States Magistrate Judge:

Plaintiffs bring this action pursuant to 42 U.S.C. § 1983 and *Bivens v. Six Unknown Agents,* 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) alleging claims for violations of the First, Fourth, Fifth, and Fourteenth Amendments, the Oregon Constitution, and Oregon common law by Defendants. They seek compensatory and punitive damages and injunctive

and declaratory relief from Defendants for alleged unconstitutional, unlawful, and tortious actions against Plaintiffs and Plaintiff Class, arising out of and related to Defendants' disruption of Plaintiffs' lawful assembly and protest demonstration in Jacksonville, Oregon, on October 14, 2004.

Named Plaintiffs[1] include Michael Moss, Lesley Adams, Beth Wilcox, Richard Royer, Lee Frances Torelle, Mischelle Elkovich, Anna Vine, and the Jackson County Pacific Green Party.

Named Defendants include United States Secret Service of the Department of Homeland Security ("Defendant Secret Service"), Mark Sullivan, Tim Wood, Rob Savage, John Doe 1, David Towe, City of Jacksonville, Ron Ruecker, Timothy F. McLain, Ran die Martz, Eric Rodriguez, Mike Winters, Jackson County, and John Does 2-20, Municipal Doe Defendants.

For the purposes of this report and recommendation, the defendants will be referred to by the following:

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[1] Plaintiffs seek class certification (SAC ¶¶ 31-34), but the court declines to address this issue in the present report and recommendation. Federal Rule of Civil Procedure 23(c)(1)(A) explains that the court must determine whether to certify the action as a class action "at an early practicable time" after a suit has been filed. However, "in some cases, it may be appropriate in the interest of judicial economy to resolve a motion for summary judgment or a motion to dismiss prior to a ruling on class certification." *Wright v. Schock*, 742 F.2d 541, 545-46 (9th Cir. 1984).

"Secret Service Defendants" or "Federal Defendants": Defendant Secret Service and individual defendants Sullivan, Basham, Wood, Savage, and John Doe 1.

"State Defendants": Defendants Ruecker, McLain, Martz, and Rodriguez.

"Local Defendants": City of Jacksonville, Jackson County, individual defendants Towe, Winters, John Does 2-20, and Municipal Doe Defendants.

Plaintiffs filed their second amended complaint ("SAC") on October 15, 2009.[2] Before the court are Defendants' motions to dismiss and motion for summary judgment. The motions are granted as to all claims previously dismissed by this court on June 8, 2007[3] to include all injunctive and declaratory relief claims, claims for relief for violations of the Fifth and Fourteenth Amendment, and claims for relief under the Oregon Constitution. (Report & Recommendation, Dkt. No. 107 ("2007 R & R") 35.) As to specific motions before the court:

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[2] Plaintiffs first brought this action in July 2006. Defendants, collectively, filed several motions to dismiss and a motion for summary judgment. The court granted in part and denied in part the motions. Federal Defendants filed an interlocutory appeal with the Ninth Circuit Court of Appeals. The Ninth Circuit reversed the court's decision but granted Plaintiffs leave to amend. Plaintiffs amended their complaint, supplementing facts, re-pleading claims previously dismissed, and pleading new claims.

[3] Court has carefully reviewed its June 2007 decision and sees no reason to disturb those rulings.

Federal Defendants' motion to dismiss (# 164) is denied in part and granted in part. Motion is denied as to Plaintiffs' claims for damages from individual federal defendants for violation of the First Amendment rights. Consistent with the 2007 R & R, motion is granted to dismiss claims against Basham for lack of personal jurisdiction, and the *Bivens* claim against federal defendants for violations of Fourth Amendment rights.

State Defendants' motion to dismiss (# 162) is granted in part and denied in part. Motion is granted to dismiss claims against Ron Ruecker and Eric Rodriguez in their individual capacities for violations of their First Amendment right. Motion is denied as to claims for violations of Fourth Amendment.

Jackson County Defendants' motion to dismiss (# 154) is granted, consistent with the 2007 R & R as to injunctive and declaratory relief and relief under the Oregon Constitution.

City of Jacksonville Defendants' motion to for summary judgment (# 156) is construed as a motion to dismiss as to Plaintiffs' § 1983 claims.[4] The motion is granted as claims for violation of Plaintiffs' First Amendment rights and denied as to claims for violations of Fourth Amendment rights. City Defendants' motion for summary judgment as to claims under

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[4] City Defendants also filed a motion for summary judgment to the FAC. (Dkt. No. 56.) On April 27, 2007, the court held that motion in abeyance pending the close of discovery. (Dkt. No. 103.)

Oregon common law is premature and held in abeyance pending the close of discovery.

I. Procedural History

A. First Amended Complaint

Plaintiffs filed their complaint on July 6, 2006, and filed their first amended complaint ("FAC") on September 26, 2006, alleging claims for violations of the First, Fourth, Fifth, and Fourteen Amendments, as well as state law claims for violations of the Oregon Constitution, and Oregon common law claims of assault and battery, false imprisonment, and negligence. Plaintiffs sought declaratory and injunctive relief, compensatory and punitive damages, interest, attorneys fees, and costs. (Dkt. Nos. 1 and 21.) Defendants collectively filed motions to dismiss and a motion for summary judgment. (Dkt. Nos. 52, 53, 56, 62, 68, and 72.) The court determined that Defendants' summary judgment motions should be held in abeyance pending the close of discovery and considered only the motions to dismiss. (Dkt. No. 103.)

After oral argument, Magistrate Judge Mark Clarke recommended that these motions be granted in part and denied in part.

> Specifically, the court finds that: 1) plaintiffs' allegations fail to establish plaintiffs have standing to seek prospective relief; 2) plaintiffs' substantive due process claims are barred as they are covered by the First and Fourth Amendments; 3) plaintiffs cannot seek damages for violations of the Oregon Constitution; 4) to the extent that plaintiffs are su-

> ing state officials in their official capacity for retrospective declaratory relief, plaintiffs' claims are barred by the Eleventh Amendment; 5) plaintiffs have failed to establish personal jurisdiction over defendant Basham; 6) plaintiffs' complaint fails to state a Fourth Amendment claim against defendants Wood and Savage; 7) taking plaintiffs' allegations as true, plaintiffs have pleaded a violation of clearly established First Amendment law by the federal defendants.

(2007 R & R, 2.) District Court Judge Owen Panner adopted the recommendation. (Dkt. No. 130.)

Claims remaining included:[5]

> (1) against Federal Defendants: the *Bivens* claim for Federal Defendants' violation of Plaintiffs' First Amendment Rights and for attorneys fees under § 1988.
>
> (2) against State, County and City Defendants: § 1983 claims for violations of their First and Fourth Amendment Rights and § 1988 claim for attorney fees.
>
> (3) against City and County Defendants: § 1983 claims for violations of their First and Fourth Amendment Rights, § 1988 claim for attorneys fees, claims for punitive damages, and claims for com-

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[5] This court respectfully disagrees with the Ninth Circuit's summary of its R & R, which concluded: "The magistrate then issued a final [R & R] recommending dismissal of all of Plaintiffs' claims against the state and local defendants." *Moss v. U.S. Secret Service*, 572 F.3d 962, 967 (9th Cir. 2009).

pensatory damages for violations of Oregon common law for assault and battery, false imprisonment, and negligence.

Federal Defendants filed an interlocutory appeal, appealing the district court's denial of its motion to dismiss claims against them and the denial of their defense of qualified immunity. The Ninth Circuit found for the Federal Defendants: "the factual content contained within the complaint does not allow us to reasonably infer that the [Federal Defendants] ordered the relocation of Plaintiffs' demonstration because of its anti-Bush message." The court concluded that the claim did not satisfy the requirements of *Twombly* and *Iqbal*. *Moss v. U.S. Secret Service*, 572 F.3d 962, 972 (9th Cir. 2009). The Ninth Circuit reversed the district court's decision but granted Plaintiffs leave to amend their complaint, giving them the opportunity to comply with *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) and *Ashcroft v. Iqbal*, —U.S.—, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). *Moss*, 572 F.3d at 964.[6] "They may be able to amend their complaint to include facts that will state a plausible claim, and thus the interests of justice would be served by granting them a chance to do so." *Id.* at 975. The case was

[6] Federal Defendants also sought an interlocutory appeal on the district court's deferral of their alternative motion for summary judgment. The Ninth Circuit concluded, "The attempt is misguided and, if it were to succeed, would deny Plaintiffs a fair opportunity to litigate the merits of their claim." *Moss*, 572 F.3d at 972.

reversed and remanded on September 8, 2009. (Dkt. No. 147.)

B. Second Amended Complaint

Plaintiffs filed their second amended complaint ("SAC"; Dkt. No. 151) on October 15, 2009 seeking four claims for relief. In filing their SAC, Plaintiffs repled claims the district court previously dismissed but were not appealed, though the Ninth Circuit's permission to replead did not encompass previously dismissed claims. Plaintiffs explained, "Although certain of Plaintiffs' claims were dismissed by the court on the Defendants' motions, those claims are restated here so as to preserve them for appeal." (SAC ¶ 2.) The court is not revisiting its previous decisions on dismissed claims, and the previous ruling remains the same.

Claims in the SAC are summarized as follows:

(1) *First Claim Against Secret Service Defendants:*

Individual Secret Service Defendants, except Defendant Sullivan, are liable in their individual or personal capacities to Plaintiffs for compensatory damages under *Bivens* for violations of First, Fourth, and Fifth Amendment rights. Plaintiffs seek punitive damages and declaratory relief under *Bivens* as well as declaratory and supplemental injunctive relief under 5 U.S.C. § 702 against all Defendants in their official capacities and all person acting in the official capacities as their agents.

(2) *Second Claim Against State, Jackson County and City of Jacksonville Defendants:*

Defendants, except State Defendant McLain and Martz, are liable in their individual and personal capacities for compensatory damages under 42 U.S.C. § 1983 and for attorneys fees under 42 U.S.C. § 1988 for violations of their First, Fourth, Fifth, and Fourteenth Amendment rights. Plaintiffs seek punitive damages and declaratory relief. Plaintiffs assert they are entitled to injunctive relief from all Defendants in their official capacities and all person acting in the official capacities as their agents.

(3) *Third Claim Against Jackson County and City of Jacksonville Defendants*

Plaintiffs seek compensatory damages for violations of their rights under the Oregon Constitution. They also seek declaratory and injunctive relief and attorneys fees pursuant to *Armaria v. Kitzhaber,* 959 O, 2d 49 (Or. 1998). (SAC ¶¶ 112-115.)

(4) *Fourth Claim Against Jackson County and City of Jacksonville Defendants*

Plaintiffs seek compensatory damages under Oregon common law for assault and battery, false imprisonment, and negligence. (SAC ¶¶ 116-118.)

In the SAC, Plaintiffs pled new facts and asserted new claims (1) against Secret Service Defendants, Sullivan, Basham, Wood, and Savange in their individual or personal capacities for declaratory relief under *Bivens* for violations of their Constitutional rights under the First, Fourth, and Fifth Amendment (SAC ¶ 105) and (2) against state and local defendants Towe, Ruecker, Rodriguez, McLain, Martz, and Win-

ters in their individual and personal capacities under 42 U.S.C. § 1983 for violations of their constitutional rights under the First, Fourth, and Fifth Amendments. (SAC ¶ 108.)

Defendants filed several motions to dismiss claims against them under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. City Defendants filed a motion for summary judgment on all claims against them. Motions include

(1) Federal Defendants Secret Service, Mark Sullivan, Ralph Basham, Tim Wood, and Rob Savage's Motion to Dismiss (# 165)

(2) State Defendants Ron Ruecker, Eric Rodriguez, Tim McLain, and Ran die Martz's Motion to Dismiss (# 162)

(3) Defendants Jackson County and Mike Winters' Motion to Dismiss (# 154),

(4) Defendants City of Jacksonville and David Towe's Motion for Summary Judgment (# 156)

The court heard oral argument on May 12, 2010.

II. Background

On October 14, 2004, former President George W. Bush made a campaign appearance in Central Point, Oregon. The President was scheduled to spend the evening at the Honeymoon Cottage in Jacksonville, Oregon. Plaintiffs, who had learned of the President's plan to visit Jacksonville, organized a demonstration to their express opposition to the President and his policies. Plaintiffs assert they communicated

their plans with Defendant Towe of the City of Jacksonville and Defendant Winters of Jackson County. (SAC ¶¶ 40-41.) Around 6:00 p.m., Plaintiffs, consisting of approximately 200 to 300 anti-Bush demonstrators, assembled on California Street between Third and Fourth Streets, where the Jacksonville Inn (the "Inn") was located. The Honeymoon Cottage was approximately two blocks south of the Inn.

A similarly sized group of pro-Bush demonstrators assembled adjacent to the anti-Bush demonstrators, beginning at the western curb of Third Street and extending west along California Street. They were separated from the anti-Bush demonstrators by the 37-foot width of Third Street. (SAC ¶¶ 45–48.)

En route to Jacksonville, the President decided to dine at the Inn. At approximately 7:00 p.m., both pro-Bush and anti-Bush demonstrators learned of the President's change of plans. Demonstrators in both groups clustered to the north side of California Street. Plaintiffs assert that both groups had equal access to the President upon his arrival and were positioned to have equal access during his departure, had they remained in the same locations. (SAC ¶ 48.)

Prior to the President's arrival, state and local law enforcement officers cleared the alleyway behind the Inn to provide back entrance access and began restricting the movements of some of the demonstrators outside the Inn. Plaintiffs allege State and Local Defendants' law enforcement officers, dressed in riot gear, cleared the Third Street alley to the patio dining area and directly behind the Inn. Plaintiffs assert

these actions were taken at the request of a Secret Service agent. Law enforcement officers blocked Third Street, including both the sidewalk north of California Street and the California Street alley running along the east side of the Inn. Law enforcement officers were stationed at the entrance of the California Street alley to prevent any unauthorized persons from entering the alley. (SAC ¶¶ 48-49.)

The President arrived at approximately 7:15 p.m., entering the Inn's open air dining patio through a back entrance. Also present at the Inn were dozens of hotel guests and diners who were permitted to remain inside the Inn without undergoing any form of security screening. In the upstairs dining area of the Inn was a group of approximately 30 persons affiliated with a medical educational group. These individuals were not screened. Plaintiffs allege that some members were able to view the President from inside the Inn. For instance, some found an unguarded door leading into the patio dining area from where they could open the door and view the President from a distance of approximately 15 feet. (SAC ¶ 52.)

At approximately 7:30 p.m., Secret Service agents directed local and state law enforcement officers to clear California Street between Third and Fourth Streets and move all persons in that area to the east side of Fourth Street and subsequently to the east side of Fifth Street. (SAC ¶ 53.) Federal Defendants claim that the reason for the Secret Services' request to move the persons in that area was because they did not want any one within handgun or explosive range of

the President.[7] Plaintiffs assert that this security rationale is false because there was no significant security difference between the two groups—the pro-Bush demonstrators and the anti-Bush demonstrators. (SAC ¶ 55.)

At approximately 7:45 p.m. a line of police officers, including State and Local Defendants, in riot gear formed across California Street, facing the anti-Bush demonstrators. These officers made amplified announcements stating that the anti-Bush assembly was now unlawful and ordered the anti-Bush demonstrators to move. Plaintiffs allege that State and Local Defendants and law enforcement officers forcefully moved the anti-Bush demonstrators from their location without ascertaining whether the demonstrators heard or understood the announcements. In some instances, Plaintiffs allege, these officers were violent, striking some individuals with clubs and firing pepper spray bullets at them. (SAC ¶ 61.) Plaintiffs further allege that once they were moved beyond Fourth Street to Fifth Street, they were separated into two groups and law enforcement officers encircled each group, preventing some demonstrators from leaving the area. Some families were separated in the process. (SAC ¶ 61.)

Pro-Bush demonstrators were permitted to remain on the northwest and southwest corners of Third and California Streets. Plaintiffs allege that the anti-

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[7] The Secret Service's explanation of protecting the President from those within handgun or explosive range will hereinafter be referred to as the "security rationale."

Bush group was targeted by the Secret Service and these demonstrators were cleared from the area:

> even though they were much farther from the President than the unscreened diners, hotel guests, and other visitors, including the assembled medical group, inside the Inn, and even though they had no greater access to the President than the pro-Bush demonstrators. In fact, having moved the anti-Bush demonstrators two blocks east the Defendant Secret Service agents left the pro-Bush demonstrators with unimpeded access to the President along the route to the Honeymoon Cottage, demonstrating that the purported reason for moving the anti-Bush demonstrators was false.

(SAC ¶ 57.) Plaintiffs allege that neither the pro-Bush demonstrators on California Street nor the unscreened diners, hotel guests, and other visitors at the Inn were moved or screened. (SAC ¶ 58.)

Plaintiffs assert that Defendants Towe, Rodriguez, Winters and other individual defendants "personally directed and approved of the action of the police against Plaintiffs . . . and personally directed and approved of permitting the pro-Bush demonstrators and unscreened diners, guests, and visitors . . . to remain in the vicinity undisturbed and unrestricted." (SAC ¶ 96.) Further, Plaintiffs explain,

> The Police Defendants' actions and actions of the police officers in using overwhelming and excessive force, including the use of officers clad in riot gear, against unarmed, law-abiding peaceful demonstra-

> tors exercising their core First Amendment rights of speech and assembly on public sidewalks were the custom, policy or practice of the State of Oregon and Defendants City of Jacksonville and Jackson County and Municipal Does respectively, or were established as such by the individual Police Defendants in taking those actions. The individual Police Defendants had the final decision-making authority and responsibility for establishing the policies of their respective employers. The individual Police Defendants' decision to order and implement the aforesaid police actions constituted the official policy of their respective public employees.

(SAC ¶ 97.)

Plaintiffs allege that this is one of several examples of the Secret Service's policy of discriminating against First Amendment expression, in its cooperation with the Advance Team under President Bush. Plaintiffs allege,

> Since the early 1960s, each American President has employed an Advance Team to work together with the Secret Service to manage the twin goals of protecting the President and providing him access to the public in his public appearances and travels. Each President has established different policies in the balance between these two goals. The Secret Service has a long history of going beyond security measures necessary to protect the President, and manipulating its security function to protect Presidents from First Amendment-protected expressions of opposition by individuals and groups. This has

> required the courts periodically to examine and declare invalid, unlawful, or excessive, so-called security measures for which the Secret Service could not show a reasonable basis.

(SAC ¶¶ 63–64.) As further evidence of their claim, Plaintiffs point to the coordination of the Secret Service with the Advance Team and reference the "Presidential Advance Manual," dated 2002, attaching a redacted copy to the complaint.

Plaintiffs allege, "the White House under President George W. Bush, more than any prior Presidency, sought to prevent or minimize the President's exposure to dissent or opposition during his public appearances and travels, while at the same time maximizing—within the demands of reasonable security—his exposure to supporters and to the public in general." (SAC ¶ 67.) Plaintiffs allege that the Secret Service Defendants and the Advance Team under President Bush's administration worked closely together to "concoct, manipulate, and gerrymander false security rationales for the exclusion or distancing of opposition, dissent, or protest expressive activity from proximity to the President, while minimizing the distancing of the public in general and supporters." (SAC ¶ 69.)

Further, Plaintiffs allege that the Secret Service had an unwritten policy and practice to work with the White House to eliminate dissent and protest from presidential appearances. The policy was put into effect on October 14, 2004:

> there was no time for the Advance Team to take action to stifle and suppress the protest. Instead, the President's team relied on the Secret Service to do so by directing and requesting local authorities to clear [streets] where protesters opposing President Bush were congregated, while leaving undisturbed the nearby pro-Bush demonstrators, as well as the unscreened diners, hotel guests, including the assembled medical group, who were inside the Inn.

(SAC ¶ 70.)

Plaintiffs also allege that written guidelines, instructions and rules for handling demonstrations, promulgated or caused to be promulgated by the Secret Service and Defendant Basham are a sham, "designed to conceal and immunize from judicial review the actual policy and practice" as evidenced in the events on October 14, 2004. (SAC ¶ 71.) Plaintiffs allege this policy imposed greater restrictions on Plaintiffs and violated the principles of the First Amendment that prohibit viewpoint discrimination as related to pro-Bush demonstrators, content discrimination of political assemblage as related to the medical group, and content or viewpoint discrimination as related to individual guests and diners at the Inn. (SAC ¶ 73.) They allege the Secret Service's actions do not comport with normal, lawful Secret Service security measures. (SAC ¶ 78.)

Plaintiffs allege that the removal of the anti-Bush demonstrators occurred only after the President entered the dining area and heard chants of the anti-

Bush demonstrators. (SAC ¶ 77.) They assert the proposed security rationale of protecting the President from handgun or explosive range was false and the actions taken were really a part of the Bush Administration's official policy of shielding the President from seeing or hearing anti-Bush demonstrators and preventing anti-Bush demonstrators from reaching the President with their message. Plaintiffs point out that the anti-Bush demonstrators posed no greater risk and, they argue, posed less risk of assaulting the President with a handgun or explosive, than the guests, diners, and the assembled medical group inside the Inn. (SAC ¶¶ 80–81.)

Finally, Plaintiffs include a list of published reports that, they allege, show how the Secret Service has engaged in actions against anti-government expressive activity. These include President Bush's appearances at the following:

(1) March 27, 2001 at Western Michigan University in Kalamazoo, Michigan

(2) August 23, 2002 in Stockton, California

(3) January 22, 2003 in St. Louis, Missouri

(4) September 2, 2002 in Neville Island, Pennsylvania

(5) December 2002 in Philadelphia, Pennsylvania

(6) May 2003 in Omaha, Nebraska

(7) June 17, 2003 in Washington, D.C.

(8) July 2003 in Philadelphia, Pennsylvania

(9) July 4, 2004 in Charleston, West Virginia

(10) July 13, 2004 in Duluth, Minnesota

(11) August 26, 2004 in Farmington, New Mexico

(12) September 9, 2004 in Colmar, Pennsylvania (SAC ¶ 82.)

III. Legal Standards of 12(b)(6) Motion to Dismiss

Defendants filed various dispositive motions, arguing the Plaintiffs have not pled facts sufficient to state a claim for relief.

To survive dismissal for failure to state a claim pursuant to Rule 12(b)(6), a complaint must contain more than a "formulaic recitation of the elements of a cause of action;" specifically, it must contain factual allegations sufficient to "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). To raise a right to relief above the speculative level, "[t]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id.,* quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235–236 (3d ed. 2004); *see also* Fed. R. Civ. P. 8(a). Instead, the plaintiff must plead affirmative factual content, as opposed to any merely conclusory recitation that the elements of a claim have been satisfied, that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* — U.S. —, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). "In sum, for a com-

plaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. United States Secret Serv.*, 572 F.3d 962, 970 (9th Cir. 2009), citing *Iqbal,* 129 S. Ct. at 1949.

"In ruling on a 12(b)(6) motion, a court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP,* 476 F.3d 756, 763 (9th Cir. 2007). In considering a motion to dismiss, this court accepts all of the allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *See Kahle v. Gonzales,* 474 F.3d 665, 667 (9th Cir. 2007), Moreover, the court "presume[s] that general allegations embrace those specific facts that are necessary to support the claim." *Nat'l Org. for Women v. Scheidler,* 510 U.S. 249, 256, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994), *quoting Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The court need not, however, accept legal conclusions "cast in the form of factual allegations." *Western Mining Council v. Watt,* 643 F.2d 618, 624 (9th Cir. 1981).

Recent decisions from the U.S. Supreme Court have clarified the pleading requirements under Rule 8. In 2007 the Court's decision in *Bell Atlantic Corporation v. Twombly,* 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), began the most recent discussion, and their decision in *Iqbal* clarified the standards further.

The Ninth Circuit carefully studied both decisions when it evaluated Defendants' interlocutory appeal related to the FAC. This court incorporates the Ninth Circuit's analysis, in part, here.

Twombly concerned a conspiracy claim under Section 1 of the Sherman Act. 550 U.S. at 548–49, 127 S. Ct. 1955. The plaintiffs had alleged facts suggesting that the defendant companies had engaged in parallel market conduct, but the plaintiffs did not allege specific facts indicating the existence of an actual agreement in restraint of trade, which was an element of the plaintiffs' cause of action. *See id.* at 553–57, 127 S. Ct. 1955. In reversing the Second Circuit's denial of the defendants' Rule 12(b)(6) motion, the Court held that an antitrust plaintiff must plead a set of facts "plausibly suggesting (not merely consistent with)" a Sherman Act violation to survive a motion to dismiss. *Id.* at 557, 127 S. Ct. 1955.

In its *Twombly* decision, the Court cautioned that it was not outright overruling *Conley v. Gibson,* 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), the foundational "notice pleading" case construing Federal Rule of Civil Procedure 8(a)(2), but it explained that *Conley's* oft-cited maxim that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley,* 355 U.S. at 45-46, 78 S. Ct. 99, read literally, set the bar too low. *See Twombly,* 550 U.S. at 561-62, 127 S. Ct. 1955. "[A]fter puzzling the profession for 50 years," the Court concluded, *Conley's* "no set of

facts" refrain "is best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Id.* at 563, 127 S. Ct. 1955.

At the same time, the Court appeared to signal that *Twombly* should not be read as effecting a sea change in the law of pleadings. *Twombly* cited *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), for the proposition that pleadings should not be found deficient even if it is apparent "that a recovery is very remote and unlikely." 550 U.S. at 556, 127 S. Ct. 1955. To add to the confusion, in *Erickson v. Pardus,* 551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007), decided shortly after *Twombly,* the Court noted that "[s]pecific facts are not necessary" for pleadings to satisfy Rule 8(a)(2). *Id.* at 93, 127 S. Ct. 2197 (citing *Twombly* (quoting *Conley*) for that proposition).

Much confusion accompanied the lower courts' initial engagement with *Twombly*. *Compare Kendall v. Visa U.S.A., Inc.,* 518 F.3d 1042, 1047 n.5 (9th Cir. 2008) (stating that, at least for the purposes of antitrust cases, *Twombly* abrogated the usual "notice pleading" rule); *and ACA Fin. Guar. Corp. v. Advest, Inc.,* 512 F.3d 46, 58 (1st Cir. 2008) (concluding that *Twombly* provided Rule 12(b)(6) with "more heft"); *with Aktieselskabet AF 21. November 2001 v. Fame Jeans,* 525 F.3d 8, 15 & n.3 (D.C. Cir. 2008) (noting disagreement among the circuits about *Twombly's* import and concluding that the case "leaves the longstanding fundamentals of notice pleading intact").

The Court addressed some of the lower courts' lingering questions in *Iqbal,* a *Bivens* action alleging (among other claims) First Amendment violations. The Court elaborated on *Twombly's* applicability in the context of a motion to dismiss based on qualified immunity.

The plaintiff in *Iqbal* a Pakistani Muslim man, was arrested and detained in the days following the attacks of September 11, 2001. 129 S. Ct. at 1942. He alleged that former Attorney General of the United States John Ashcroft and Federal Bureau of Investigation ("FBI") Director Robert Mueller, by specifically authorizing an unconstitutional detention policy, subjected him to "harsh conditions of confinement on account of his race, religion, or national origin." *Id.*

The Court first explained that "bare assertions . . . amount[ing] to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim," for the purposes of ruling on a motion to dismiss, are not entitled to an assumption of truth. *Id.* at 1951 (quoting *Twombly,* 550 U.S. at 555, 127 S. Ct. 1955). Such allegations are not to be discounted because they are "unrealistic or nonsensical," but rather because they do nothing more than state a legal conclusion—even if that conclusion is cast in the form of a factual allegation. *Id.* Thus, in *Iqbal,* the Court assigned no weight to the plaintiff's conclusory allegation that former Attorney General Ashcroft and FBI Director Mueller knowingly and willfully subjected him to harsh conditions of confinement "solely on account of [his] religion, race, and/or national origin

and for no legitimate penological interest." *Id.* (quoting plaintiff's complaint).

After dispatching with the complaint's conclusory allegations, the Court elaborated on *Twombly's* plausibility standard. "A claim has facial plausibility," the Court explained, "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 129 S. Ct. at 1949. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly,* 550 U.S. at 556, 127 S. Ct. 1955). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief'" *Id.* (quoting *Twombly,* 550 U.S. at 557, 127 S. Ct. 1955).

In sum, for a complaint to survive a motion to dismiss, the non-conclusory "factual content" and reasonable inferences from that content must be plausibly suggestive of a claim entitling the plaintiff to relief. *Id.*

IV. Declaratory or Injunctive Relief Claims

This court dismissed prospective declaratory and injunctive relief claims of the FAC because "plaintiffs lack standing, plaintiffs' claim is not ripe for review, and plaintiffs have an adequate remedy at law." (2007 R & R 35.) Plaintiffs repled all claims in their SAC, including claims previously dismissed by this court, and pled new claims for declaratory relief against Federal Defendants in their official capacities.

Federal Defendants argue that because the court has previously dismissed injunctive and declaratory relief claims for lack of standing, Plaintiffs' new claim for individual-capacity equitable relief is "untenable." They argue, "Plaintiffs *also* lack standing to seek equitable relief from . . . Savage and Wood in their individual capacities (it follows, as well, that Plaintiffs' individual capacity, equitable relief claims are unripe, just as their previously asserted equitable relief claims were held by this Court to be)." (Fed. Defs.' Mem. 34.)

Though Plaintiffs have re-pled and supplemented their claims, the allegations that support claims for declaratory and injunctive relief remain materially the same. The court's previous ruling dismissed these claims, and this decision is not disturbed.

> Plaintiffs' allegations are insufficient to support a claim for equitable relief. The threat of future injury to plaintiffs is based on an extended chain of speculative contingencies and some day intentions which are insufficient to support standing. *Anoushiravani v. Fishel,* 2004 WL 1630240 at * 4 (D. Or.). The allegations in plaintiffs' complaint fail to establish that plaintiffs have standing to seek prospective relief. Although plaintiffs allege a pattern and practice of conduct by the Secret Service, plaintiffs have not alleged that they have been injured either before or after the October 14 demonstration or that they plan to demonstrate at any particular time or place in the future. Unlike the pattern and practice cases cited by plaintiffs,

plaintiffs have not shown that they have been personally injured by this alleged pattern and practice, other than at the October 14 demonstration. The lack of such allegations distinguishes this case from *Marbet v. City of Portland*, 2003 WL 23540258 (D. Or.) and other pattern and practice cases relied upon by plaintiffs. The lack of such allegations cannot be resolved by class certification.

. . .

Plaintiffs subjective feelings of inhibition to participate in future demonstrations are not sufficient. *Laird v. Tatum*, 408 U.S. 1, 13–14 [92 S. Ct. 2318, 33 L. Ed. 2d 154] (1972). Plaintiffs have not pled a real and immediate threat. The court finds both *Elend v. Sun Dome, Inc.*, 370 F. Supp. 2d 1206 (M.D. Fla. 2005) and *Acorn v. City of Philadelphia*, 2004 WL 1012693 (E.D. Pa.) persuasive and directly on point. As in those cases, plaintiffs' allegations are insufficient to support standing to seek prospective relief.

The issuance of equitable relief also requires the likelihood of substantial and immediate irreparable harm and an inadequate remedy at law. *O'Shea v. Littleton*, 414 U.S. 488, 502 [94 S. Ct. 669, 38 L. Ed. 2d 674] (1974). This requirement cannot be met where the threat of injury is conjectural and hypothetical, and there are adequate remedies at law. *Id.* The allegations in plaintiffs' complaint do not show that they have been previously subjected to the same type of conduct either before and after this incident. This is the only time they have been

> subjected to this type of treatment. Plaintiffs allegations demonstrate that plaintiffs cannot meet the requirement of showing any real or immediate threat that plaintiffs will be wronged again. *See Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1042–1044 (9th Cir. 1999). In addition, plaintiffs have a claim for damages, and, therefore, have an adequate remedy at law. *City of Los Angeles v. Lyons*, 461 U.S. 95, 109, 113 [103 S. Ct. 1660, 75 L. Ed. 2d 675] (1983).

(2007 R & R 33–35.) Accordingly, any new claims for declaratory or injunctive relief are dismissed for the same reasons.

V. First Amendment Claims

Plaintiffs allege that all Defendants violated their First Amendment rights and seek relief under *Bivens* against Federal Defendants and under § 1983 against State, Local, and City Defendants.[8]

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[8] Section 1983 provides a civil action against *persons* who violate an individual's constitutional rights. Federal employees sued in their individual capacities may be sued for damages as well as declaratory or injunctive relief. *Hafer v. Melo*, 502 U.S. 21, 31, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). Individuals sued in their official capacities may only be sued for declaratory or injunctive relief. *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Further, a state is not a person for the purposes of this section, but case law, however, treats municipal and local governments as "persons" under the statute and subject to damages and declaratory or injunctive relief. *Monell v. Dept. of Social Services of New York*, 436 U.S. 658, 701, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Because all injunctive relief claims were dismissed in the

A. Federal Defendants' Motion to Dismiss First Amendment Claims Is Denied

Federal Defendants filed their motion to dismiss Plaintiffs' claims against Defendants Wood, Savage, and John Doe 1 for violation of their First Amendment rights.[9] To survive the motion, Plaintiffs must plead a plausible *Bivens* claim. Plaintiffs must allege a violation of their constitutional rights by agents acting under the color of federal law. *Morgan v. U.S.*, 323 F.3d 776, 780 (2003) (citing *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)).

A violation of First Amendment rights may result from content discrimination or viewpoint discrimination. "'Content discrimination' occurs when the government 'chooses the subjects' that may be [publicly] discussed, while 'viewpoint discrimination' occurs when the government prohibits 'speech by particular speakers,' thereby suppressing a particular view about a subject." *Giebel v. Sylvester*, 244 F.3d 1182, 1188 (9th Cir. 2001) (alterations in the original) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 59, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) (Brennan, J., dissenting)). "'[V]iewpoint discrimination' occurs when the government prohibits 'speech by

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2007 R & R, Plaintiffs' remaining First Amendment claims under § 1983 are for damages against Defendants Rodriguez, Ruecker, Towe, Winters, Jackson County, and the City of Jacksonville.

[9] Plaintiffs include Defendant Basham in their *Bivens* claim; however, the court determined in 2007 that it did not have personal jurisdiction.

particular speakers,' thereby suppressing a particular view about a subject." *Giebel v. Sylvester*, 244 F.3d 1182, 1188 (9th Cir. 2001) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 59, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) (Brennan, J., dissenting)); *c.f. R.A.V. v. City of St. Paul*, 505 U.S. 377, 391, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). The Supreme Court made it clear that government suppression of speech, based on the speaker's motivating ideology, opinion, or perspective is impermissible. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); *Mahoney v. Babbitt*, 105 F.3d 1452, 1456 (D.C. Cir. 1997) (holding that the First Amendment does not permit the federal government to bar ideological opponents from peacefully protesting on the sidewalks of Pennsylvania Avenue during President Clinton's second Inaugural Parade).

This court follows the *Iqbal* methodological approach to assess the adequacy of Plaintiffs' complaint, as the Ninth Circuit did when it evaluated the FAC on interlocutory appeal.

> A court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should as-

> sume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal, 129 S. Ct. at 1950.

1. Summary of Ninth Circuit's Application of *Iqbal* to FAC

Because the Ninth Circuit identified areas in the FAC that it found to be deficient of the pleading the standards, regarding the *Bivens* claim, this court looks specifically at those areas and how they were sufficiently re-pled in the SAC. *See Moss,* 572 F.3d at 970-71.

First, the Ninth Circuit identified three pleadings that were not entitled to the assumption of truth, being that they were no more than legal conclusions and not supported by factual allegations. *See Iqbal,* 129 S. Ct. at 1950. These pleadings included allegations that (1) Federal Defendants acted on an impermissible motive in relocating Plaintiffs; (2) Federal Defendants ordered the relocation, acting in conformity with an officially authorized *sub rosa* Secret Service policy of suppressing speech critical of the President; and (3) there was systematic viewpoint discrimination at the highest levels of the Secret Service. *Moss,* 572 F.3d at 970.

Second, the Ninth Circuit determined that the remaining factual allegations did not plausibly suggest a claim for relief. It concluded, "[t]o prevail on their *Bivens* claim against individual Agents, Plaintiffs must establish that the Agents ordered the relocation of their demonstration *because of* not merely in spite of,

the demonstration's anti-Bush message." *Moss*, 572 F.3d at 970.

The court identified two remaining non-conclusory factual allegations. These allegations were offered to show Federal Defendants' disparate treatment towards anti-Bush demonstrators and thus evidence of discriminatory intent. However, the court concluded the following remaining allegations were not enough: (1) agents ordered the relocation of anti-Bush demonstrators but left a similarly situated pro-Bush demonstration undisturbed and (2) diners and guests inside the Inn were not subjected to the security screening or asked to leave the premises, despite their close proximity to the President. *Moss*, 572 F.3d at 971. The court explained, "the factual content contained within the complaint does not allow us to reasonably infer that the Agents ordered the relocation of Plaintiffs' demonstration because of its anti-Bush message, and therefore it fails to satisfy *Twombly* and *Iqbal*." *Id.* at 972.

2. Plaintiffs Have Pled a Plausible *Bivens* First Amendment Claim

This court now evaluates the plausibility of Plaintiffs' SAC *Bivens* claim for a violation of their First Amendment rights by the Federal Defendants acting in their individual capacities.

a. Plaintiffs Have Successfully Repled Non-Conclusory Allegations

The Ninth Circuit summed up its findings discounting specific factual allegations:

> The bald allegation of impermissible motive on the Agents' part, standing alone, is conclusory and is therefore not entitled to an assumption of truth. The same is true of Plaintiffs' allegation that, in ordering the relocation of their demonstration, the Agents acted in conformity with an officially authorized *sub rosa* Secret Service policy of suppressing speech critical of the President. The allegation of systematic viewpoint discrimination at the highest levels of the Secret Service, without *any* factual content to bolster it, is just the sort of conclusory allegation that the *Iqbal* Court deemed inadequate, and thus does nothing to enhance the plausibility of Plaintiffs' viewpoint discrimination claim against the Agents.

Moss, 572 F.3d at 970.

Plaintiffs have amended and supplemented their factual allegations. *See Id.* at 972, 975. The "legal conclusions," as identified by the Ninth Circuit in FAC, have now been supported by factual allegations and are thus entitled to an assumption of truth at this stage of the pleadings.

i. Impermissible Motive

Plaintiffs allege the Federal Defendants acted with an impermissible motive when they relocated the anti-Bush demonstrators. They suggest that the Federal Defendants' motive in moving the anti-Bush demonstrators was not based on their security rationale but based on an impermissible motive of suppressing anti-Bush demonstrators' speech, thereby violating their First Amendment rights. (SAC ¶¶ 55, 57.) Given

the additional facts alleged, this allegation is no longer a "bald legal conclusion."

The basis of Plaintiffs' allegation of impermissible motive is that the security rationale was only applied to the anti-Bush demonstrators. Defendants asserted that they relocated the anti-Bush group because they did not want anyone within handgun or explosive range of the President. (SAC ¶ 54.) From this assertion, it follows that anyone who was within handgun or explosive range of the President could expect to be relocated, screened, or at least subject to some other form of security.

On the scene that day, there were many who were in handgun or explosive range of the President, including pro-Bush and anti-Bush demonstrators and certainly guests and diners also at the Inn. All groups had the same notice of the President's arrival at the Inn. Both groups of demonstrators were nonviolent, and interactions between these two groups were "courteous and jovial." (SAC ¶ 46.)

Plaintiffs assert that there was no significant security difference between the pro-Bush and anti-Bush groups prior to the President's arrival. (SAC ¶ 54.) Further, the only difference between Plaintiffs and the other groups was the anti-Bush demonstrators' speech. (SAC ¶ 80.)

Plaintiffs also assert that the President was protected from public view, to include both groups of demonstrators, by a wooden fence, six feet in height. (SAC ¶ 51.) Plaintiffs allege the Secret Service secured the alley on California Street with law enforce-

ment officers in riot gear. Neither group of demonstrators had line of sight to the patio where the President was dining, and both groups were blocked by the buildings along California Street. (SAC ¶¶ 49, 50.) Plaintiffs also assert that the diners at the Inn posed a greater security threat to the President because they were simply closer to the President than the groups of demonstrators. (SAC ¶ 57.)

The Secret Service and other law enforcement officers, however, relocated only the pro-Bush demonstrators two block from their original location, presumably to move them outside the security perimeter and outside the handgun or explosive range. Plaintiffs argue this reason of security, however was false and was only given to cover up the impermissible motive of restricting the anti-Bush demonstrators' speech. They point out that the relocation occurred only after anti-Bush chants and slogan were heard within the patio. (SAC ¶ 53.)

The new facts alleged highlight that those permitted to stay within the security perimeter or within handgun or explosive range were those who either had no expressed view of the President or his policies or who had a positive view. (SAC ¶ 57.) For instance, the guests at the Inn were within handgun or explosive range of the President and yet were subjected to no enhanced security. Further, the pro-Bush demonstrators were able to cheer the President on his motorcade route after his meal, and some guests and diners were able to view the President while he was on

the patio from an unlocked door. (SAC ¶¶ 55–56, 62.) Plaintiffs argue,

> [i]f preventing people from being within handgun or explosive range of the President "[h]ad been the true reason for the . . . [order to move the anti-Bush demonstrators], the Defendant Secret Service agents would have requested or directed that the pro-Bush demonstrators at the corner of Third and California be moved further to the west so that they would not be in range of the President as he traveled from the Inn to the Honeymoon Cottage."

(Pls.' Mem. in Opp'n 13, citing SAC ¶ 55.)

Plaintiffs allege the anti-Bush demonstrators were targeted because of their speech. They argue this is plausibly alleged and supported when the court considers that all people within the handgun or explosive range of the President posed the same threat but only those who expressed an anti-Bush message were relocated further from the Inn and further from the President's post-dinner motorcade route.

The court agrees. The allegation that Federal Defendants acted with an impermissible motive is not a legal conclusion and is entitled to assumption of truth for the purposes of this motion.

ii. *Sub Rosa* Policy

Plaintiffs assert that the Federal Defendants were operating on a *sub rosa* policy that suppressed the speech of individuals who opposed the President or his policies. In analyzing the FAC, the Ninth Circuit

found that there was no factual support for this allegation. Plaintiffs have since asserted additional facts supporting their allegation that there was a *sub rosa* policy.

Plaintiffs generally state that the policy and practices of the Secret Service on October 14, 2004, and at other instances over the previous two years violated three principles of the First Amendment: (1) imposition of greater restrictions on Plaintiffs than on pro-Bush demonstrators outside the Inn, violating the principle of viewpoint discrimination; (2) imposition of greater restrictions on Plaintiffs than on the medical group assembled inside the Inn, violating the principle of content discrimination against political assemblage as compared to non-political assemblage; and (3) imposition of greater restrictions on Plaintiffs than on individual diners and guests inside the Inn, violating the principles that prohibit content discrimination or viewpoint discrimination against persons solely because they are assembled to express a political or opposing view. (SAC ¶ 73.)

Plaintiffs allege specifically, "[t]he Secret Service's actual but unwritten policy and practice was to work with the White House under President Bush to eliminate dissent and protest from presidential appearances." (SAC ¶ 70.) "[V]iewpoint discrimination by the Secret Service in connection with President Bush was the official policy of the White House." (SAC ¶ 68.) Plaintiffs allege that the Presidential Advance Manual, put forth by the White House Advance Team under the

Bush Administration, presents sufficient evidence of the Secret Service's unofficial policy:

> The White House under President George W. Bush, more than any prior Presidency, sought to prevent or minimize the President's exposure to dissent or opposition during his public appearances and travels, while at the same time maximizing—within the demands of reasonable security—his exposure to supporters and to the public in general. This policy was set out in some detail in the official "Presidential Advance Manual," dated October 2002, instructing the White House Advance Team on how to keep protestors out of the President's vicinity and sight. . . . The unredacted excerpts [of the Presidential Advance Manual] include discussions about how to deal with protestors, how to disrupt protests, and how to insure the protesters are kept out of sight or hearing of the President and the media. These facts demonstrate not just a pattern and practice, but an official White House policy of seeking to stifle dissent.

(SAC ¶¶ 67–68.) Plaintiffs allege that this practice and policy is evidenced by the Secret Services's actions over the preceding two years against anti-government expressive activity. (*See* SAC ¶ 82.)

Regarding the specific event on October 14, 2004, Plaintiffs allege,

> when the President's plans changed . . . , there was no time for the Advance Team to take action to stifle and suppress the protest. Instead the President's team relied on the Secret Service to do

> so by directing and requesting local authorities to clear both sides of California Street between Third and Fourth Streets, and subsequently between Third and Fifth Streets, where protesters opposing President Bush were congregated, while leaving undisturbed the nearby pro-Bush demonstrators, as well as the unscreened diners, hotel guests, and other visitors, including the assembled medical group, who were inside the Inn.

(SAC ¶ 70.) Plaintiffs argue that the Secret Service's actions "were consistent with and taken pursuant to the actual but unwritten policy and practice of the Secret Service to shield the President from seeing or hearing anti-Bush demonstrators and to prevent anti-Bush demonstrators from reaching the President with their message." (SAC ¶ 81.)

The allegation of a *sub rosa* policy is supported with the excerpts of the Advance Manual. Though this manual was not written for or by the Secret Service, Plaintiffs allege Federal Defendants were implementing this policy when they moved only anti-Bush demonstrators from the location. "[T]he Secret Service worked closely with the Advance Team to achieve the goal set out in the Presidential Advance Manual, and to concoct, manipulate, and gerrymander false security rationales for the exclusion of distancing of opposition, dissent, or protest expressive activity from proximity to the President, while minimizing the distancing of the public in general and supporters." (SAC ¶ 69.)

Specifically, the Advance Manual instructs the Advance Team in the "Preparing for Demonstrators" Section:

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

(SAC, Ex. B, 9.) Under "Handling Demonstrators", it explains,

> Once a group of demonstrators has been identified, the Advance person must decide what action to take. If it is determined that the media will not see or hear them and that they pose no potential disruption to the event, they can be ignored. On the other hand, if the group is carrying signs, trying to shout down the President, or has potential to cause some greater disruption to the event, action needs to be taken *immediately* to minimize the demonstrator's effect. . . . If the demonstrators appear to be a security threat notify the Secret Service immediately. If demonstrators appear likely to cause only a political disruption, it is the Advance person's responsibility to take appropriate action.

(SAC, Ex. B, 10.)

As Plaintiffs point out, Federal Defendants' actions mirrored the instructions in this Advance Manual:

only the anti-Bush demonstrators were moved, thereby "minimizing" their threat. Plaintiffs' allegation of a *sub rosa* policy and the Secret Service's involvement in training and directing agents on this policy is not conclusory.

The Federal Defendants, however, counter that the Ninth Circuit previously considered and consequently rejected Plaintiffs' claim of a *sub rosa* policy when it evaluated the sufficiency of the FAC. (Federal Defs.' Mem. in Supp. of Mot. to Dismiss ("Fed. Defs.' Mem.") 15–26.) The court disagrees with this interpretation of the Ninth Circuit decision. The Ninth Circuit found that Plaintiffs' allegation of an officially authorized *sub rosa* Secret Service policy was conclusory and needed some factual allegations if it were to be considered in the complaint's sufficiency evaluation. *Moss,* 572 F.3d at 970. The Ninth Circuit did not specifically place limitations on what allegations Plaintiffs could re-plead in their First Amendment claim. *Id.* at 974–75.

Federal Defendants also object to Plaintiffs' allegations of the dozen previous instances of the Secret Service's policy of suppressing First Amendment rights. "[T]hese other alleged incidents are entirely dissimilar to the one at issue here, and, in any event, none of them is said to have involved Defendants Savage and Wood." They argue that Wood and Savage cannot be responsible for policies allegedly promulgated by the federal agency that employs them or for the implementation of policies by fellow agents around the country. (Fed. Defs.' Mem. 14–15.)

Federal Defendants want the allegations of previous instances of viewpoint discrimination disregarded, arguing they do not support a *Bivens* claim. They explain,

> Just as those Defendants cannot be subjected to suit for the actions of others . . . so too they are not responsible for claimed "policies" allegedly promulgated by the federal agency that employs them, or for the alleged implementation of such policies by fellow agents around the country. . . . Indeed, the Supreme Court has squarely held that a *Bivens* action such as this is not the proper means to challenge the alleged policies of federal agencies.

(Fed. Defs.' Mem. 14–15.)

Federal Defendants are correct; the Supreme Court has clearly declined to extend *Bivens* actions to claims against a federal agency. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 486, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994). However, as the Ninth Circuit noted, the purpose of the allegation of a *sub rosa* policy is not to support a *Bivens* claim against the Agency but to enhance the plausibility of Plaintiffs' viewpoint discrimination claim on the whole. *See Moss*, 572 F.3d at 970.[10]

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[10] Additionally, this allegation may have a dual purpose to support Plaintiffs' claims against defendants in their official capacity, though the court previously dismissed these claims. For example, Plaintiffs are seeking declaratory and supplemental injunctive relief under 5 U.S.C. § 702 against Secret Service Defendants in their official capacities and all persons acting in the official capaci-

The court is not convinced by Federal Defendants' argument. Plaintiffs alleged that there was an unwritten policy implemented by the Federal Defendants to shield the President from anti-Bush demonstrations and messages. In support of this allegation, they have submitted excerpts of the Advance Manual describing measures to shield the President and have alleged in what ways these instructions were implemented in Jacksonville and in other areas of the country over the preceding two years. What the Ninth Circuit found as a conclusory allegation in the FAC, has been repled in the SAC to be non-conclusory.

iii. Systematic Viewpoint Discrimination

The Ninth Circuit saw no merit in the FAC's assertion of systematic viewpoint discrimination. The court noted, "the allegation of systematic viewpoint discrimination at the highest level of the Secret Service, without *any* factual content to bolster it, is just the sort of conclusory allegation that the *Iqbal* Court deemed inadequate." *Moss,* 572 F.3d at 970.

Factual support has been added to the SAC to bolster this allegation. Plaintiffs added support with allegations based on the Advance Manual, the Advance Manual itself attached to the complaint, and the alleged similar instances of speech suppression across the country over the preceding two years. Plaintiffs' systematic viewpoint discrimination allegation is supported by factual content and thus is worthy of as-

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ties, though the court declines to revisit its prior ruling. (SAC ¶ 105.)

sumption of truth. This is enough, at this stage of the litigation, to raise the conclusory allegation in the FAC to one in the SAC that is entitled to assumption of truth.

b. Non-Conclusory Factual Allegations Suggest a Plausible *Bivens* First Amendment Claim

Viewing all the factual allegations entitled to assumption of truth in the SAC, including those noted above, Plaintiffs have pled a plausible claim. For pleading purposes, the court can reasonably infer a First Amendment violation based on these alleged facts.

i. Disparate Treatment as Related to Pro-Bush Demonstrators

Plaintiffs have plausibly alleged disparate treatment to support their claim of discriminatory intent. Plaintiffs asserted that the Secret Service's security rationale was false, arguing it was a sham, designed for the purpose to relocate the Plaintiffs. As proof, they point out that anti-Bush demonstrators were treated differently than the other groups. They allege that they were the only ones subject to the security measures and support this with their allegation that others also within handgun or explosive range were not relocated or subjected to any security measures. Individuals who were within this proximity to the President included both pro- and anti-Bush demonstrators as well as guests and diners at the Inn. Further, both groups of demonstrators were blocked from the President by buildings along California Street. (SAC ¶ 50.) However, it was only the anti-

Bush demonstrators who were moved or subjected to any kind of security measures. Plaintiffs argue this shows that they were treated differently because of their views.

Plaintiffs allege several new facts in the SAC to remedy what the Ninth Circuit found deficient in their FAC. The Ninth Circuit found that there was no plausible disparate treatment claim based only the relocation of one block from Third to Fourth Street.

> The complaint alleges that the Agents instructed state and local police to move "all persons" between Third and Fourth Streets to the east side of Fourth Street, a position roughly the same distance from the Inn's patio dining area as the Pro-Bush demonstration, and that in issuing that order, the Agents explained their desire to ensure that no protestors remained in handgun or explosive range of the President. . . . If the Agents' motive in moving Plaintiffs away from the Inn was—contrary to the explanation they provided to state and local police—suppression of Plaintiffs' anti-Bush message, then presumably they would have ensured that demonstrators were moved to an area where the President could not hear their demonstration, or at least to an area farther from the Inn then the position that the pro-Bush demonstrators occupied. Instead, according to the complaint, the Agents simply instructed state and local police to move the anti-Bush protestors to a location situated a comparable distance from the Inn as the other demonstrators, thereby establishing a consistent perime-

> ter around the President. This is not a plausible allegation of disparate treatment.

Moss, 572 F.3d at 971.

Taking note of the Ninth Circuit's opinion, Plaintiffs amended their complaint and alleged, "Secret Service Defendants Wood, Savage, and John Doe 1 requested or directed Defendant Towe and the other Police Defendants to clear California Street of all persons between Third and Fourth Streets—that is, the members of Plaintiff Class—and to move them to the east side of Fourth Street and *subsequently to the east side of Fifth Street*." (SAC ¶ 53 (emphasis added).) Further, they allege the police forcibly moved the anti-Bush group from where they were demonstrating "east along California Street until they had all crossed Fourth Street, and then to the east side of Fifth Street." (SAC ¶ 61.)

Plaintiffs argue,

> Had that been the true reason [that is, Secret Service did not want anyone within handgun or explosive range of the President] for the request or direction, the Defendant Secret Service agents would have requested or directed that all persons dining, staying at, or visiting the Inn who had not been screened by the Secret Service or the Police Defendants be removed from the Inn. Likewise, had that been the true reason . . . , the Defendant Secret Service agents would have requested or directed that the pro-Bush demonstrators at the corner of Third and California be moved further west so that they would not be in range of the

> President as he traveled from the Inn to the Honeymoon Cottage where he was staying. . . . Instead, the Defendant Secret Service agents left the pro-Bush demonstrators on the Northwest and Southwest corners of Third and California Streets . . . to cheer for President Bush as he traveled to the Honeymoon Cottage, while causing the anti-Bush demonstrators to be violently moved two blocks east, well out of the President's view. . . . In fact, having moved the anti-Bush demonstrators two blocks east, the Defendant Secret Service agents left the pro-Bush demonstrators with unimpeded access to the President along the route to the Honeymoon Cottage.

(SAC ¶¶ 55–56.)

Federal Defendants argue that Plaintiffs' additional allegations do not impact the Ninth Circuit's conclusion that there is no plausible claim. On the allegation of disparate treatment, Federal Defendants stress that the law requires that the two groups be similarly situated, not identically situated. They argue,

> If the Ninth Circuit could not plausibly infer viewpoint discrimination based on Defendants' alleged request to relocate Plaintiffs to the east side of Fourth Street, then viewpoint discrimination cannot be plausibly inferred based on a new allegation that the dispersal order actually extended a mere block further. Even at Fifth Street, Plaintiffs were still, in the Ninth Circuit's words, in "a position roughly the same distance from the Inn's patio dining area as the Pro-Bush demonstration" and "situated" at a

> "comparable distance from the Inn as the other demonstrators."

(Fed. Defs.' Mem. 16; citing *Moss,* 572 F.3d at 971.) Federal Defendants argue that this additional allegation does not push the complaint from merely possible to plausible.

While the court agrees that "similarly situated" does not necessarily require the groups to be "identically situated," Plaintiffs have alleged facts that the groups were not similarly situated after the relocation. Both pro- and anti-Bush demonstrators had equal access during the President's arrival and would have had equal access had they not been subject to the security rationale. (SAC ¶ 48.) In fact, after the move, the anti-Bush group was more than twice the distance from the President's hearing range than the pro-Bush group. (Pls.' Mem. in Opp'n 12.) The other supported factual allegations tip the balance to plausible, specifically Plaintiffs' allegation of the falsity of Defendants' security rationale. Plaintiffs allege that "contrary to the assertion of [defendants] there is no line of sight to the patio restaurant from the sidewalks of California Street" and that Federal Defendants "gerrymander[ed] their 'security zone'" to exclude anti-Bush demonstrators. (Pls.' Mem. in Opp'n 6, *citing* SAC ¶¶ 69, 51.)

As to Federal Defendants' argument that the claim is not plausible because Plaintiffs have not alleged that the President was unable to hear their speech from their location, Defendants have not shown that this is dispositive of Plaintiffs' claim. (Fed. Defs.' Mem. 16.)

Even so, the Advance Manual supports the alleged motive to move anti-Bush demonstrators from the hearing range of the President. (SAC, Ex. B, 10.) Plaintiffs allege that the agents acted with the impermissible motive to suppress anti-Bush demonstrators' speech. This can be plausibly alleged without an allegation that their speech was not heard.

ii. Disparate Treatment as Related to Diners and Guests at Inn

Plaintiffs allege that they were treated differently than the diners and guests at the Inn. They argue that, while the anti-Bush demonstrators were pushed two blocks to Fifth Street, the diners and guests were unaffected even though they were also within handgun or explosive range of the President and had the same amount of notice of the President's decision to dine at the Inn.

Plaintiffs allege that despite this purported risk from all individuals within this proximity, "[d]uring the entire time these actions were being taken against Plaintiffs . . . members, the Defendants did not take any action to move the pro-Bush demonstrators or move the unscreened diners, hotel guests, and other visitors, including the assembled medical group, who were inside the Inn." (SAC 162.)

Plaintiffs made a similar allegation in the FAC, but the Ninth Circuit did not find it supportive of a plausible claim. The court distinguished the diners and guests because this combined group was not engaged in expressive activity. Commenting on the allega-

tions of the FAC, the court relied on its decision in *Menotti v. City of Seattle:*

> Again, the crux of Plaintiffs' complaint is that the differential treatment of similarly situated pro-Bush and anti-Bush demonstrators *reveals* that the Agents had an impermissible motive—suppressing Plaintiffs' anti-Bush viewpoint. The differential treatment of diners and guests in the Inn, who did not engage in expressive activity of any kind and were not located in public areas outside the Inn, however, offers little if any support for such an inference. *See Menotti v. City of Seattle,* 409 F.3d 1113, 1130 (9th Cir. 2005).

Moss, 572 F.3d at 971.

This court, however, respectfully views the crux of the SAC somewhat differently than the Ninth Circuit. Plaintiffs allege that they were treated differently than all other groups who were within explosive or handgun range of the President. As Plaintiffs explained, "[i]t is not that the differential treatment for anti-Bush protestors and the diners and guests at the Inn directly demonstrates viewpoint discrimination. Rather, it is that the differential treatment demonstrates the falsity of the security rationale offered by [Federal Defendants]." (Pls.' Mem. in Opp'n 14.)

Accordingly, the question this court considers is whether the differential treatment of anti-Bush demonstrators compared to all other groups within handgun and explosive range reveals the Federal Defendants had an impermissible motive.

The issue in *Menotti* is distinguishable from the issue here. In *Menotti*, the plaintiffs sued the City of Seattle for violation of their constitutional rights based on an emergency order enacted by the City during the 1999 World Trade Organization (WTO) Conference. 409 F.3d at 1118 (9th Cir. 2005). The ordinance was created as a direct result of the violence and unrest of protestors. It was undisputed that the actions of a small group of violent protestors put WTO delegates, police officers, the general public, and other demonstrators at risk. *Id.* at 1122–23. The mayor of Seattle declared a civil emergency on November 30, 1999, and signed the Local Proclamation of Civil Emergency Order Number 3 ("Order No. 3"). The order had the following effect:

> all persons, subject to limited exceptions, were prohibited from entering the portion of downtown Seattle described. . . . The exceptions to the prohibition on entering the restricted zone were granted for: (1) delegates and personnel authorized by the WTO to participate in official WTO functions; (2) employees and owners of businesses within the restricted area and other personnel necessary to the operation of those businesses; and (3) emergency and public safety personnel.

Id. at 1125. Persons could not protest in support of or against any topic within the restricted zone.

The plaintiffs in *Menotti* attacked Order No. 3 as unconstitutional on its face, but the Ninth Circuit disagreed: "[t]he purpose of enacting Order No. 3 had everything to do with the need to restore and maintain

civic order, and nothing to do with the content of [Plaintiffs'] message." *Id.* at 1129. It concluded,

> [t]he exemptions permitted shoppers and downtown workers to go about their business in the restricted zone and did not enable the City to discriminate against any persons on the basis of their views. Further, there is no evidence that those persons who were permitted to enter the restricted zone were part of the security problem that prompted the adoption of Order No. 3.

Id. at 1120.

In *Moss,* the corollary to Order No. 3 is the Secret Service proposed security rationale that they did not want any person within handgun or explosive range of the President. However, unlike *Menotti,* there was neither violence by any demonstrator nor was there an order of civil emergency.

The threat to the President's security here, as implied by the security rationale, came simply from the *proximity* of persons to the President. In *Menotti,* the threat was created by actual violence. When the shoppers and business owners were exempted from security measures in Seattle, it was because they were not a part of the security problem. 409 F.3d at 1130. The position of the shoppers and business owners is not the same as the position of the diners and guests here. Their proximity to the President makes them a part of the security problem, political views notwithstanding. They received different and, arguably, better treatment than the anti-Bush demonstrators as

shown by the fact that they were neither relocated nor screened.

That the diners and guests were not expressing a political view is immaterial to the fact that their proximity made them a potential threat to the President's safety. As Plaintiffs described,

> surely they posed a greater risk of assaulting the President with a handgun or explosive than the anti-Bush demonstrators outside the Inn, separated from and blocked from even seeing the President by the Inn itself and other buildings on California Street.

(Pls.' Mem. in Opp'n 15.)

The court acknowledges and respects the experience and intelligence of the Secret Service and the inherent danger and grave responsibility involved in protecting the President. In no way is this court suggesting that it knows how to do the job of a Secret Service agent. Further, it is not proposing that it knows a better solution for how to protect the President in such a situation.

However, after reviewing the security rationale and its application, the court notes that there were no actions taken to protect the President from potential threats of the diners and guests at the Inn, even though their proximity logically posed a threat to the President, if the court applies the security rationale to everyone and not just the anti-Bush demonstrators. The absence of any measures thus supports Plaintiffs' allegation that the security rationale was false, and

this falsity supports Plaintiffs' allegations of improper purpose and viewpoint discrimination. Plaintiffs have plausibly alleged that they were subject to disparate treatment because of, not merely in spite of, their political views.

3. Federal Defendants Do Not Have Qualified Immunity

Plaintiffs argue that even if they did violate Plaintiffs' constitutional rights, they have qualified immunity. Determining whether government officials are entitled to qualified immunity involves a two-step inquiry. At step 1, the court asks whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the officer's conduct violated a constitutional right. And, at step 2, the court asks whether the right was clearly established in light of the specific context of the case. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (internal quotation marks omitted).

As previously discussed, Plaintiffs have pled a plausible *Bivens* claim against Federal Defendants. Accordingly, the analysis now moves to step 2. Neither a 42 U.S.C. § 1983 nor a *Bivens* action will hold a supervisor strictly vicariously liable for the actions of his subordinates under a theory of respondeat superior. *Iqbal*, 129 S. Ct. at 1948. Although this question is a

part of the substance of § 1983 and *Bivens* liability, it is also a proper component of the qualified immunity inquiry:

> In conducting a qualified immunity analysis . . . , courts do not merely ask whether, taking the plaintiff's allegations as true, the plaintiff's clearly established rights were violated. Rather, courts must consider as well whether each defendant's alleged conduct violated the plaintiff's clearly established rights. For instance, an allegation that Defendant A violated a plaintiff's clearly established rights does nothing to overcome Defendant B's assertion of qualified immunity, absent some allegation that Defendant B was responsible for Defendant A's conduct.

Hope, 536 U.S. at 751 n.9, 122 S. Ct. 2508 (Thomas, J., dissenting).

In *Kwai Fun Wong v. United States,* the Ninth Circuit, on interlocutory appeal, dismissed part of a *Bivens* action for failure to state a claim where the complaint "fails to identify what role, if any, each individual defendant had in placing [the plaintiff] in detention." 373 F.3d 952, 966 (9th Cir. 2004).

Further, the Ninth Circuit explained in *al-Kidd v. Ashcroft* that "direct, personal participation is not necessary to establish liability for a constitutional violation." 580 F.3d 949, 965 (9th Cir. 2009) (citing *Kwai Fun Wong,* 373 F.3d at 966). Supervisors can be held liable for the actions of their subordinates (1) for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by

others, which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence in the constitutional deprivation by subordinates; or (4) for conduct that shows a "reckless or callous indifference to the rights of others." *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991) (internal citations and quotation omitted). Any one of these bases will suffice to establish the personal involvement of the defendant in the constitutional violation.

Plaintiffs have sued Defendants Wood, Savage, and John Doe 1 in their individual capacities. Plaintiffs allege,

> Defendants Tim Wood, Rob Savage, and John Doe 1 at all times material hereto, were Secret Service agents at the scene of the demonstration, acting within the scope of their employment and under color of law, assigned to provide security for the President, and directing, requesting and communicating with the other Defendants in their operations related to the demonstration. Defendants Wood, Savage, and Doe 1 are sued in their official and individual capacities.

(SAC ¶¶ 16–17.) Plaintiffs' first claim for relief states,

> The individual Secret Service Defendants, except Defendant Sullivan, are liable in their individual or personal capacities to Plaintiffs and Plaintiff Class . . . for compensatory damages under *Bivens v.*

> *Six Unknown Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), for the violation of their rights of freedom of speech, assembly, and association under the First Amendment. . . . [Wood, Savage, and John Doe I] acted willfully and maliciously, or with indifference or reckless disregard of Plaintiff Class members' rights or safety, and Plaintiffs and Plaintiff Class . . . are therefore entitled to an award of punitive damages against the individual Secret Service Defendants in their individual capacities, except Defendant Sullivan, in an amount to be established at trial.

(SAC ¶¶ 102–03.)

Plaintiffs claim that Defendants Wood, Savage, and John Doe 1 "requested or directed" the local law enforcement officers to clear California Street between Third and Fourth Streets. (SAC ¶ 53.) They also allege that these Defendants proposed the security rationale that violated Plaintiffs' First Amendment rights for viewpoint discrimination. The Federal Defendants then allowed the pro-Bush demonstrators to remain, undisturbed, to cheer on the President's motorcade while targeting the anti-Bush demonstrators and moving them further from the route. (SAC ¶¶ 56–58, 70.) They also allege that the Secret Service, headed by Defendant Basham,

> worked closely with the Advance Team to achieve the goal set out in the Presidential Advance Manual, and to concoct, manipulate, and gerrymander false security rationales for the exclusion or distancing of opposition, dissent, or protest expressive

> activity from proximity to the President, while minimizing the distancing of the public in general and supporters.

(¶ SAC 69.) Plaintiffs also allege Wood, Savage, and John Doe 1

> have promulgated or caused to be promulgated written guidelines, directives, instructions and rules which purport to prohibit Secret Service agents from discriminating between anti-government and pro-government demonstrators, between demonstrators and others engaged in expressive assembly, and between demonstrators and members of the public not engaged in expressive assembly, but these documents do not represent the actual policy and practice of the Secret Service, and are a sham, designed to conceal and immunize from judicial review the actual policy and practice [described herein]. The actions of the Secret Service Defendants during the episode at the Jacksonville Inn on October 14, 2004, were an implementation of this actual policy and practice, which included employing, directing, requesting, or encouraging state and local authorities to assist in implementing the discriminatory policy.

(SAC ¶¶ 71–72.)

Federal Defendants argue that they have qualified immunity because Plaintiffs' First Amendment rights were not clearly established at the time and the Federal Defendants' conduct on that day was reasonable. (Fed. Defs.' Mem. 15–16.)

In their view, "two public servants made an entirely reasonable and lawful judgment call for the purpose of protecting the President . . . in the challenging context of the President's public appearance at an unfamiliar location." This was an "exceedingly difficult and sensitive task" and "[u]ltimately Defendants saw fit to clear the single block directly in front of the President's location and where Plaintiffs happened to be present." (Fed. Defs.' Mem. 18.) They stress the small window of time in which Federal Defendants had to make a decision and note, "in the unique circumstances confronting them, their common-sense, on-the-spot judgment call was eminently reasonable." (Fed. Defs.' Mem. 19.)

Federal Defendants also strongly advocate for qualified immunity here for the public interests of the qualified immunity doctrine itself. They argue that denying them immunity would have far-reaching effects: "for the court to hold otherwise . . . would run the risk of causing Secret Service agents, generally, to hesitate when in the field with the President over taking a protective action they reasonably believe to be necessary." (Fed. Defs.' Mem. 20.) Rather than considering this incident and its specific context, Federal Defendants ask the court to consider the future impact:

> They ought *not* to be distracted by any concern, that if they take a particular protective action in the field that they reasonably perceive to be necessary (as was the case here), this will mire them in meritless litigation and subject them to potentially disa-

> bling threats of liability. But subjecting Defendants Savage and Wood to suit on *these* allegations would pose precisely this risk.

(Fed. Defs.' Mem. 21 (citations omitted).) Further, they argue that if liability were extended here,

> any agent in the field would potentially second-guess himself or herself—and delay any action at all, possibly to the President's detriment—by pausing to wonder if he or she should *also* remove other individuals who might be in or near the general areas of the President but who are not similarly situated to the large crowd.

(Fed. Defs.' Mem. 22.)

Despite Federal Defendants' arguments, the court is not convinced. The court has applied the standards of a Rule 12(b)(6) motion, and Plaintiffs have plausibly alleged that their First Amendment rights were clearly established during their demonstration in Jacksonville, Oregon.

The court construes all the plausible allegations in the light most favorable to Plaintiffs, as the non-moving party. These allegations, at their essence, assert that the anti-Bush demonstrators were exercising their First Amendment right on October 14, 2004, in demonstrating against the President and his policies. Plaintiffs alleged that it was only the anti-Bush demonstrators who were subject to a security rationale and who were dispersed and moved up to two blocks from the President. They allege the pro-Bush demonstrators and guests and diners at the Inn were not

subjected to security measures. *See* Part V.A.2(b). Taking these allegations as true, Plaintiffs have asserted they were discriminated against and effectively targeted because of their anti-Bush speech in direct a violation of their First Amendment rights. A reasonable officer would have been aware that targeting and moving this group based solely on their speech, violated their established rights.

Plaintiffs have identified the roles of Wood and Savage played in the actions that violated the anti-Bush demonstrators' rights on October 14. *See Kwai Fun Wong,* 373 F.3d at 966. Plaintiffs allege they were on the scene in Jacksonville and requested or directed that the pro-Bush demonstrators be moved. They also allege it was their proposed security rationale that discriminated against anti-Bush demonstrators. Plaintiffs have plausibly alleged their conduct violated their rights.

Construing only the plausible allegations in the light most favorable to Plaintiffs, Plaintiffs have alleged there was a *sub rosa* policy in place that limited expressive activity, and Plaintiffs' First Amendment rights. *See* Part V.B.1.b. Plaintiffs have plausibly alleged that their First Amendment rights were clearly established and that the Federal Defendants participated in actions that violated these clearly established rights. Federal Defendants Wood and Savage are not entitled to qualified immunity. The Federal Defendants' motion to dismiss the *Bivens* claim for violation of First Amendment rights should be denied.

B. State Defendants' Motion to Dismiss the § 1983 First Amendment Claim Is Granted

The court now considers Plaintiffs' 42 U.S.C. § 1983 claims against State Police Defendants in their individual capacities.

1. Plaintiffs Have Not Pled a Plausible § 1983 First Amendment Claim

This court applies the Court's methodological approach in *Ashcroft v. Iqbal*, — U.S. —, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009). *See* Part V.B.

To prevail on a claim for relief under 42 U.S.C. § 1983, Plaintiffs must plausibly plead two elements: "(1) that the Defendants acted under color of state law; and (2) that the Defendants caused them to be deprived of a right secured by the Constitution and laws of the United States." *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997). Because State Defendants do not dispute that they acted under color of state law, the issue here is whether Plaintiffs have satisfactorily pled that Rodriguez or Ruecker violated Plaintiffs' federal or constitutional rights.

Plaintiffs have pled that State Defendants Rodriguez and Ruecker, deprived them of their First Amendment constitutional rights through content or viewpoint discrimination. (SAC ¶ 99; Pls.' Mem. in Opp'n 24.) As discussed above, "'[c]ontent discrimination' occurs when the government 'chooses the subjects' that may be [publicly] discussed, while 'viewpoint discrimination' occurs when the government prohibits 'speech by particular speakers,' thereby sup-

pressing a particular view about a subject." *Giebel v. Sylvester,* 244 F.3d 1182, 1188 (9th Cir. 2001) (alterations in the original) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 59, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) (Brennan, J., dissenting)). Viewpoint discrimination violates an individual's First Amendment rights. *R.A.V. v. City of St. Paul,* 505 U.S. 377, 391, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992).

To survive State Police Defendants' motion to dismiss, Plaintiffs must plausibly plead that Rodriguez and Ruecker "acted with discriminatory purpose" during their challenged conduct; that is, they engaged in viewpoint or content discrimination because of, not merely in spite of, discriminatory effects on Plaintiffs. *See Iqbal,* 129 S. Ct. at 1948 (internal citations omitted). As previously discussed, "[P]urposeful discrimination requires more than 'intent as volition or intent as awareness of consequences.' It instead involves a decisionmaker's undertaking a course of action because of, not merely in spite of [the action's] adverse effects upon an identifiable group." *Iqbal,* 129 S. Ct. at 1948 (internal quotations and citations omitted).

Plaintiffs must also plausibly plead personal conduct by Rodriguez and Ruecker that violated Plaintiffs' First Amendment rights. *See al-Kidd v. Ashcroft,* 580 F.3d 949, 964 (9th Cir. 2009). Section 1983 will not "hold a supervisor strictly vicariously liable for the actions of his subordinates." *al-Kidd,* 580 F.3d at 964. Yet, "direct, personal participation is not necessary to establish liability for a constitutional violation."

"Supervisors can be held liable for the actions of their subordinates (1) for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence in the constitutional deprivation by subordinates; or (4) for conduct that shows a 'reckless or callous indifference to the rights of others.'" *Id.* at 965 (citing and quoting *Larez v. City of Los Angeles,* 946 F.2d 630, 646 (9th Cir. 1991)).

a. Conclusory Allegations Are Disregarded

"[B]are assertions" that amount to "nothing more than a formulaic recitation of the elements of a constitutional discrimination claim" do not survive a motion to dismiss. *Iqbal,* 129 S. Ct. at 1951 (internal quotation and citation omitted). The opinion in *Iqbal* provides an illustrative analysis of a constitutional discrimination claim that was too conclusory to survive a motion to dismiss.

> [R]espondent plead[ed] that petitioners 'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.' . . . The complaint alleges that [Petitioner] Ashcroft was the 'principal architect' of this invidious policy . . . and that [Petitioner] Mueller was 'instrumental' in adopting and executing it.

Id. at 1950–51. The Ninth Circuit found that these allegations, without further support, were "bare assertions" that amounted to "nothing more than a formulaic recitation of the elements of a constitutional discrimination claim." *Id.* (internal quotation and citation omitted).

Here, like in *Iqbal* the court should disregard some of Plaintiffs' allegations because they amount only to a "formulaic recitation of the elements of a constitutional discrimination claim;" they are unsupported by allegations of specific culpable actions taken individually by either Rodriguez or Ruecker that violated Plaintiffs' constitutional rights. (*See, e.g.* SAC ¶¶ 96, 99, 109.) First, paragraph 96 does not equal more than a formulaic recitation of elements. It alleges that "the individual State Police Defendants *personally directed and approved* of the actions of the police against Plaintiff Class, and *personally directed and approved* of permitting the pro-Bush demonstrators and unscreened diners, guests, and visitors . . . to remain in the vicinity undisturbed and unrestricted." (SAC ¶ 96 (emphasis added).) As Plaintiffs have openly conveyed (*see* Pls.' Mem. in Opp'n 24), Plaintiffs crafted paragraph 96 of the SAC in an attempt to satisfy the requirements of *al-Kidd,* which requires plaintiffs to plead personal conduct by defendants that violated plaintiffs' constitutional rights:

> Defendants Ruecker and Rodriguez are 'liable for the actions of their subordinates (1) for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which

> they knew or reasonably should have known would cause others to inflict constitutional injury; [and] (2) for culpable action or inaction in training, supervision, or control of subordinates' in connection with the execution of the Secret Service's direction and request to remove the anti-Bush protestors from the vicinity of the Inn.

(Pls.' Mem. in Opp'n 24 (citing *al-Kidd*, 580 F.3d at 965).) Yet, because Plaintiffs fail to support paragraph 96 with any factual content regarding when, how, or from where Rodriguez and Ruecker "personally directed and approved of the various activities that resulted in the alleged discrimination, paragraph 96's allegations are conclusory and the court should disregard them.

Second, the court should not consider Plaintiffs' allegations in paragraphs 99 and 109 of the SAC because there Plaintiffs again only offer recitations of the elements of their First Amendment claim without factual support. In paragraph 99 of the SAC, Plaintiffs conclusorily allege that

> actions against Plaintiff Class in discriminating against them based on the fact, content, and/or viewpoint of their expression . . . were the result of improper training, supervision, instruction and discipline of . . . the police officers under the personal directions of the State . . . Police Defendants By the practice or custom of failing to adequately and properly train, supervise, instruct, or discipline their police officers, the De-

> fendants have directly caused the violations of rights that are the subject of this action.

(SAC ¶ 99.) In paragraph 109 of the SAC, Plaintiffs allege, "The individual Police Defendants . . . acted willfully and maliciously, or with indifference or reckless disregard of Plaintiff Class Members' rights or safety." Neither paragraph is supported by factual allegations. Such conclusory allegations fail to state a claim against Rodriguez or Ruecker on which relief can be granted. *See Iqbal,* 129 S. Ct. at 1951.

b. Plaintiffs' Remaining Allegations Do Not Plead a Plausible Section 1983 Claim Against Rodriguez or Ruecker

Plaintiffs do not plead a plausible violation of Plaintiffs' First Amendment rights by Rodriguez or Ruecker, and consequently, the section 1983 claim against those individuals should be dismissed. *See Iqbal,* 129 S. Ct. at 1949; *see* Part III and Part V.A.2.b, *supra.*

To survive State Defendants' motion to dismiss, Plaintiffs must plead factual content that plausibly suggests personal conduct based on discriminatory purpose by either Rodriguez or Ruecker. In order "[t]o state a claim based on a violation of a clearly established right [in the context of a First Amendment discrimination claim], respondent must plead sufficient factual matter to show that petitioners adopted and implemented the . . . policies at issue not for a neutral . . . reason but for the purpose of discriminating. . . ." *Iqbal,* 129 S. Ct. at 1948–49.

Here, Plaintiffs' allegations do not plausibly allege that Rodriguez and Ruecker's conduct was motivated by a discriminatory purpose. First, Plaintiffs' allegations of negligence, which are the primary focus of their allegations in support of their First Amendment claim, are irrelevant for a showing of the requisite discriminatory purpose. Rather than pleading facts that plausibly suggest some discriminatory purpose behind Rodriguez and Ruecker's actions, Plaintiffs allege and give some facts supporting that "the Police Defendants knew or should have known" that the Federal Police Defendants were themselves acting with discriminatory purpose when they requested or directed the State Police Defendants to move Plaintiffs down the street. (*See* SAC ¶¶ 53–55.)[11] Plaintiffs further assert that "Defendants should not be permitted to hide behind the directions and requests of the Secret Service [to move the anti-Bush demonstrators] as an excuse for blatant viewpoint and content discrimination in violation of the First Amendment." (Pls.' Mem. in Opp'n 24.) These allegations do not support discriminatory intent and are irrelevant to a § 1983 claim.

Second, Plaintiffs' allegations on the whole indicate that the decision to move the anti-Bush demonstrators

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[11] State Police Defendants assert that the Secret Service agents told them that the reason for moving the anti-Bush demonstrators down California Street was to prevent anyone from being "within handgun or explosive range of the President." (SAC ¶ 54.) In response, Plaintiffs allege that "the Police Defendants knew or should have known that [this reason] was false." (SAC ¶ 55.)

and not to move or screen other groups or individuals rested solely with the Secret Service, not with State Defendants. (*See, e.g.,* SAC ¶¶ 53–54, 56–59; State Defs.' Mem. in Supp. 12–13.) As State Defendants assert, the allegations against them indicate no purpose on their part other than to carry out the Secret Service's directions. (*See* State Defs.' Mem. in Supp. 12–13.)

Third, Plaintiffs' allegations do not tend to rule out more likely explanations that do not involve a discriminatory purpose for why State Defendants complied with the Secret Service's alleged requests to relocate the anti-Bush demonstrators. (*See* SAC ¶¶ 59–60); *Iqbal,* 129 S. Ct. at 1951 ("[G]iven more likely explanations, [the pleadings] do not plausibly establish this purpose."). Common sense suggests there are other more likely explanations for Rodriguez and Ruecker's choice to follow the Secret Service's requests. *See Iqbal,* 129 S. Ct. at 1950 ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.") (internal citation omitted). Arguably, Rodriguez and Ruecker determined that the Secret Service officers, who have the specialized job to protect the President, had superior knowledge about threats to the President's safety. Few rationale police officers would second-guess a request by the Secret Service for a specific action when there is a presidential security concern. (*See* SAC ¶ 54.) These more likely explanations for the State Defendants' conduct weigh against the plausibility of Plaintiffs' § 1983 First

Amendment claim against. *See Twombly,* 550 U.S. at 566–69, 127 S. Ct. 1955 (acknowledging that defendant's parallel conduct was consistent with an unlawful agreement in violation of the Sherman Act, but nevertheless concluding that parallel conduct did not plausibly suggest an illegal agreement because it was not only compatible with, but indeed more likely explained by, lawful, unchoreographed free-market behavior).

Plaintiffs do not plead a plausible First Amendment claim under 42 U.S.C. § 1983 against Rodriguez and Ruecker. The court should grant State Police Defendants' motion and dismiss this claim.

2. State Defendants Have Qualified Immunity

Rodriguez and Ruecker are entitled to qualified immunity. For this additional reason, Plaintiffs' § 1983 claim against State Police Defendants in their individual capacities for violations of Plaintiffs' First Amendment rights should be dismissed.

As previously explained, to overcome qualified immunity, Plaintiffs must plead facts that plausibly satisfy both prongs of the qualified immunity analysis: (1) that the officers' conduct violated Plaintiffs' constitutional rights and (2) the contours of the right are sufficiently clear such that a reasonable officer would understand he is violating this right. *See Saucier,* 533 U.S. at 201, 121 S. Ct. 2151; *Iqbal,* 129 S. Ct. at 1950; *see* Part V.A.3, *supra.*

As discussed above, Plaintiffs failed to plausibly plead that Rodriguez and Ruecker's personal conduct violated Plaintiffs' First Amendment rights through

viewpoint or content discrimination. While the qualified immunity inquiry could end here, *see Anderson v. Creighton,* 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) the court considers for the sake of argument whether Plaintiffs' allegations overcome the second prong of the qualified immunity analysis.

To overcome the second prong of qualified immunity, Plaintiffs must plead facts that plausibly suggest that "'[t]he contours of the right [are] sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right.'" *See Saucier,* 533 U.S. at 202, 121 S. Ct. 2151 (citing *Anderson,* 483 U.S. at 640, 107 S. Ct. 3034); *Iqbal,* 129 S. Ct. at 1950. This clarity depends in part on the state of the law at the time of the challenged conduct. *See Saucier,* 533 U.S. at 202, 121 S. Ct. 2151. If the law were such that it would not be clear to a reasonable officer that his conduct was unlawful, then summary judgment for the defendant based on qualified immunity is appropriate. *Id.* 533 U.S. at 202, 121 S. Ct. 2151 (citing *Malley v. Briggs,* 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) (declaring that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law")). In ruling on this issue from the FAC in 2007, this court noted that at the time of State Defendants' challenged conduct in 2004, it was "clearly established" that viewpoint discrimination violates the First Amendment. *Moss v. U.S. Secret Service,* 2007 WL 2915608 at * 20 (D. Or., Oct. 7, 2007) (citing *R.A.V. v. City of St. Paul,* 505 U.S. 377, 391, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) (finding that the

government cannot regulate speech based upon its content or favor one viewpoint over another)).

The clarity of the constitutional right also depends on whether a reasonable officer could believe that the challenged law enforcement conduct was lawful "in light of . . . the information the . . . officers possessed" at the time of the challenged conduct. *Anderson,* 483 U.S. at 641, 107 S. Ct. 3034 (1987); *accord Bilida v. McCleod,* 211 F.3d 166, 174 (1st Cir. 2000) (citing *Anderson,* 483 U.S. at 641, 107 S. Ct. 3034, and explaining that, "[a]lthough qualified immunity normally turns on objective circumstances, . . . this likely means objective circumstances actually known to the officer" (internal citations omitted)). The court "draw[s] on its judicial experience and common sense" to determine whether Plaintiffs have plausibly alleged that it would have been clear to a reasonable officer in the position of Rodriguez and Ruecker that his conduct was unlawful. *See Iqbal,* 129 S. Ct. at 1950 (internal citation omitted).

Plaintiffs have not shown that it would have been clear to a reasonable officer in Rodriguez and Ruecker's situation that his conduct of moving the anti-Bush demonstrators at the instruction of the Secret Service agents was unlawful. First, the facts alleged do not plausibly suggest that either Rodriguez or Ruecker would have been aware of the differential treatment of the anti-Bush demonstrators as compared to the pro-Bush demonstrators. Respondent does not allege, much less plausibly allege, that either Rodriguez or Ruecker were on location at the time of the alleged

injurious activity or knew of and were updated about the details of the relative sizes and locations of the demonstrators, diners, the President, and the nearby alleys, or of the relative distances between relevant street blocks, between the President's planned departure route and the various groups, etc. Yet, without factual allegations that plausibly suggest that Rodriguez and Ruecker knew of the differential treatment of the pro- and anti-Bush demonstrators, it is not plausible that it would have been clear to a reasonable officer in Rodriguez or Ruecker's position that his conduct was unconstitutional. The court agrees with Police Defendants on this point. (*See* State Defs.' Mem. in Supp. 17 ("[P]laintiffs do not allege any facts to show that either Superintendent Ruecker or Captain Rodriguez would have been aware of [the] differential treatment, such that they might have known that plaintiffs were subjected to viewpoint (or any) discrimination.").)

Second, even if Rodriguez and Ruecker had been aware of the differential treatment of the pro- and anti-Bush demonstrators, Plaintiffs have not shown that a reasonable police officer could find no legal justification for such differential treatment. *Bilida*, 211 F.3d at 174–175 ("Plausible instructions from a superior or fellow officer support qualified immunity where, viewed objectively in light of the surrounding circumstances, they could lead a reasonable officer to conclude that the necessary legal justification for his actions exists (e.g. a warrant, probable cause, exigent circumstances)."); *accord Anderson*, 483 U.S. at 641, 107 S. Ct. 3034.

In *Bilida v. McCleod*, the court concluded that plaintiff "might well have a valid Fourth Amendment claim" where defendant police officers entered plaintiff's home and seized her pet raccoon without a warrant. 211 F.3d 166, 174 (1st Cir. 2000). However, the *Bilida* court also concluded that police officers were entitled to qualified immunity because they "had every reason to think that Captain Tyler had secured a warrant or concluded . . . that one was unnecessary" before he directed the defendants to seize the specific raccoon at the specific address. Captain Tyler was defendants' superior officer, and the defendants knew that "the decision [to seize the racoon] had already been made" following a investigation by the police and animal control that same evening. *Id.*

Here, even if a reasonable officer in the position of Rodriguez or Ruecker were fully aware of the details, he would have good reason to believe that his actions in compliance with the Secret Services' orders were legally justified. A reasonable officer could conclude that the Secret Service agents were acting and giving him directions based on knowledge of a specific threat to the President's safety known only to the Secret Service agents. Plaintiffs allege that Secret Service Defendants "requested or directed . . . Police Defendants to clear California Street *of all persons* between Third and Fourth Streets," not to clear California Street of all pro-Bush demonstrators between Third and Fourth Streets. (SAC ¶¶ 53–54 (emphasis added).) Furthermore, "the Defendant Secret Service agents told . . . the Police Defendants that the reason for the request or direction was that they

did not want anyone within handgun or explosive range of the President." (SAC ¶ 54.) Consequently, the Secret Service's instructions to the State Police Defendants would have been plausible instructions from a superior officer that, when viewed objectively, "could lead a reasonable officer to conclude that the necessary legal justification for his actions exists." *Bilida*, 211 F.3d at 174–175.

Third, Plaintiffs do not allege that Rodriguez or Ruecker knew enough about the policy and practice of the Secret Service to discern its alleged actual discriminatory policy from its alleged official policy. Plaintiffs make no allegations to support any allegation that State Defendants had sufficient knowledge to recognize that the Secret Service's activities, alleged to demonstrate the Secret Service's "Long History and Actual Policy" of discriminating against First Amendment expression (*see* SAC ¶¶ 63–72, 81–84), significantly differed from the "normal, lawful Secret Service security measures during Presidential public appearances or visits . . . absent . . . special circumstances suggesting the need for unusual security measures." (*see* SAC ¶ 78.) Consequently, it is not plausible that it would have been clear to a reasonable officer in the place of Rodriguez and Ruecker that his conduct was unlawful where he was following the Secret Service's orders to move all persons though these persons consisted predominantly of anti-Bush demonstrators.

Rodriguez and Ruecker are entitled to qualified immunity. Plaintiffs have not shown that either vio-

lated Plaintiffs' First Amendment rights, a requirement under the first prong of *Saucier*. Moreover, they fail to overcome the second prong of qualified immunity. Plaintiffs have not shown that a reasonable officer would have known of the Secret Service agents' differential treatment of the pro- and anti-Bush demonstrators, would have second-guessed the Secret Service's directions and their provided justification, or would have known enough about the Secret Service's policies to alert him to a First Amendment violation here. Consequently, the contours of Plaintiffs' rights would not have been sufficiently clear to alert a reasonable police officer in Rodriguez or Ruecker's position that his conduct was unlawful. Therefore, State Defendants' motion to dismiss Plaintiffs' claim against Rodriguez or Ruecker in their individual capacities should be granted. *See Anderson*, 483 U.S. at 640, 107 S. Ct. 3034.

C. City of Jacksonville Defendants' Motion to Dismiss the § 1983 First Amendment Claim Is Granted

City Defendants David Towe and City of Jacksonville move for summary judgment on Plaintiffs' § 1983 claim for violation of First Amendment rights and they also move to dismiss these claims for similar or the same reasons.

Plaintiffs pled similar if not identical claims in their FAC, and City Defendants moved for summary judgment in 2007. On April 22, 2007, the court held the motion for summary judgment in abeyance pending the completion of discovery at the request of Plaintiffs'

counsel. (Dkt. No. 103.) The court also stayed the discovery deadline on August 15, 2007. (Dkt. No. 129.)

Because discovery has not yet been completed, the court will not consider City Defendant's motion for summary judgment at this time.[12] However, the court reviews City Defendants' arguments as they relate to a motion to dismiss under Rule 12(b)(6).

As with Plaintiffs' claims against State Defendants, the complaint must plausibly plead that Defendant Towe acted under the color of state law and caused them to be deprived of their First Amendment rights. Plaintiffs allege they were deprived of their rights because of content or viewpoint discrimination. Accordingly, to survive the motion to dismiss, Plaintiffs must plausibly plead that Towe acted with discriminatory purpose during the challenged conduct. *See* Part V.B.I.

The City of Jacksonville may be held liable under § 1983 under current case law by what is known as a *Monell* claim. In *Monell v. Department of Social Services of the City of New York,* the Supreme Court explained,

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[12] When the Federal Defendants sought to appeal this court's denial of their motion for summary judgment, the Ninth Circuit first explained that it did not have jurisdiction over the issue but also commented that were the appeal to succeed were to succeed, it "would deny Plaintiffs a fair opportunity to litigate the merits of their claim." *Moss*, 572 F.3d at 972.

> a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsibly.

436 U.S. 658, 694–95, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). To survive the motion to dismiss as to § 1983 claims against the City of Jacksonville, then, Plaintiffs must plausibly allege that their First Amendment rights were violated by way of an official policy, custom or practice of the City of Jacksonville.

Plaintiffs make allegations against the City Defendants that are generally similar to the allegations against the State Defendants. They allege,

> Defendants' Towe, Rodriguez, Wingers and the other individual State and Local Police Defendants personally directed and approved of the actions of the police against [Plaintiffs], and personally directed and approved of permitting the pro-Bush demonstrators and unscreened diners, guests and visitors, . . . inside the Jacksonville Inn to remain in the vicinity undisturbed and unrestricted. The Police Defendants' actions . . . in using overwhelming and excessive force, including the use of officers in riot gear, against unarmed, law-abiding peaceful demonstrators exercising their core First Amendment rights of speech and assembly were the custom, policy, or practice of the State of Oregon and Defendants City of Jacksonville and

> Jackson County and Municipal Does . . . or were established as such by the individual Police Defendants in taking those actions. The individual Police Defendants had the final decision-making authority and responsibility for establishing the policies of their respective employers. The individual Police Defendants' decisions to order and implement the aforesaid police actions constituted the official policy of their respective public employers.

(SAC ¶¶ 96–97). Further they allege the discriminatory actions were the result of

> inadequate and improper training, supervision, instruction and discipline . . . of the police officers under the personal directions of State and Local Police Defendants. Such inadequate and improper training, supervision, instruction and discipline are the custom and practice of Defendants. By the practice or custom of failing to adequately and properly train, supervise, instruct or discipline their police officers, the Defendants have directly caused the violations of rights that are the subject of this action.

(SAC ¶ 99.)

For the same reasons as set forth above, these allegations as they refer to claims for First Amendment violations are no more than conclusory allegations and thus are not considered in the evaluation of the plausibility of Plaintiffs' claims. Allegations that Defendant Towe personally directed and approved of moving the anti-Bush demonstrators and leaving other groups

undisturbed are not supported by other factual allegations and amount to formulaic recitations of claim. Any remaining non-conclusory allegations do not plausibly allege that Defendant Towe acted with discriminatory intent. Plaintiffs merely allege that local police officers reasonably followed the Secret Service's request or direction to move the anti-Bush demonstrators. They have not plausibility alleged discriminatory intent.

Similarly, allegations that it was the custom and practice of the City of Jacksonville that also violated the Plaintiffs' First Amendment rights are also conclusory. Plaintiffs assert that the actions represent the custom and practice of the City of Jacksonville. However, their allegations only display that the custom or practice was to follow the directions of Secret Service officers who were tasked with providing security for the President. Plaintiffs have not alleged that the custom or practice was discriminatory or revealed any discriminatory intent. Plaintiffs have not alleged that any of the City's policies were adopted for a discriminatory purpose, thereby violating Plaintiffs' First Amendment rights. *See Iqbal,* 129 S. Ct. at 1948–49. There is no Monell claim against the City of Jacksonville.

Plaintiffs cannot overcome the City of Jacksonville Defendants' qualified immunity defense for the same reasons that they did not overcome the State Defendants' qualified immunity defense. *See* Part V.B.2. They have not met the first prong to show a violation of constitution rights, and neither can they meet the

second prong. Their allegations do not plead facts that their First Amendment rights were sufficiently clear in this circumstance that a reasonable officer following the directions of the Secret Service would know he was violating Plaintiffs' rights. In the context here, in which the President's safety is of imminent concern, it was not unreasonable for an officer to conclude that moving the group of anti-Bush demonstrators' would violate those demonstrators First Amendment rights.

Plaintiffs have not alleged a plausible § 1983 claim for violation of First Amendment rights against City Defendants. The City Defendants' motion should be granted.

VI. Fourth Amendment Claims

Plaintiffs allege Defendants violated their Fourth Amendment rights in the way in which they relocated anti-Bush demonstrators. They seek relief under *Bivens* against the Federal Defendants and relief under § 1983 against State, County and City Defendants. The 2007 R & R dismissed Plaintiffs' Fourth Amendment *Bivens* claim because "there were no allegations in the complaint supporting that defendants Savage or Wood directed local law enforcement to use excessive force on the demonstrators or unlawfully seize the demonstrators." (2007 R & R 44.) This decision is unchanged.

To determine whether Plaintiffs have stated a plausible Fourth Amendment claim under § 1983, the court follows the framework outlined by the Supreme Court in *Graham v. Connor. Davis v. City of Las Vegas,*

478 F.3d 1048, 1053–54 (9th Cir. 2007). "[A]ll claims that law enforcement officials have used excessive force—deadly or not—in the course of an arrest, investigatory stop or other 'seizure' . . . are properly analyzed under the Fourth Amendment and its 'objective reasonableness' standard." *Graham*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). "This analysis 'requires balancing the nature and quality of the intrusion' on the person's liberty with the 'countervailing governmental interests at stake' to determine whether the force used was objectively reasonable under the circumstances." *Davis*, 478 F.3d at 1054 (citing *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005)).

The court looks to reasonableness at the moment the excessive force occurred. "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates the Fourth Amendment. The calculus of reasonableness must embody the allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97, 109 S. Ct. 1865 (internal citations omitted).

The court first assesses the quantum of force used and then measures the governmental interest at stake by evaluating a range of factors. *Davis*, 478 F.3d at 1054. Factors include the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the

suspect is actively resisting arrest or attempting to evade arrest by flight. *Id.* Courts also may consider whether there were other available alternative methods in capturing or subduing the individual. *Id.*

Plaintiffs' allegations of Fourth Amendment violations incorporate State, County, and City Defendants. Plaintiffs explicitly designated the term "Police Defendants" to refer collectively to (1) State Police Defendants Ruecker, McLain, Martz, and Rodriguez and (2) Local Police Defendants of the City of Jacksonville, Jackson County, individual defendants Towe and Winters, John Does 2-20, and the Municipal Doe Defendants.[13] (SAC ¶¶ 29-30.)

State Police Defendants move to dismiss the claim against them for failure to state a claim. The City of Jacksonville Defendants move for summary judgment

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[13] Section 1983 provides a civil action against persons who violate an individual's constitutional rights. Federal employees sued in their individual capacities may be sued for damages as well as declaratory or injunctive relief. *Hafer v. Melo*, 502 U.S. 21, 31, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). Individuals sued in their official capacities may only be sued for declaratory or injunctive relief. *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908). Further, a state is not a person for the purposes of this section, but case law, however, treats municipal and local governments as "persons" under the statute and subject to damages and declaratory or injunctive relief. *Monell v. Dept. of Social Services of New York*, 436 U.S. 658, 701, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Because all injunctive relief claims were dismissed in the 2007 R & R, Plaintiffs' remaining Fourth Amendment claims under § 1983 are for damages against Defendants Rodriguez, Ruecker, Towe, Winters, Jackson County, and the City of Jacksonville.

on Plaintiffs' Fourth Amendment claims. As previously noted, the court holds the summary judgment motion in abeyance pending the close of discovery. It does consider the City of Jacksonville Defendants' motion under the Rule 12(b)(6) standards.

A. State Police Defendants' Motion to Dismiss the § 1983 Fourth Amendment Claim Is Denied

State Police Defendants argue that Plaintiffs' claim for Fourth Amendment violations should be dismissed because the SAC does not allege personal conduct of Defendants Ruecker and Rodriguez to meet the pleading requirements for a § 1983 claim under Rule 8 and there is no liability because they have qualified immunity. Plaintiffs have plausibly pled a § 1983 Fourth Amendment claim.

The court analyzes State Defendants' motions under the *Iqbal* standard explained above. Plaintiffs must state a claim that is plausible on its face. A § 1983 claim must allege personal conduct of the named defendants in order to allege liability. (See V.B, *supra.*) While supervisory liability is inapplicable, Plaintiffs may allege Ruecker and Rodriguez are liable for the actions of their subordinates if they plausibly allege one the bases for liability set forth in *al-Kidd,* 580 F.3d at 965 (imposing liability for actions of subordinates "(1) for setting in motion a series of acts by others . . . which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence in the constitutional deprivation by sub-

ordinates; [and] (4) for conduct that shows a 'reckless or callous indifference to the rights of others'") (internal citations and quotations omitted).

State Defendants move to dismiss, asserting that personal conduct allegations are "virtually nonexistent" and they have qualified immunity. (State Defs.' Mem. in Supp. 20.) The court disagrees. When assuming the non-conclusory factual allegations as true for the purposes of this motion to dismiss, there are sufficient allegations to state a plausible claim.

Plaintiffs allege that State Defendants used unreasonable force in relocating anti-Bush demonstrators who were demonstrating peacefully, lawfully and exercising their protected First Amendment rights. (SAC ¶¶ 45, 59-62.) Their allegations provide context for the events that day and allege that the anti-Bush demonstrators made efforts to cooperate with law enforcement officers and sought to plan and participate in a lawful demonstration.

> Plaintiff Elkovich told Defendants that parents and their young children were expected to participate, that she wanted to avoid any possible problems, and that the demonstration was to be peaceful and law-abiding, with handouts to participants so informing them. Plaintiff Elkovich also emphasized that due to the law-abiding nature of the gathering, riot-geared police would not be necessary and asked that they not be present. Defendant Towe assented to the route and location of the demonstration and said he did not plan to use riot-geared police.

(SAC ¶ 39.)

Plaintiffs allege, however, that when the State Defendants were instructed to relocate the anti-Bush demonstrators, all Defendants went too far.

> Police Defendants and their police officers, including officers clad in riot gear, forced the anti-Bush demonstrators to move east along California Street, in some cases by violently shoving Plaintiffs . . . and striking them with clubs and firing pepper spray bullets at them. . . . After moving [anti-Bush demonstrators] across Fifth Street, the Police Defendants divided [anti-Bush demonstrators] into two groups, encircling each group and preventing [anti-Bush demonstrators] from leaving the area. Some . . . including those with young children, were attempting to leave the area. Several families had become separated, including children; some of whom were lost, frightened and traumatized as a result of the Police Defendants' actions.

(SAC ¶¶ 60–61.)

Further, Plaintiffs allege,

> The Police Defendants' actions and the actions of the police officers in using overwhelming and excessive force, including the use of officers clad in riot gear, against unarmed, law-abiding peaceful demonstrators exercising their core First Amendment rights . . . were the custom, policy or practice of the State of Oregon and Defendants City of Jacksonville and Jackson County and Municipal

> does respectively, or were established as such by the individual Police Defendants in taking those actions. The individual Police Defendants had the final decisionmaking authority and responsibility for establishing the policies of their respective employers. The individual Police Defendants' decisions to order and implement the aforesaid police actions constituted the official policy of their respective public employers. . . . The Defendants' actions against Plaintiffs . . . in the use of overwhelming and constitutionally excessive force against them were the result of inadequate and improper training, supervision, instruction and discipline . . . of the police officers under the personal directions of the State and Local Police Defendants. Such inadequate and improper training, supervision, instruction and discipline are the custom and practice of the Defendants. By the practice or custom of failing to adequately and properly train, supervise, instruct or discipline their police officers, the Defendants have directly caused the violations of rights that are the subject of this action.

(SAC ¶¶ 97–99.)

Taking these non-conclusory factual allegations as true, Plaintiffs have plausibly alleged that their Fourth Amendment rights were violated. Assessing the quantum of force and measuring the government interest at stake here, Plaintiffs have alleged that the use of force, namely use of violent shoving, strikes with clubs, and use of pepper spray, was unreasonable.

Undoubtedly, the government interest is high in this case; few would argue that the safety and security of the President should not be of great concern. However, given the specific circumstances here—a peaceful, planned, multi-generation demonstration—Plaintiffs have plausibly alleged the force used to relocate the group went too far.

For instance, Plaintiffs' factual allegations show that the anti-Bush demonstrators did not pose a greater risk to the security of the President as other individuals in the area or to the officers. *See Davis,* 478 F.3d at 1054. In addition, the factual allegations suggest that other methods could have been employed to relocate the group. *See id.* Plaintiffs assert that Police Defendants did not communicate with the demonstration organizers about the need to move the location and Plaintiffs assert that the Police Defendants began moving the demonstrators "[w]ithout attempting to determine whether the assemblage understood the announcements, and without allowing time for the class of about 200 to 300 persons crowded on the sidewalks to move." (SAC ¶ 60.) Considering these allegations under the framework of *Davis* and *Graham* and accepting the factual allegations as true for the purpose of this motion, the court finds the use of force was not reasonable.

State Defendants argue there is no § 1983 claim because Plaintiffs have not alleged personal conduct and are seeking liability through supervisor liability: "it appears to be plaintiffs' view that Rodriguez and Ruecker are liable because they were responsible for

the conduct of those they supervised, and not because of any injury or other constitutional deprivation that they personally rendered." (State Defs.' Mem. in Supp. 18.)

The court disagrees. Plaintiffs have alleged sufficient personal conduct to state a claim against the State Police Defendants. As set forth in *al-Kidd*, an official may be held liable for culpable action or inaction in training, supervision, or control of subordinates. 580 F.3d at 965. Plaintiffs have alleged that actions taken against the anti-Bush demonstrators were "overwhelming and constitutionally excessive force" and that they were a "result of inadequate and improper training, supervision, instruction and discipline." It is plausible on the face of the complaint that officers who use excessive force in the circumstances described here have had inadequate training as to what is necessary and appropriate force to relocate peaceful demonstrators.

Allegations also support that State Police Defendants may be held liable for setting into motion a series of acts that they knew or should have known would result in the use of excessive force. *See id.* Plaintiffs assert that the officers employing the alleged excessive force were under the personal direction of the State Police Defendants. It goes without saying that officers will be taking directions and orders from their superiors. Such directions, including that officers use riot gear on a peaceful group of demonstrators, could plausibly set into motion the course of events that resulted in the injury here. While it may give

further support to their claim to have allegations as to training manuals or verbatim instructions, at this stage in the litigation, it is not necessary.

Plaintiffs have plausibly alleged that State Defendants used excessive force to move a group of peaceful demonstrators. Plaintiffs have asserted that officers who forcibly relocated the group were under the direction of the State Defendants. They have plausibly alleged personal conduct of State Police Defendants to be held liable under § 1983.

1. State Defendants Do Not Have Qualified Immunity

State Defendants assert qualified immunity, and they argue that Plaintiffs cannot meet the second prong: "Even under the 'peaceful' circumstances alleged by plaintiffs, these officers reasonably could have believed that the degree of force used was appropriate in carrying out their duties." (State Defs.' Mem. in Supp. 26.) The court disagrees.

Following the steps from *Saucier* outlined in preceding sections, Plaintiffs have met the first prong of the qualified immunity inquiry by plausibly alleging State Defendants' personal conduct violated their Fourth Amendment rights. For the claim to survive, they must further allege that their right to be free of excessive force was sufficiently clear such that a reasonable officer would know that his conduct violates their rights. *See Saucier,* 533 U.S. at 202, 121 S. Ct. 2151.

The court in *Saucier* discussed the definition of "reasonableness" in the second prong of the quality immunity inquiry. "The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. . . . An officer might correctly perceive all the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances." *Id.* at 205, 121 S. Ct. 2151. In *Saucier*, the demonstrator alleged that a police officer used excessive force when he grabbed plaintiff, took him to a military van, and pushed or shoved him inside. At the time this occurred, the demonstrator was attempting to hang a banner at a national park where the Vice President of the United States was in attendance. He had hidden the banner from view knowing that it was not permitted and was attempting to display the banner on a barrier that separated the public from a secure area when he was intercepted by police. *Id.* at 206, 121 S. Ct. 2151.

The court concluded, based on the specific circumstances, that the police officer's actions were "within the bounds of appropriate police responses."

> [Police officer] did not know the full extent of the threat [the demonstrator] posed or how many other persons there might be who, in concert with [the demonstrator] posed a threat to the security of the Vice President. There were other potential protestors in the crowd, and at least one other individual was arrested and placed into the van. . . . It cannot be said there was a clearly established

> rule that would prohibit using the force [police officer] did to place [the demonstrator] into the van to accomplish these objectives.

Id. at 208–09, 121 S. Ct. 2151.

The circumstances here are simply not the same. Here, Plaintiffs communicated with Police Defendants prior to the demonstration, seeking to inform them of their plans and confirm that the demonstration would be lawful. Plaintiffs identified themselves as demonstrators, notified Police Defendants of their size and intent, and obtained approval for the time, place, and route of their demonstration. (SAC ¶ 39.) Plaintiffs took no affirmative action to threaten the security of the President. The threat they posed was based on their proximity to the President and not on some questionable, potentially threatening action of deliberately approaching a security barrier. (SAC ¶ 54.) Their peaceful demonstration, however was met by police officers who were "forcefully [moving anti-Bush demonstrators] from where they were demonstrating, using clubs, pepper spray bullets, and forceful shoving." (SAC ¶ 61.) After the relocation to Fifth Street, the group was divided and encircled, preventing some from leaving and separating family members, including small children. (SAC ¶ 61.) As alleged and for the purposes of this motion, the circumstances support Plaintiffs and their assertion that a reasonable officer would know such force on this group was unreasonable.

Plaintiffs' have alleged a plausible § 1983 claim for violation of the Fourth Amendment rights against

State Police Defendants, and these defendants are not entitled to qualified immunity.

B. City Defendants' Motion to Dismiss the § 1983 Fourth Amendment Claim Is Denied

Allegations of City Defendants' actions that violated Plaintiffs' Fourth Amendment rights are nearly identical to allegations of the State Defendant actions. (SAC ¶¶ 96–99.) Plaintiffs seek relief from Defendant Towe under § 1983 for actions taken in his individual capacity. For the same reasons that State Defendants Ruecker and Rodriguez may be held liable for Fourth Amendment violations in their individual capacities, so may Defendant Towe. Allegations support that Defendant Towe may be held liable for setting into motion a series of acts that they knew or should have known would result in the use of excessive force.

Plaintiffs also seek relief from the Defendant City of Jacksonville under § 1983. As previously explained, a municipality may be held liable under § 1983 if the custom and practice or official policy is alleged to have violated constitutional rights. *Monell*, 436 U.S. at 694–95, 98 S. Ct. 2018; see Part V.C. Liability results when such custom or policy "may fairly be said to represent official policy." *Id.*

Plaintiffs have not plausibly stated a *Monell* claim. Though they cite the elements of such a claim in their complaint, allegations are no more than a formulaic recitation and are not entitled to the presumption of truth, under *Iqbal*, 129 S. Ct. at 1951. Barely stating that "the individual Police Defendants' decisions to

order and implement the aforesaid police actions constituted the official policy of their respective public employers" is simply not enough. Section 1983 claims against City of Jacksonville, therefore, should be dismissed.

VII. Claims for Violation of Oregon Constitution

Plaintiffs' third claim seeks relief from County and City Defendants for violations of rights under the Oregon Constitution. (SAC ¶¶ 112-115.) The court's 2007 R & R dismissed this claim. (2007 R & R 2.) Relying on the Oregon Supreme Court decision *Hunter v. City of Eugene,* 309 Or. 298, 787 P.2d 881 (1990), the court explained that "persons whose rights under Article I, Section 8 of the Oregon Constitution are violated may not bring an action for damages directly under the constitution, but are limited to existing common law, equitable and statutory remedies." (2007 R & R 36.) The court's previous decision is unchanged, and Plaintiffs' third claim for relief is dismissed.

VIII. Claims for Oregon Common Law Violations

Plaintiffs' fourth claim seeks relief from City and County defendants for violation of Oregon common law for assault, battery, false imprisonment, and negligence. (SAC ¶¶ 116–18.) City Defendants move for summary judgment on this claim.

Plaintiffs pled similar if not identical claims in their FAC, and City Defendants moved for summary judgment in 2007. On April 22, 2007, the court held the motion for summary judgment in abeyance pending

the completion of discovery at the request of Plaintiffs' counsel. (Dkt. No. 103.) The court also stayed the discovery deadline on August 15, 2007. (Dkt. No. 129.)

Plaintiffs' claims for Oregon common law violations are fact-intensive, and entering judgment on these claims without providing the opportunity to complete discovery would be premature and unfair to both parties. The court holds City Defendants' current motion for summary judgment in abeyance, as to claims remaining claims.

IX. Conclusion

Consistent with the 2007 R & R, all prospective and injunctive relief claims, all Fifth and Fourteenth Amendment claims, claims against Defendant Basham, *Bivens* claim against Federal Defendants for Fourth Amendment violations, and all claims for violation of the Oregon Constitution are dismissed.

Defendants' motions are granted in part, dismissing the following claims:

Against State Defendants: § 1983 claim for violation of Plaintiffs' First Amendment rights against defendant Ruecker and Rodriguez in their individual capacities.

Against City of Jacksonville Defendants: § 1983 claim for violation of Plaintiffs' First Amendment rights against Defendant Towe in his individual capacity and the City of Jacksonville and § 1983 claim for violation of Plaintiffs' Fourth Amendment Rights against City of Jacksonville.

Thus, remaining claims include:

Against Federal Defendants: *Bivens* claim for violation of Plaintiffs' First Amendment rights against defendants Wood and Savage in their individual capacities.

Against State Defendants: § 1983 claims for violation of Plaintiffs' Fourth Amendment rights against defendant Ruecker and Rodriguez in their individual capacities.

Against County Defendants: § 1983 claims for violation of Plaintiffs' First and Fourth Amendment rights and claims for relief under Oregon common law.

Against City Defendants: § 1983 claim for violation of Plaintiffs' Fourth Amendment rights against Defendant Towe in his individual capacity and claims for relief under Oregon common law against Defendant Towe and the City of Jacksonville.

X. Recommendation

The motions should be granted in part and denied in part.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. *Objections to this Report and Recommendation, if any, are due by* ***August 23, 2010****. If objections are filed, any responses to the objections are due within 17 days, see Federal Rules of Civil*

Procedure 72 and 6. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 06-3045-CL

MICHAEL MOSS, LESLEY ADAMS, BETH WILCOX, RICHARD ROYER, LEE FRANCES TORELLE, MISCHELLE ELKOVICH AND ANNA VINE, FORMERLY KNOWN AS ANNA BOYD, INDIVIDUALLY AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED, AND JACKSON COUNTY PACIFIC GREEN PARTY, PLAINTIFFS

v.

UNITED STATES SECRET SERVICE OF THE DEPARTMENT OF HOMELAND SECURITY, MARK SULLIVAN, DIRECTOR OF THE UNITED STATES SECRET SERVICE, IN HIS OFFICIAL CAPACITY, RALPH BASHAM, FORMER DIRECTOR OF THE UNITED STATES SECRET SERVICE, IN HIS INDIVIDUAL CAPACITY, TIM WOOD, UNITED STATES SECRET SERVICE AGENT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, ROB SAVAGE, UNITED STATES SECRET SERVICE AGENT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, JOHN DOE 1, UNITED STATES SECRET SERVICE AGENT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, PARTICIPATING IN THESE ACTIONS AND KNOWN TO THE DEFENDANT SECRET SERVICE, BUT UNKNOWN AT THIS TIME TO PLAINTIFFS, DAVID TOWE, CHIEF OF POLICE OF JACKSONVILLE, OREGON, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION OF THE STATE OF OREGON, RON RUECKER, SUPERINTENDENT OF THE OREGON STATE POLICE, IN HIS INDIVIDUAL CAPACITY, TIMOTHY F. MCLAIN, SUPERINTENDENT OF THE OREGON STATE POLICE, IN HIS OFFICIAL CAPACITY, RANDIE MARTZ, CAPTAIN OF

THE SOUTHWEST REGIONAL HEADQUARTERS OF THE OREGON STATE POLICE, IN HIS OFFICIAL CAPACITY, ERIC RODRIGUEZ, FORMER CAPTAIN OF THE SOUTHWEST REGIONAL HEADQUARTERS OF THE OREGON STATE POLICE, IN HIS INDIVIDUAL CAPACITY, MIKE WINTERS, SHERIFF OF JACKSON COUNTY, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, JACKSON COUNTY, A MUNICIPAL CORPORATION OF THE STATE OF OREGON, JOHN DOES 2-20, THAT IS, THE COMMANDING OFFICERS OF OTHER LAW ENFORCEMENT AGENCIES OF PUBLIC BODIES PARTICIPATING IN THESE ACTIONS, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES, KNOWN TO THE IDENTIFIED DEFENDANTS, BUT UNKNOWN AT THIS TIME TO PLAINTIFFS, AND MUNICIPAL DOES, THE PUBLIC BODIES EMPLOYING DEFENDANTS JOHN DOES 2-20, DEFENDANTS

[Filed: Oct. 16, 2009]

SECOND AMENDED COMPLAINT
Filed by Plaintiffs

DEMAND FOR JURY TRIAL

INTRODUCTION

1. This is a class action, pursuant to the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, 5 U.S.C. § 702, the Oregon Constitution, Article I, Sections 8, 9, 20 and 26, and the common law, seeking damages and injunctive and declaratory relief against the Defendants for unconstitutional, unlawful, and tortious ac-

tions against Plaintiffs and Plaintiff Class, growing out of and related to Defendants' disrupting a lawful assembly and protest demonstration by Plaintiffs and Plaintiff Class in Jacksonville, Oregon on October 14, 2004. Although certain of Plaintiffs' claims were dismissed by the court on Defendants' Motions, those claims are restated here so as to preserve them for appeal.

2. The individual Plaintiffs are citizens of the United States and residents of Oregon who were in Jacksonville, Oregon, on October 14, 2004, assembled on the public sidewalks in front of and across the street from an inn where President George W. Bush was present, and conducting a demonstration ("the demonstration") to protest the President's policies. Plaintiff Jackson County Pacific Green Party ("Green Party") joins this action on behalf of its members, some of whom were participants in the demonstration. Plaintiffs were exercising their First Amendment rights by demonstrating peacefully and in full accordance with the law when, without provocation or lawful basis, and without reasonable or adequate warning, the Defendants, by physical force, compelled Plaintiffs to vacate the sidewalks which by right they had chosen for their demonstration. The Defendants, in addition to unlawfully and forcefully moving Plaintiffs, failed to give them an adequate warning and opportunity to move of their own volition. Some Defendants physically assaulted members of Plaintiff Class by pushing them, striking them with clubs and firing pepper spray bullets into the assemblage. The individual named Plaintiffs, each of whom was protesting in Jacksonville

and each of whose constitutional rights were violated by the Defendants, accordingly bring this action under the United States Constitution, 42 U.S.C. § 1983, the Oregon Constitution and the common law to vindicate their own civil rights and the civil rights of Plaintiff Class.

3. Plaintiffs seek declaratory and injunctive relief prohibiting the United States Secret Service and Defendants Sullivan, Basham, Wood, Savage and John Doe 1 ("Secret Service Defendants"), Defendants McLain, Martz, and Rodriguez ("State Police Defendants"), the other Defendants ("Local Police Defendants"), and all persons acting as their agents or in concert with them, from engaging in the practice of or continuing a pattern and practice of, or requesting or encouraging others to engage in the practice of:

(a) Barring or forcing a lawful assembly of people from any area where they have a lawful right to assemble, where there is no reasonable security reason to so bar or force them;

(b) Barring or forcing a lawful assembly of people from areas where other unscreened members of the public are allowed to congregate or be present;

(c) Barring or forcing anti-government demonstrators from areas where pro-government demonstrators are allowed to be present;

(d) Using excessive force to move nonviolent persons;

(e) Using riot-geared officers at nonviolent demonstrations; and

(f) Using non-lethal weapons or any form of chemical agents against nonviolent demonstrators.

4. Plaintiffs also seek an award of compensatory and punitive damages for violation of their constitutional rights, as well as for physical injuries, pain and suffering, against the individual Secret Service Defendants, except Defendant Sullivan, in their individual capacities; the individual Local Police Defendants, including the individual John Doe Defendants, in their individual capacities; and against Defendants Jackson County, the City of Jacksonville and the Municipal Does.

JURISDICTION

5. This action is brought pursuant to the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution, *Bivens v. Six Unknown Agents,* 403 U.S. 388 (1971), 5 U.S.C. § 702 and 42 U.S.C. § 1983. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

6. This Court has supplemental jurisdiction over Plaintiffs' state law claims under 28 U.S.C. § 1367.

PARTIES

Plaintiffs

7. At all times material hereto, Plaintiff Michael Moss ("Plaintiff Moss") was a resident of Jacksonville, Oregon, participating in the demonstration. Plaintiff Moss was struck with clubs and shot with pepper spray bullets by police officers employed by or under the supervision or control of the State and Local Police Defendants.

8. At all times material hereto, Plaintiff Lesley Adams ("Plaintiff Adams") was a resident of Jacksonville, Oregon, participating in the demonstration.

9. At all times material hereto, Plaintiff Beth Wilcox ("Plaintiff Wilcox") was a resident of Shady Cove, Oregon, participating in the demonstration.

10. At all times material hereto, Plaintiff Richard Royer ("Plaintiff Royer") was a resident of Trail, Oregon, participating in the demonstration. Plaintiff Royer had a pre-existing asthma condition and was injured by the chemical agents in the bullets used by police officers employed by or acting as agents of the Police Defendants.

11. At all times material hereto, Plaintiff Lee Frances Torelle ("Plaintiff Torelle") was a resident of Ashland, Oregon, participating in the demonstration. At the time of the demonstration, Plaintiff Torelle was a minor. Plaintiff Torelle was separated from the adults who accompanied her to the demonstration and was injured by the chemical agents used by police

officers employed by or acting as agents of the Police Defendants.

12. At all times material hereto, Plaintiff Mischelle Elkovich ("Plaintiff Elkovich") was a resident of Ashland, Oregon, and was a co-organizer of and participated in the demonstration.

13. At all times material hereto, Plaintiff Anna Vine, formerly known as Anna Boyd ("Plaintiff Vine") was a resident of Ashland, Oregon, and was a co-organizer of and participated in the demonstration. Plaintiff Vine is allergic to pepper spray and was injured by the chemical agents in the bullets used by police officers employed by or acting as agents of the Police Defendants.

14. The Jackson County Pacific Green Party is an unincorporated association and a political party in Jackson County, Oregon, some of whose members participated in the demonstration, and whose members, at the encouragement of the Party, regularly engage in peaceful demonstrations in Jackson County, in other parts of Oregon; and around the country, including at public appearances by senior federal officials protected by the United States Secret Service Defendants.

Defendants

15. Defendant United States Secret Service of the Department of Homeland Security ("Defendant Secret Service") is and at all times material hereto was the federal agency responsible for providing security for

the President and Vice President of the United States and certain other senior federal officials.

16. Defendant Mark Sullivan ("Defendant Sullivan") is the Director of the United States Secret Service, acting within the scope of his employment and under color of law, and responsible for directing the operations of the Secret Service and supervising all Secret Service agents. He is sued in his official capacity only. Defendant Ralph Basham ("Defendant Basham") was the Director of the United States Secret Service on October 14, 2004, and prior to Defendant Sullivan taking office on May 30, 2006, acting within the scope of his employment and under color of law and responsible for directing the operations of the Secret Service and supervising all Secret Service agents. Defendant Basham is sued in his individual capacity only.

17. Defendants Tim Wood ("Defendant Wood"), Rob Savage ("Defendant Savage"), and John Doe I ("Defendant John Doe 1") at all times material hereto, were Secret Service agents at the scene of the demonstration, acting within the scope of their employment and under color of law, assigned to provide security for the President, and directing, requesting and communicating with the other Defendants in their operations related to the demonstration. Defendants Wood, Savage and Doe 1 are sued in their official and individual capacities.

18. Defendant David Towe ("Defendant Towe") is and at all times material hereto was, the Chief of the Jacksonville Police Department, acting within the

scope of his employment and under color of state law, and responsible for directing the operations of the Jacksonville Police Department and supervising the law enforcement officers and agents acting under his authority, as well as law enforcement officers of other agencies who were at the scene of the demonstration to assist and support Defendants Towe and the City of Jacksonville. Defendant Towe is sued in his official and individual capacities.

19. Defendant City of Jacksonville ("Defendant Jacksonville") is a duly organized municipal corporation under Oregon law, and a public body liable for the tortuous conduct of its agents and employees pursuant to ORS 30.260(4) and 30.265(1). Defendant Jacksonville employs Defendant Towe.

20. Defendant Ron Ruecker (hereafter "Defendant Ruecker") is and, until January 2007, was the Superintendent of the Oregon State Police, acting within the scope of his employment and under color of state law, and responsible for directing the operations of the Oregon State Police and supervising the law enforcement officers and agents acting under his authority. Defendant Ruecker is sued in his individual capacity.

21. Defendant Timothy F. McLain ("Defendant McLain"), as successor to Ron Ruecker, is currently the Superintendent of the Oregon State Police, having been appointed in January 2007, and is responsible for directing the operations of the Oregon State Police and supervising the law enforcement officers and agents acting under his authority. Defendant McLain is sued in his official capacity only.

22. Defendant Randie Martz ("Defendant Martz"), as successor to Kurt Barthel, is the Captain of the Southwest Regional Headquarters of the Oregon State Police, acting within the scope of his employment and under color of state law, and responsible for directing the operations of said headquarters and supervising the law enforcement officers and agents acting under his authority. Defendant Martz is sued in his official capacity only (as was his predecessor, Kurt Barthel).

23. On October 14, 2004, Defendant Eric Rodriguez ("Defendant Rodriguez") was Captain of the Southwest Regional Headquarters of the Oregon State Police acting within the scope of his employment and under color of state law, and responsible for directing the operations of said Headquarters and supervising the law enforcement officers and agents acting under his authority. Defendant Rodriguez is sued in his individual capacity only.

24. Defendant Mike Winters ("Defendant Winters") is and at all times material hereto was, the Sheriff of Jackson County, acting within the scope of his employment and under color of state law, and responsible for directing the operations of the Jackson County Sheriffs Office and supervising the law enforcement officers and agents acting under his authority. Defendant Winters is sued in his official and individual capacities.

25. Defendant Jackson County ("Defendant Jackson County") is a political subdivision of the state of Oregon and is a public body liable for the tortious conduct of its agents and employees pursuant to ORS

30.260(4) and 30.265(1). Defendant Jackson County employs Defendant Winters.

26. Defendants John Does 2-20 were the commanding officers of, and Defendant Municipal Does were the governmental bodies employing, other law enforcement agents participating in the actions of the identified Defendants taken against Plaintiffs during the demonstration, which Defendants' identities are known to the identified Defendants, but unknown at this time to Plaintiffs. At all relevant times Defendant John Does 2-20 were acting under color of state law and acting within the scope of their authority. Defendant John Does 2-20 are sued in their official and individual capacities.

27. The true names of all John Doe and Municipal Doe Defendants shall be substituted and this Complaint shall be amended when their identities are established during discovery.

28. At all times material hereto, the term "Secret Service Defendants" refers to the Defendant Secret Service, individual defendants Sullivan, Basham, Wood and Savage and John Doe 1.

29. The term "State Police Defendants" refers to Defendants Ruecker, McLain, Martz, and Rodriguez.

30. The term "Local Police Defendants" refers to the City of Jacksonville, Jackson County, individual Defendants Towe and Winters, John Does 2-20, and the Municipal Doe Defendants. The term "Police Defendants" refers collectively to the "State Police Defendants" and the "Local Police Defendants."

CLASS ALLEGATIONS

31. The Individual Plaintiffs bring this suit on behalf of themselves and as a class action pursuant to the provisions of Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure on behalf of the class of all persons, adults and children, assembled on, or denied access to assemble on, or forced to move away from, the sidewalks adjacent to and across the street from the Jacksonville Inn, between Third and Fourth Streets, in Jacksonville, Oregon, on the evening of October 14, 2004 ("Plaintiff Class").

32. On information and belief, Plaintiff Class includes approximately 200 to 300 persons, making joinder of all class members impracticable.

33. Questions of law and fact common to members of Plaintiff Class include:

(a) Whether the Defendants had a lawful basis to order the class to move away from the public sidewalks where they were assembled and exercising First Amendment rights;

(b) Whether the conduct of Plaintiff Class presented a clear and present danger that justified the taking of law enforcement action that interfered with Plaintiff Class's exercise of First Amendment rights;

(c) Whether Plaintiff Class as a whole was peaceful and orderly at the time that the Defendants physically assaulted Plaintiff Class members by pushing them, striking them with clubs, and firing pepper spray bullets into Plaintiff Class;

(d) Whether the Defendants' decision to move and to use force against Plaintiff Class and their action in doing so was based on the content of the speech of Plaintiff Class rather than security considerations;

(e) Whether the Police Defendants gave Plaintiff Class an adequately intelligible order to disperse and a reasonable opportunity to do so prior to taking physical action against Plaintiff Class;

(f) Whether the Defendants had a lawful basis to employ physical force against Plaintiff Class, including forceful shoving, firing pepper spray bullets into Plaintiff Class and striking demonstrators with clubs, and whether the Defendants' actions in doing so constituted excessive force;

(g) Whether there was unjustified firing of pepper spray bullets into Plaintiff Class and whether that constituted excessive force;

(h) Whether the Defendants lacked reasonable grounds to believe and lacked a good faith belief that Plaintiff Class had violated any laws or that Plaintiff Class was engaged in any conduct that justified ordering them to move, moving them, and moving them with physical force;

(i) Whether the Defendants' actions violated the First, Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution, the Oregon Constitution, Article I, Sections 8, 9, 20, and 26, and state common law rights of Plaintiff Class;

(j) Whether the Secret Service Defendants have engaged in a nationwide pattern and practice of

unconstitutionally creating excessively large security zones around Secret Service protectees that are not based on security criteria; and

(k) Whether the Secret Service Defendants have engaged in a nationwide pattern and practice of unconstitutionally excluding anti-government demonstrators from traditional public forums where pro-government demonstrators, and other unscreened members of the public, are allowed to congregate.

34. The named Plaintiffs' claims are typical of the claims of all members of Plaintiff Class. The interests of the named class representatives are not antagonistic to and are aligned with the interests of Plaintiff Class because each named Plaintiff's claim stems from the same events that founded the basis of the class claims and is based upon the same legal or remedial theory. The named Plaintiffs will fairly and adequately protect the interests of members of Plaintiff Class. Plaintiffs are represented by counsel competent to prosecute this civil rights class action.

35. Questions of law and fact common to the members of Plaintiff Class predominate over any questions affecting only individual members, including legal and factual issues relating to damages.

36. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Class treatment will be more efficient, convenient and desirable than individual litigation of numerous claims. Plaintiff Class is readily defined and is manageable, and prosecution of a class action will eliminate the possibility of repetitious litigation.

FACTS

The Demonstration at the Jacksonville Inn

37. On October 14, 2004, President George W. Bush made a campaign appearance in Central Point, Oregon. President Bush was scheduled to spend the evening at the Jacksonville Inn Honeymoon Cottage located on Main Street, west of Third Street, and south of California Street, approximately two blocks from the Jacksonville Inn, in Jacksonville, Oregon.

38. Plaintiffs Elkovich and Vine organized a demonstration to take place in Jacksonville, Oregon on the afternoon and evening of October 14, 2004. The demonstrators planned to gather during the afternoon in Griffin Park, located on South Fifth Street in Jacksonville, about two blocks from the Jacksonville Inn, then, beginning at about 5:30 PM, to march from Griffin Park to the sidewalks on California Street between 3rd and 4th Streets, a location about two blocks away from the Honeymoon Cottage in Jacksonville, Oregon, where the President was scheduled to spend the evening.

39. Prior to the demonstration, Plaintiff Elkovich spoke separately with Defendant Towe, Chief of the Jacksonville Police, and with Defendant Winters, Sheriff of Jackson County. Plaintiff Elkovich informed these Defendants of the details of the planned demonstration and the route the demonstrators planned to follow. Plaintiff Elkovich told these Defendants that parents and their young children were expected to participate, that she wanted to avoid any possible problems, and that the demonstration was to

be peaceful and law-abiding, with handouts to participants so informing them. Plaintiff Elkovich also emphasized that due to the law-abiding nature of the gathering, riot-geared police would not be necessary and asked that they not be present. Defendant Towe assented to the route and location of the demonstration and said he did not plan to use riot-geared police.

40. Plaintiff Elkovich asked Defendant Towe to be accessible to her for coordination purposes at the scene of the demonstration. Defendant Towe declined, and did not propose an alternative means for the police to maintain coordination with demonstration leaders during the demonstration.

41. Defendant Winters told Plaintiff Elkovich that protecting the rights of demonstrators was one of his priorities and that officers in riot gear would be in discreet locations, but not deployed unless needed. Defendant Winters assented to the route and location of the demonstration and assured Plaintiff Elkovich that if demonstrators stayed on the sidewalks, there would not be any problems. Defendant Winters did not propose any means for the police to maintain coordination with demonstration leaders during the demonstration.

42. Beginning about 5:00 PM on October 14, 2004, Plaintiffs and Plaintiff Class, consisting of about 200 to 300 anti-Bush demonstrators, including elderly people, families, children, and babes in arms, assembled in Griffin Park in Jacksonville, Oregon.

43. In Griffin Park, Plaintiff Vine told the assembled anti-Bush demonstrators of the demonstration

plan, that the plan had been discussed with Defendants Towe and Winters, that Defendants Towe and Winters had assured Plaintiff Elkovich that the demonstrators would not be disturbed if they remained on the sidewalks, and that there was to be no disorder.

44. The State and Local Police Defendants' police officers were located throughout downtown Jacksonville. At about 6:00 PM, the anti-Bush demonstrators, in accordance with the planned demonstration and the route which Plaintiff Elkovich had cleared with Defendants Towe and Winters, left Griffin Park and proceeded to California Street between Third and Fourth Streets.

45. At that time, Plaintiffs and Plaintiff Class did not know that the President would decide to come to the Jacksonville Inn on California Street for dinner. Plaintiffs and Plaintiff Class conducted their demonstration with chants, slogans, and signs. All class members were orderly, interacted with police without incident, and remained on the sidewalks.

46. Immediately adjacent to the anti-Bush demonstrators was a similarly sized group of pro-Bush demonstrators, also chanting and exhibiting signs. The pro-Bush demonstrators began at the western curbs of Third Street and extended west along California Street. The anti-Bush demonstrators began at the eastern curbs of Third Street and extended east to Fourth Street. The two groups were separated only by the 37-foot width of Third Street. Interactions between the anti-Bush demonstrators and the pro-Bush demonstrators were courteous and even jovial.

The President Decides to Dine at the Inn

47. While the President was en route to Jacksonville, he decided to dine at the Jacksonville Inn instead of at the Honeymoon Cottage. At about 7:00 P.M., the pro-Bush and anti-Bush demonstrators learned that the President was coming to dine at the Jacksonville Inn on the north side of California Street between Third and Fourth Streets. The Jacksonville Inn had a dining area located on a patio at the rear of the Inn.

48. After learning of the President's dinner plan, the participants in both the pro-Bush and anti-Bush demonstrations clustered more on the north side of California Street than on the south side. The respective locations of the group of pro-Bush demonstrators and Plaintiff Class of anti-Bush demonstrators are shown as "A" and "B", respectively, on the map attached as Exhibit A to this Second Amended Complaint. As shown on the map, the location of the eastern-most pro-Bush demonstrators was not significantly different from the location of the western-most anti-Bush demonstrators. Both sets of demonstrators had equal access to the President during his arrival at the Jacksonville Inn and would have had equal access during his departure had the anti-Bush demonstrators not been violently moved two blocks east as alleged below.

49. Shortly after 7:00 PM, just prior to the President's arrival at the patio dining area at the rear of the Jacksonville Inn, at the request of the Secret Service agent on site, a group of the State and Local Police Defendants' police officers dressed in riot gear cleared

the Third Street alley all the way to the patio dining area directly behind the Jacksonville Inn. Police also blocked Third Street, including both sidewalks, north of California Street. Riot-geared police officers cleared the California Street alley running along the east side of the Inn and were stationed at the entrance of the California Street alley to prevent any unauthorized persons from entering the alley. No demonstrators attempted to enter the California Street alley at any time after the police cleared the alley. At the intersection of Third and California Streets, the State and Local Police Defendants' police officers began barring members of both groups of demonstrators from crossing the streets, and confining them to the sidewalks on which they were standing.

50. The anti-Bush demonstrators along California Street did not have any access to the President or any line of sight to the dining patio at the rear of the Jacksonville Inn. As shown on Exhibit A, the anti-Bush demonstrators were blocked by the buildings along California Street—the U.S. Hotel, the Bijou, the Jacksonville Inn, and the Sterling Savings Bank—and by the riot-geared police officers stationed at the entrance of the California Street alley.

51. President Bush and his party arrived at the back of the Jacksonville Inn at approximately 7:15 PM, and the President entered the back patio of the Inn through the back patio door. The patio dining area was enclosed by a 6-foot high wooden fence, blocking a view of those in the patio dining area from the sight of all those outside that area.

52. Also present inside the Inn and the patio dining area were dozens of guests and diners. Defendants did not screen these persons or order or force them to leave the patio. Also present, just upstairs from the patio dining area, was a group of approximately thirty persons participating in an assemblage with expressive content, namely, an educational discussion of medical issues. Some members of the medical group, who came downstairs to get a glance at the President, found an unguarded door leading into the patio dining area, opened that door and stood looking at the President from a distance of about 15 feet.

The Secret Service Directs Removal of Anti-Bush Demonstrators

53. Fifteen minutes later at about 7:30 PM, after class members' anti-Bush chants and slogans could be heard within the patio where the President was dining, Secret Service Defendants Wood, Savage and John Doe 1 requested or directed Defendant Towe and the other Police Defendants to clear California Street of all persons between Third and Fourth Streets—that is, the members of Plaintiff Class—and to move them to the east side of Fourth Street and subsequently to the east side of Fifth Street.

54. The Defendants claim that the Defendant Secret Service agents told Defendant Towe and the Police Defendants that the reason for the Secret Service's request or direction was that they did not want anyone within handgun or explosive range of the President. To the extent the agents in fact made such an assertion, the assertion was false and Defendant

Towe and the Police Defendants knew or should have known that it was false, because there was no significant security difference between the two groups of demonstrators.

55. Had that been the true reason for the request or direction, the Defendant Secret Service agents would have requested or directed that all persons dining, staying at, or visiting the Inn who had not been screened by the Secret Service or the Police Defendants be removed from the Inn. Likewise, had that been the true reason for the request or direction, the Defendant Secret Service agents would have requested or directed that the pro-Bush demonstrators at the corner of Third and California be moved further to the west so that they would not be in range of the President as he travelled from the Inn to the Honeymoon Cottage where he was staying. The Honeymoon Cottage was at 115 Main Street, one block south of California Street and West of Third Street. The line marked "C" on Exhibit A shows the direction to the Honeymoon Cottage from the rear of the Jacksonville Inn.

56. Instead, the Defendant Secret Service Agents left the pro-Bush demonstrators on the Northwest and Southwest corners of Third and California Streets, marked as "A" on Exhibit A, to cheer for President Bush as he traveled to the Honeymoon Cottage, while causing the anti-Bush demonstrators to be violently moved two blocks east, well out of the President's view.

57. The Defendant Secret Service agents targeted only the anti-Bush demonstrators to be cleared from the area, even though they were much farther from the President than the unscreened diners, hotel guests, and other visitors, including the assembled medical group, inside the Inn, and even though they had no greater access to the President than the pro-Bush demonstrators. In fact, having moved the anti-Bush demonstrators two blocks east, the Defendant Secret Service agents left the pro-Bush demonstrators with unimpeded access to the President along the route to the Honeymoon Cottage, demonstrating that the purported reason for moving the anti-Bush demonstrators was false.

58. Defendants Wood, Savage and John Doe 1 did not direct or request that Defendant Towe or the other Police Defendants move or screen the pro-Bush demonstrators outside the Inn or the unscreened diners, hotel guests, and other visitors, including the assembled medical group, inside the Inn.

59. At approximately 7:45 PM, the Police Defendants formed a line of riot-geared police officers across California Street on Third Street, facing east (i.e., facing the anti-Bush demonstrators and with their backs to the pro-Bush demonstrators). Behind them was an armored personnel carrier. The Police Defendants made amplified announcements, unintelligible to many class members, that the assembly was now unlawful, and ordered Plaintiffs and Plaintiff Class of anti-Bush demonstrators to move from the sidewalks where they were lawfully assembled to the east side of

Fourth Street. The Police Defendants failed to contact Plaintiffs Elkovich or Vine, the known leaders of the anti-Bush demonstration, made no effort to coordinate with them, and, by restricting their movement, prevented them from assisting in communicating with Plaintiff Class.

The Police Defendants Violently Move the Anti-Bush Demonstrators

60. Without attempting to determine whether the assemblage understood the announcements, and without allowing time for the class of about 200 to 300 persons crowded on the sidewalks to move, the Police Defendants and their police officers, including officers clad in riot gear, forced the anti-Bush demonstrators to move east along California Street, in some cases by violently shoving Plaintiffs and Plaintiff Class members, striking them with clubs and firing pepper spray bullets at them.

61. The Police Defendants continued forcefully to move class members from where they were demonstrating, using clubs, pepper spray bullets, and forceful shoving, east along California Street until they had all crossed Fourth Street, and then to the east side of Fifth Street. After moving the class members across Fifth Street, the Police Defendants divided the class members into two groups, encircling each group and preventing class members from leaving the area. Some class members, including those with young children, were attempting to leave the area. Several families had become separated, including children;

some of whom were lost, frightened and traumatized as a result of the Police Defendants' actions.

62. During the entire time these actions were being taken against Plaintiffs and Plaintiff Class members, the Defendants did not take any action to move the pro-Bush demonstrators or to move the unscreened diners, hotel guests, and other visitors, including the assembled medical group, who were inside the Inn.

The Secret Service's Long History and Actual Policy of Discriminating Against First Amendment Expression

63. Since the early 1960s, each American President has employed an Advance Team to work together with the Secret Service to manage the twin goals of protecting the President and providing him access to the public in his public appearances and travels. Each President has established different policies in the balance between these two goals.

64. The Secret Service has a long history of going beyond security measures necessary to protect the President, and manipulating its security function to protect Presidents from First Amendment-protected expressions of opposition by individuals and groups. This has required the courts periodically to examine and to declare invalid, unlawful, or excessive, so-called security measures for which the Secret Service could not show a reasonable basis.

65. As long ago as 1969, in *Quaker Action Group v. Hickel*, 421 F.2d 1111, 1117 (D.C. Cir. 1969), the United States Court of Appeals for the District of Columbia

Circuit upheld a preliminary injunction against Secret Service instigated regulations limiting demonstrations on the sidewalk adjacent to the White House and in neighboring Lafayette Park. The court specifically rejected the notion that it must accept the Secret Service's purported security rationale, instead holding that "we must also assure ourselves that those conclusions rest upon solid facts and a realistic appraisal of the danger rather than vague fears extrapolated beyond any foreseeable threat." The court went on to note: "The history of this country, moreover, records no effort of which we are aware to assault a public figure by mass violence; assassinations have characteristically been the work of single individuals or at most small groups." The same statement is as true today as it was 40 years ago. And following a trial on the merits, the Court of Appeals concluded that the numerical limits sought by the Secret Service were not supportable.

66. The United States Court of Appeals for the Ninth Circuit has not ruled in a Secret Service case, but in *Bay Area Peace Navy v. U.S.*, 914 F.2d 1224, 1228 (9th Cir. 1990), the court invalidated a United States Coast Guard security zone, ruling that the government "is not free to foreclose expressive activity in public areas on mere speculation about danger . . . . [o]therwise the government's restriction on First Amendment expression in public areas would become essentially unreviewable."

67. The White House under President George W. Bush, more than any prior Presidency, sought to pre-

vent or minimize the President's exposure to dissent or opposition during his public appearances and travels, while at the same time maximizing—within the demands of reasonable security—his exposure to supporters and to the public in general.

68. This policy was set out in some detail in the official "Presidential Advance Manual," dated October 2002, instructing the White House Advance Team on how to keep protesters out of the President's vicinity and sight. A redacted copy of the "Presidential Advance Manual," which was produced and filed in *Rank v. Hamm*, U.S.D.C., S.D. W. Va., Case No. 2:04-cv-00997, is attached as Exhibit B.[1] Viewpoint discrimination by the Secret Service in connection with President Bush was the official policy of the White House. The unredacted excerpts include discussions about how to deal with protesters, how to disrupt protests, and how to insure that protesters are kept out of sight or hearing of the President and the media. These facts demonstrate not just a pattern and practice, but an official White House policy of seeking to stifle dissent.

69. The Secret Service Defendants worked closely with the Advance Team to achieve the goal set out in the Presidential Advance Manual, and to concoct, manipulate, and gerrymander false security rationales for the exclusion or distancing of opposition, dissent, or protest expressive activity from proximity to the

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[1] The reference to Exhibit C in the document is the exhibit referent it had in the West Virginia action.

President, while minimizing the distancing of the public in general and supporters.

70. The Secret Service's actual but unwritten policy and practice was to work with the White House under President Bush to eliminate dissent and protest from presidential appearances. When the President's plans changed on October 14, 2004, there was no time for the Advance Team to take action to stifle and suppress the protest. Instead, the President's team relied on the Secret Service to do so by directing and requesting local authorities to clear both sides of California Street between Third and Fourth Streets, and subsequently between Third and Fifth Streets, where the protesters opposing President Bush were congregated, while leaving undisturbed the nearby pro-Bush demonstrators, as well as the unscreened diners, hotel guests, and other visitors, including the assembled medical group, who were inside the Inn.

71. Defendants Secret Service and Basham have promulgated or caused to be promulgated written guidelines, directives, instructions and rules which purport to prohibit Secret Service agents from discriminating between anti-government and pro-government demonstrators, between demonstrators and others engaged in expressive assembly, and between demonstrators and members of the public not engaged in expressive assembly, but these documents do not represent the actual policy and practice of the Secret Service, and are a sham, designed to conceal and immunize from judicial review the actual policy

and practice described in paragraphs 63 to 70 of this Second Amended Complaint.

72. The actions of the Secret Service Defendants during the episode at the Jacksonville Inn on October 14, 2004, were an implementation of this actual policy and practice, which included employing, directing, requesting, or encouraging state and local authorities to assist in implementing the discriminatory policy.

73. Inasmuch as the First Amendment requires that governmental restrictions on expressive conduct be based on a compelling governmental interest unrelated to the fact that the conduct contains expressive content, the Secret Service policy and practices described in paragraphs 63 to 70 of this Second Amended Complaint and the Secret Service Defendants' actions at the Jacksonville Inn on October 14, 2004, violated three distinct principles of this First Amendment standard:

(a) Imposition of greater restrictions on Plaintiff Class than on the pro-Bush demonstrators outside the Inn violated the principle prohibiting viewpoint discrimination.

(b) Imposition of greater restrictions on Plaintiff Class than on the medical group assembled inside the Inn violated the principle prohibiting content discrimination against a political assemblage as compared to a non-political assemblage.

(c) Imposition of greater restrictions on Plaintiff Class than on individual diners and guests inside the Inn violated the principles prohibiting content and

or viewpoint discrimination against persons solely because they are assembled to express a political or opposing point of view.

74. The Secret Service Defendants had no valid security reason to request or order the eviction of Plaintiffs and Plaintiff Class from the north and south sidewalks of California Street between Third and Fourth Streets on October 14, 2004.

75. In the United States, no attempt to harm any President has ever been made from a group assembled to express opposition, protest, or dissent from the President's policies.

76. Plaintiff Class of anti-Bush demonstrators were a peaceful group, consisting of families, elderly persons, children, and mothers with babes in arms, whose leaders had contacted Defendants Winters and Towe in advance to assure them of their intention to protest peacefully in a law abiding manner.

77. The Defendant Secret Service agents had at least 20 minutes from the time the President decided to dine at the Jacksonville Inn to assess the security situation at and around the Inn. During that time, the Defendant Secret Service agents had the police clear the two alleys adjacent to the Inn, but made no effort to have the anti-Bush demonstrators moved. It was only after the President was in the patio dining area and the chants of the anti-Bush demonstrators could be heard from the patio that the Defendant Secret Service agents targeted Plaintiffs and Plaintiff Class of anti-Bush demonstrators to be moved from the public sidewalks on California Street.

78. This action by the Secret Service Defendants did not comport with normal, lawful Secret Service security measures during Presidential public appearances or visits to hotels, restaurants, or other publicly accessible buildings, absent threats, reports or other special circumstances suggesting the need for unusual security measures. Specifically:

(a) There had been no reports, threats, or other information suggesting a potential attempt to harm the President, or any other special circumstances suggesting the need for unusual security measures.

(b) It is not the general practice of the Secret Service, in the absence of special circumstances, to establish a security zone extending an entire city or town block around hotels, restaurants, or other buildings the President may be visiting in the United States.

(c) The Secret Service has specific statutory authority to establish security zones within "buildings and grounds" visited by the President, but not on adjacent public sidewalks and streets.

(d) On information and belief, the criterion of keeping people out of handgun range of the President was made up for this particular occasion, having no precedent in any prior security zones or Presidential appearances, in the absence of special circumstances.

(e) On information and belief, the criterion of keeping people out of explosive range of the President was made up for this particular occasion, having no

precedent in any prior security zones or Presidential appearances, in the absence of special circumstances.

79. Plaintiff Class of anti-Bush demonstrators posed no greater risk of assaulting the President with a handgun or explosive than the pro-Bush group of demonstrators. The Jacksonville Inn and other buildings on California Street and the riot-geared police securing the California Street alley blocked the view and line of sight from the sidewalk in front of the Inn and along the north side of California Street to the patio dining area at the rear of the Inn, making it impossible for Plaintiff Class of anti-Bush demonstrators to assault the President with a handgun or explosive from that location.

80. Given their location, Plaintiff Class of anti-Bush demonstrators posed no greater risk and in fact posed less risk of assaulting the President with a handgun or explosive, than the guests, diners, and the assembled medical group inside the Inn. Specifically, the Secret Service Defendants knew or should have known:

(a) Plaintiff Class of anti-Bush demonstrators had no more advance knowledge than the people inside the Inn that the President was coming to the Inn for dinner in the patio dining area; thus, there was no more reason to suspect them of harboring hidden weapons or plans for assault than the people inside the Inn.

(b) The guests, diners, and the assembled medical group inside the Inn posed a greater risk, if any, of assaulting the President with a handgun or

explosive than anyone outside of the Inn; for example, several members of the medical group assembled inside the Inn opened an unguarded door to the patio dining area and stood looking at the President from a distance of only fifteen feet.

(c) The only operative distinction between the unscreened diners, guests and other visitors, including the assembled medical group, inside the Inn, and Plaintiff Class of anti-Bush demonstrators outside the Inn, was that the anti-Bush demonstrators were expressing a point of view opposed to the President and his policies and that those inside the Inn were not doing so.

81. The actions of the Secret Service Defendants at the Jacksonville Inn on October 14, 2004, were consistent with and taken pursuant to the actual but unwritten policy and practice of the Secret Service to shield the President from seeing or hearing anti-Bush demonstrators and to prevent anti-Bush demonstrators from reaching the President with their message. The actions of the Secret Service Defendants at the Jacksonville Inn on October 14, 2004, were also consistent with the Bush administration's official policy of shielding the President from seeing or hearing anti-Bush demonstrators and preventing anti-Bush demonstrators from reaching the President with their message as reflected in the Presidential Advance Manual, redacted portions of which are attached as Exhibit B to this Second Amended Complaint.

82. According to published reports, the Secret Service has engaged in these kinds of actions against

anti-government expressive activity on numerous other occasions, including, without limitation:

(a) At President Bush's appearance at Western Michigan University in Kalamazoo, Michigan, on March 27, 2001, a demonstrator was carrying a sign sarcastically commenting on the prior Presidential election ("Welcome Governor Bush"). At the direction of the Secret Service, a university police officer ordered the demonstrator to go to a "protest zone" behind an athletic building located 150-200 yards from the parade route even though several hundred people who were not carrying signs were allowed to remain in the area where the protester had stood. The protest zone was located so that people sent there could not be seen by the President or his motorcade. When the demonstrator refused to enter the protest zone, but insisted on standing where other people had been allowed to gather, he was arrested, also at the direction of the Secret Service.

(b) On August 23, 2002, in Stockton, California, at an appearance in a local park to support a Republican gubernatorial candidate, at the direction of the Secret Service, protesters were ordered behind a row of large, Greyhound-sized buses, which placed them out of sight and earshot of their intended audience, and were advised that if they went to the other side of the buses, a location visible to those attending the event, they would be arrested. People who carried signs supporting the President's policies and spectators not visibly expressing any views were al-

lowed to gather in front of the buses, where event attendees could see them.

(c) On January 22, 2003, in St. Louis, Missouri, President Bush made a visit to announce an economic plan. At the direction of the Secret Service, protesters carrying signs opposing the economic plan and criticizing the President's foreign policy were sent to a "protest zone" located in a public park, three blocks away and down an embankment from where the President was speaking. Neither people attending the event nor people in the motorcade could see the protesters in the protest zone. One protester was arrested for refusing to enter the protest zone. Standing near the location where the protester was arrested was a group of people who were not asked to move, including a woman who carried a sign reading, "We Love You President Bush," who was neither ordered into the protest zone nor arrested.

(d) On September 2, 2002, in Neville Island, Pennsylvania, in connection with a speech by President Bush, at the direction of the Secret Service, anti-Bush demonstrators were sent to a "designated free speech zone" located on a large baseball field one-third of a mile away from where President Bush was speaking. Only people carrying signs critical of the President were required to enter and remain. Many people carrying signs supporting the President and his policies were allowed to stand alongside the motorcade route right up to where the President was speaking. When retired steelworker Bill Neel refused to enter the protest zone and insisted on being allowed to stand

where the President's supporters were standing, he was arrested for disorderly conduct and detained until the President had departed.

(e) In December 2002, in Philadelphia, Pennsylvania, at the direction of the Secret Service, protesters opposed to President's Bush's then-proposed tax cut plan were required to congregate in a protest zone well out of sight to the route to be taken by the President and the hotel where the President would be staying, while members of the public supporting the President or not expressing a view opposed to the President were permitted access to the sidewalks adjacent to the hotel and along the route he would be traveling.

(f) In May 2003, in connection with a speech by President Bush in Omaha, Nebraska, a group opposed to the President's tax cut plan planned a protest during the president's stop at a local plastics plant. At the direction of the Secret Service, the demonstrators were required to hold their protest more than half a mile away from the event.

(g) On June 17, 2003, in Washington, D.C., the President spoke at the Hilton Hotel. Protesters from the Children's Defense Fund criticizing the President's policies were picketing on the north side of T Street, adjacent to the hotel. A Secret Service agent, who showed them his badge, directed the protesters across the street. Spectators not visibly expressing any views were allowed to walk on the sidewalk in front of the hotel.

(h) In July 2003, in connection with a protest at a presidential visit to the Treasury Financial Facility in Philadelphia, Pennsylvania, demonstrators critical of President Bush were treated differently and less favorably than demonstrators supportive of the President. After the anti-Bush demonstrators were told that no one could protest directly across the street from the building, they agreed to a location diagonal from the building the President was visiting. When they noticed that pro-Bush demonstrators were being permitted to be directly across the street (where the anti-Bush demonstrators had been told no one would be permitted), they complained, and the Secret Service attempted to move the anti-Bush demonstrators even farther away. When a court blocked the local police and Secret Service from doing so, they then parked several large police vans in front of the anti-Bush demonstrators, thereby ensuring that the demonstrators would not be seen or heard by President Bush.

(i) On July 4, 2004, in Charleston, West Virginia, Jeffrey and Nicole Rank were arrested at the direction of the Secret Service while peacefully attending a speech by President Bush. Their "crime" was wearing t-shirts critical of the President. The charges against the Ranks were dropped. The Ranks sued and ultimately received $80,000 in settlement.

(j) On July 13, 2004, in Duluth, Minnesota, in connection with a presidential visit, the Secret Service had photographs posted at security checkpoints of three individuals who had indicated in a news story that they intended to protest against the President.

(k) On August 26, 2004, in Farmington, New Mexico, the Secret Service denied entrance to an individual who had a ticket for a Bush-Cheney rally because they believed the individual was there to protest.

(l) On September 9, 2004, in Colmar, Pennsylvania, a suburb of Philadelphia, the Secret Service, in conjunction with Bush campaign staffers, directed the arrest and detention of seven AIDS activists who protested during a speech by President Bush and the Secret Service agents then threatened to bar journalists who sought access to the activists from returning to the speech.

83. These other instances of actions by the Secret Service against anti-governmental expressive conduct constitute a pattern and practice, warranting judicial relief.

84. The Secret Service's sham written guidelines, directives, instructions and rules described in paragraph 71 of this Complaint do not represent the actual policy and practice of the Secret Service, but rather were designed to conceal and immunize from judicial review the Secret Service's unlawful and unconstitutional pattern and practices.

85. Secret Service agents have engaged in conduct and actions to suppress and stifle anti-governmental expressive conduct and/or speech or conduct critical of Secret Service protectees and have not been disciplined or corrected for engaging in such actions.

Plaintiffs' Injuries

86. As a result of Defendants' actions, Plaintiffs and Plaintiff Class members suffered damages in the form of loss of their rights under the United States Constitution, First, Fourth, Fifth and Fourteenth Amendments, the Oregon Constitution, Article I, Sections 8, 9, 20, and 26, and their common law rights, and physical and emotional injuries, pain and suffering. The experience was especially traumatic, both physically and emotionally, for the children, some of whom are now fearful about attending future demonstrations and of police officers.

87. Plaintiffs, Plaintiff Class members and other Green Party members desire and intend to continue demonstrating peacefully in proximity to federal officials who are protected by the Secret Service, both in Jackson County and elsewhere. It is likely and foreseeable that Plaintiffs, Plaintiff Class members and other Green Party members will again be harmed by the practices described in this Second Amended Complaint.

88. Plaintiffs, Plaintiff Class members and Green Party members are under a real and immediate threat that, unless the Secret Service Defendants and the State and Local Police Defendants are enjoined from doing so, they will continue the pattern and practices described in this Second Amended Complaint.

89. Such pattern and practices threaten Plaintiffs, Plaintiff Class and Green Party members with being banned from exercising their First Amendment rights in locations proximate to the President, Vice Presi-

dent, or other Secret Service protectees, despite the fact that pro-government demonstrators and/or other unscreened members of the public whose assembling does not involve political or expressive content will be allowed in such locations.

90. Such pattern and practices threaten Plaintiffs, Plaintiff Class and Green Party members with being subjected to having lawful and orderly demonstrations which they organize or in which they participate stopped, disrupted, and assaulted in the manner that occurred in the October 14, 2004, Jacksonville demonstration.

91. The aforesaid threats inhibit Plaintiffs, Plaintiff Class members and Green Party members from organizing and participating in such demonstrations, from encouraging others to do so, and from encouraging others to bring their children to these events as an educational democratic activity.

92. Plaintiffs and Plaintiff Class members have no adequate remedies at law for the injuries described in paragraphs 87 to 91 of this Second Amended Complaint.

93. At the time that the Defendants took the aforesaid actions against them, class members were exercising federal and state constitutional rights and common law rights and were not in violation of any law. Defendants violated the federal and state constitutional rights and common law rights of the class members. There was no reasonable or lawful basis for the Defendants to take such actions.

94. The actions of Defendants were within the scope of their employment.

95. The individual Police Defendants were acting under color of state law.

96. Defendants Towe, Rodriguez, Winters and the other individual State and Local Police Defendants personally directed and approved of the actions of the police against Plaintiff Class, and personally directed and approved of permitting the pro-Bush demonstrators and unscreened diners, guests, and visitors, including the assembled medical group, inside the Jacksonville Inn to remain in the vicinity undisturbed and unrestricted.

97. The Police Defendants' actions and the actions of the police officers in using overwhelming and excessive force, including the use of officers clad in riot gear, against unarmed, law-abiding peaceful demonstrators exercising their core First Amendment rights of speech and assembly on public sidewalks were the custom, policy or practice of the State of Oregon and Defendants City of Jacksonville and Jackson County and Municipal Does respectively, or were established as such by the individual Police Defendants in taking those actions. The individual Police Defendants had the final decision-making authority and responsibility for establishing the policies of their respective employers. The individual Police Defendants' decisions to order and implement the aforesaid police actions constituted the official policy of their respective public employers.

98. Both the rights that Plaintiff Class members were exercising, and the fact that the Defendants' actions against them violated those rights, were clearly established and well settled law as of October 14, 2004. Accordingly, the Defendants had no reasonable basis to believe that the Defendants' actions were lawful.

99. The Defendants' actions against Plaintiff Class in discriminating against them based on the fact, content, and/or viewpoint of their expression and in the use of overwhelming and constitutionally excessive force against them were the result of inadequate and improper training, supervision, instruction and discipline of the Secret Service agents under the personal direction of Defendant Basham and of the police officers under the personal directions of the State and Local Police Defendants. Such inadequate and improper training, supervision, instruction and discipline are the custom and practice of the Defendants. By the practice or custom of failing to adequately and properly train, supervise, instruct or discipline their police officers, the Defendants have directly caused the violations of rights that are the subject of this action.

FIRST CLAIM FOR RELIEF

• Violation of First, Fourth, and Fifth Amendment Rights •

Against the Secret Service Defendants Only

100. Plaintiffs reallege and incorporate by reference the preceding paragraphs as if fully set forth herein.

101. On information and belief, all Defendants were acting jointly and in concert in taking the actions alleged.

102. The individual Secret Service Defendants, except Defendant Sullivan, are liable in their individual or personal capacities to Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) for compensatory damages under *Bivens* v. *Six Unknown Agents,* 403 U.S. 388 (1971), for the violation of their rights of freedom of speech, assembly, and association under the First Amendment to the United States Constitution, and of their rights to be free from unreasonable seizure and assault under the Fourth and Fifth Amendments.

103. The individual Secret Service Defendants, except Defendant Sullivan, acted willfully and maliciously, or with indifference or reckless disregard of Plaintiff Class members' rights or safety, and Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) are therefore entitled to an award of punitive damages against the individual Secret Service Defendants in their individual or personal capacities, except Defendant Sullivan, in an amount to be established at trial.

104. Plaintiffs and Plaintiff Class are entitled to declaratory relief under *Bivens* against the individual Secret Service Defendants in their individual or personal capacities, except Defendant Sullivan, declaring that one or more of them violated Plaintiffs and Plaintiff Class's rights of freedom of speech, assembly and association under the First Amendment to the United

States Constitution, and their rights to be free from unreasonable seizure and assault under the Fourth and Fifth Amendments.

105. Plaintiffs and Plaintiff Class are entitled to declaratory and supplemental injunctive relief under 5 U.S.C. § 702 against all Secret Service Defendants in their official capacities and all persons acting in the official capacities as their agents or in concert with them, declaring as unlawful and prohibiting the Secret Service Defendants, and all persons acting as their agents or in concert with them from engaging in the practice of, or continuing a pattern and practice of, or requesting or encouraging others to engage in the practice of:

(a) Barring or forcing a lawful assembly of people from any area where they have a lawful right to assemble, where there is no reasonable security reason to so bar or force them;

(b) Barring or forcing a lawful assembly of people from areas where other unscreened members of the public are allowed to congregate or be present;

(c) Barring or forcing anti-government demonstrators from areas where pro-government demonstrators are allowed to be present;

(d) Using excessive force to move nonviolent persons;

(e) Using riot-geared officers at nonviolent demonstrations; or

(f) Using non-lethal weapons or any form of chemical agents against nonviolent demonstrators.

SECOND CLAIM FOR RELIEF

•42 U.S.C. § 1983: Violation of First, Fourth, and Fifth Amendment Rights•

Against the State and Local Police Defendants

106. Plaintiffs reallege and incorporate by reference the preceding paragraphs as if fully set forth herein.

107. The State and Local Police Defendants were acting jointly and in concert and under color of state law to violate the constitutional rights of Plaintiffs and Plaintiff Class.

108. The Police Defendants, except Defendants McLain and Martz, are liable in their individual or personal capacities to Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) for compensatory damages under 42 U.S.C. § 1983 and for attorneys fees under 42 U.S.C. § 1988 for the violation of their rights of freedom of speech, assembly and association under the First Amendment to the United States Constitution, and of their rights to be free from unreasonable seizure and assault under the Fourth and Fifth Amendments, and to all these rights as incorporated and applied through the Fourteenth Amendment.

109. The individual Police Defendants, except Defendants McLain and Martz, acted willfully and maliciously, or with indifference or reckless disregard of

Plaintiff Class members' rights or safety, and Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) are therefore entitled to an award of punitive damages against the individual Police Defendants, except Defendants McLain and Martz, in their individual or personal capacities in an amount to be proven at trial.

110. Plaintiffs and Plaintiff Class are entitled to declaratory relief against the Police Defendants in their individual or personal capacities, except Defendants McLain and Martz, declaring that one or more of them violated Plaintiffs and Plaintiff Class's rights of freedom of speech, assembly and association under the First Amendment to the United States Constitution, and their rights to be free from unreasonable seizure and assault under the Fourth and Fifth Amendments, as incorporated and applied through the Fourteenth Amendment.

111. Plaintiffs and Plaintiff Class are entitled to injunctive relief against the Police Defendants in their official capacities and all persons acting in their official capacities as their agents or in concert with them, prohibiting the Police Defendants, and all persons acting as their agents or in concert with them from engaging in the practice of, or continuing a pattern and practice of, or requesting or encouraging others to engage in the practice of:

(a) Barring or forcing a lawful assembly of people from any area where they have a lawful right to assemble, where there is no reasonable security reason to so bar or force them;

(b) Barring or forcing a lawful assembly of people from areas where other unscreened members of the public are allowed to congregate or be present;

(c) Barring or forcing anti-government demonstrators from areas where pro-government demonstrators are allowed to be present;

(d) Using excessive force to move nonviolent persons;

(e) Using riot-geared officers at nonviolent demonstrations; or

(f) Using non-lethal weapons or any form of chemical agents against nonviolent demonstrators.

THIRD CLAIM FOR RELIEF

• Violation of Rights Under Oregon Constitution •

Against the Local Police Defendants

112. Plaintiffs reallege and incorporate by reference the preceding paragraphs as if fully set forth herein.

113. The Local Police Defendants are liable to Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) for compensatory damages for the violation of their rights under the Oregon Constitution, Article I, Sections 8, 9, 20 and 26.

114. Plaintiffs and Plaintiff Class are entitled to declaratory and injunctive relief against the Local Police Defendants, declaring that one or more of them violated Plaintiffs and Plaintiff Class's rights of freedom of speech, assembly and association, and their

rights to be free from unreasonable seizure and assault under the Oregon Constitution, Article I, Sections 8, 9, 20 and 26, and prohibiting the Local Police Defendants, and all persons acting as their agents or in concert with them from engaging in the practice of, or continuing a pattern and practice of, or requesting or encouraging others to engage in the practice of:

(a) Barring or forcing a lawful assembly of people from any area where they have a lawful right to assemble, where there is no reasonable security reason to so bar or force them;

(b) Barring or forcing a lawful assembly of people from areas where other unscreened members of the public are allowed to congregate or be present;

(c) Barring or forcing anti-government demonstrators from areas where pro-government demonstrators are allowed to be present;

(d) Using excessive force to move nonviolent persons;

(e) Using riot-geared officers at nonviolent demonstrations; or

(f) Using non-lethal weapons or any form of chemical agents against nonviolent demonstrators.

115. Plaintiffs and Plaintiff Class are entitled to an award of attorney fees against the Local Police Defendants pursuant to *Armatta v. Kitzhaber,* 327 Or 250 (1998).

FOURTH CLAIM FOR RELIEF

Violation of Oregon Common Law Against the Local Police Defendants

116. Plaintiffs reallege and incorporate by reference the preceding paragraphs as if fully set forth herein.

117. The Local Police Defendants are liable to Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) for compensatory damages under the common law of Oregon for assault and battery, false imprisonment and negligence.

118. Timely notices of claims were filed pursuant to the Oregon Tort Claims Act.

PRAYER FOR RELIEF

WHEREFORE, the named Plaintiffs, on behalf of themselves and Plaintiff Class, request:

1. An Order certifying this action as a class action pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure, certifying the named Plaintiffs as class representatives and designating Steven M. Wilker, Paul W. Conable, James K. Hein, Ralph J. Temple, and Arthur B. Spitzer as class counsel;

2. On the First Claim for Relief, a judgment:

(a) For compensatory damages in favor of Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) against one or more of the individual Secret Service Defendants in their

individual or personal capacities, except Defendant Sullivan, jointly and severally;

(b) For punitive damages in favor of Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) against one or more of the individual Secret Service Defendants in their individual or personal capacities, except Defendant Sullivan;

(c) Declaring that one or more of the individual Secret Service Defendants in their individual or personal capacities, except Defendant Sullivan, violated Plaintiffs and Plaintiff Class's rights of freedom of speech, assembly and association under the First Amendment to the United States Constitution, and their rights to be free from unreasonable seizure and assault under the Fourth and Fifth Amendments; and

(d) Declaring unlawful the following practices, and ordering supplemental injunctive relief under 5 U.S.C. § 702, prohibiting the Secret Service Defendants in their official capacities, and all persons acting in their official capacities as their agents or in concert with them from engaging in the practice of, or continuing a pattern and practice of, or requesting or encouraging others to engage in the practice of:

(i) Barring or forcing a lawful assembly of people from any area where they have a lawful right to assemble, where there is no reasonable security reason to so bar or force them;

(ii) Barring or forcing a lawful assembly of people from areas where other unscreened

members of the public are allowed to congregate or be present;

(iii) Barring or forcing anti-government demonstrators from areas where pro-government demonstrators are allowed to be present;

(iv) Using excessive force to move nonviolent persons;

(v) Using riot-geared officers at nonviolent demonstrations; or

(vi) Using non-lethal weapons or any form of chemical agents against nonviolent demonstrators.

3. On the Second Claim for Relief, a judgment:

(a) For compensatory damages in favor of Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) against one or more of the individual Police Defendants in their individual or personal capacities, except Defendants McLain and Martz, jointly and severally;

(b) For punitive damages in favor of Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) against one or more of the individual Police Defendants in their individual or personal capacities, except Defendants McLain and Martz;

(c) Declaring that one or more of the individual Police Defendants in their individual or personal capacities, except Defendants McLain and Martz, violated Plaintiffs and Plaintiff Class's rights of free-

dom of speech, assembly and association under the First Amendment to the United States Constitution, and their rights to be free from unreasonable seizure and assault under the Fourth and Fifth Amendments, as incorporated and applied through the Fourteenth Amendment; and

(d) Enjoining the Police Defendants in their official capacities, and all persons acting in their official capacities as their agents or in concert with them from engaging in the practice of, or continuing a pattern and practice of, or requesting or encouraging others to engage in the practice of:

(i) Barring or forcing a lawful assembly of people from any area where they have a lawful right to assemble, where there is no reasonable security reason to so bar or force them;

(ii) Barring or forcing a lawful assembly of people from areas where other unscreened members of the public are allowed to congregate or be present;

(iii) Barring or forcing anti-government demonstrators from areas where pro-government demonstrators are allowed to be present;

(iv) Using excessive force to move nonviolent persons;

(v) Using riot-geared officers at nonviolent demonstrations; or

(vi) Using non-lethal weapons or any form of chemical agents against nonviolent demonstrators.

4. On the Third Claim for Relief, a judgment:

(a) For compensatory damages in favor of Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) and against Local Police Defendants for the violation of their rights under the Oregon Constitution, Article I, Sections 8, 9, 20 and 26.

(b) Declaring that one or more of the Local Police Defendants violated Plaintiffs and Plaintiff Class's rights of freedom of speech, assembly and association, and their rights to be free from unreasonable seizure and assault under the Oregon Constitution, Article I, Sections 8, 9, 20 and 26;

(c) Enjoining the Local Police Defendants, and all persons acting as their agents or in concert with them from engaging in the practice of, or continuing a pattern and practice of, or requesting or encouraging others to engage in the practice of:

(i) Barring or forcing a lawful assembly of people from any area where they have a lawful right to assemble, where there is no reasonable security reason to so bar or force them;

(ii) Barring or forcing a lawful assembly of people from areas where other unscreened members of the public are allowed to congregate or be present;

(iii) Barring or forcing anti-government demonstrators from areas where pro-government demonstrators are allowed to be present;

(iv) Using excessive force to move nonviolent persons;

(v) Using riot-geared officers at nonviolent demonstrations; or

(vi) Using non-lethal weapons or any form of chemical agents against nonviolent demonstrators.

5. On the Fourth Claim for Relief, a judgment for compensatory damages in favor of Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) and against Local Police Defendants under the common law of Oregon for assault and battery, false imprisonment and negligence.

6. Pre-and post-judgment interest on all amounts awarded;

7. Costs, disbursements, and reasonable attorney fees; and

8. Such other and further relief, including injunctive relief, as is just and proper under the circumstances.

JURY DEMAND

Plaintiffs request a jury trial for all issues so triable.

DATED Oct. 15, 2009

TONKON TORP LLP
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Attorneys for Plaintiffs
Cooperating Attorney for ACLU Foundation of Oregon, Inc.

EXHIBIT A TO SECOND AMENDED COMPLAINT

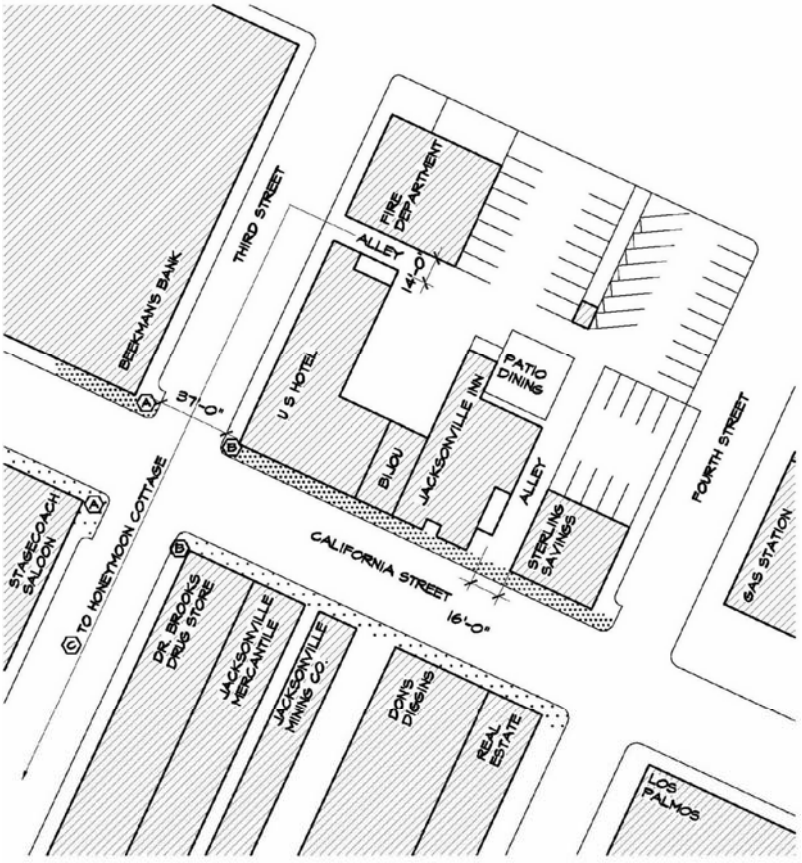

EXHIBIT A TO SECOND AMENDED COMPLAINT
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EXHIBIT B TO SECOND AMENDED COMPLAINT

PRESIDENTIAL ADVANCE MANUAL

OFFICE OF PRESIDENTIAL ADVANCE

OCTOBER 2002

NOTE: It is a violation of Federal law to duplicate or reproduce this manual without permission. It is not to be photocopied or released to anyone outside of the Executive Office of the President, White House Military Office or United States Secret Service. It has been developed for your guidance and is intended for your personal use. For more information, please contact the Office of Presidential Advance at (202) 456-5309.

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TABLE OF CONTENTS

[Pages 2-11 redacted]

[redacted]

Summary

[redacted]

The President participates in various types of events. However the principles and guidelines covered in this manual can be applied to any type of event. Common events are speeches (to both large and small groups), rallies, roundtable meetings and tours.

[Pages 13-31 redacted]

Section V. Crowd Raising and Ticket Distribution

[redacted]

[redacted]

The Lead Advance will assign a member of the Advance Team or trusted volunteer to help raise the crowd and to organize a ticket distribution system. Proper ticket distribution is vital to creating a well-

balanced crowd and deterring potential protestors from attending events. The amount and type of tickets will be determined on an event basis by the Lead Advance and the Advance Office. Each ticket type will be numbered in order to track distribution and facilitate the placement of groups or people at the event.

Distribution

Tickets will be sent to the Lead Advance for distribution. The Office of Presidential Advance, the Office of Political Affairs, and the division responsible for the event will determine the distribution groups. In most cases, tickets should be distributed from the Advance Staff office. The Lead Advance will choose a trusted local volunteer to handle the actual distribution of tickets. Groups will be allocated tickets by number and must sign for tickets upon pick-up. Groups should be encouraged to request only the amount of tickets that they can use and tickets that are not issued must be returned to the Lead Advance

[redacted]

[redacted]

Typically, tickets will be divided into two different categories. In some cases, depending on the type and

event size, there will be additional categories added. There will also be an additional 15-20 percent above the tickets ordered printed in order to ensure that the event is full and there are no empty seats or areas. The categories are:

VIP	These tickets should be used to highlight a group of involved in the theme of event and in limited numbers to members of the State Party, Local Officials, the Host of the Event, or other groups extremely supportive of the Administration. These seats are usually located behind the podium or in the area between the stage and the main camera platform.
GENERAL	Tickets distributed as general seating. These tickets represent the bulk of the seating at large events.

Ticket Collection

Ticket collection at events should take place prior to the magnetometer checkpoint. Volunteers should be used to form the crowd into lines, check for signs or protestors, and to remove the stubs on official tickets. Homemade signs are not allowed at events.

[redacted]

Demonstrators

Always be prepared for demonstrators, even if the local organization tells you that there will not be any. It is the responsibility of the Lead Advance to have in place an effective plan for dealing with demonstrators.

Preventing Demonstrators

As mentioned, all Presidential events must be ticketed or accessed by a name list. This is the best method for preventing demonstrators. People who are obviously going to try to disrupt the event can be denied entrance at least to the VIP area between the stage and the main camera platform. That does not mean that supporters without tickets cannot be given tickets at the door and gain entrance to the event. It is also <u>not</u> the responsibility of the Secret Service to check the tickets of the people entering. They are concerned whether the person is a threat physically to The President and not a heckler. It is important to have your volunteers at a checkpoint before the Magnetometers in order to stop a demonstrator from getting into the event. Look for signs that they may be carrying, and if need be, have volunteers check for folded cloth signs that demonstrators may be bringing to the event.

For fundraising events, [redacted]

Preparing for demonstrators

There are several ways the advance person can prepare a site to minimize demonstrators. First, as

always, work with the Secret Service and have them ask the local police department to designate a protest area where demonstrators can be placed; preferably not in view of the event site or motorcade route.

The formation of "rally squads" is a common way to prepare for demonstrators by countering their message. This tactic involves utilizing small groups of volunteers to spread favorable messages using large hand held signs, placards, or perhaps a long sheet banner, and placing them in strategic areas around the site.

These squads should be instructed always to look for demonstrators. The rally squad's task is to use their signs and banners as shields between the demonstrators and the main press platform. If the demonstrators are yelling, rally squads can begin and lead supportive chants to drown out the protestors (USA!, USA!, USA!). As a last resort, security should remove the demonstrators from the event site. The rally squads can include, but are not limited to, college/ young republican organizations, local athletic teams, and fraternities/ sororities.

For larger rallies, the squads should be broken up into groups of approximately 15-25 people. A squad should be placed immediately in front of the stage, immediately in front of the main camera platform, close to the cut platform, immediately behind the stage area (if people are being used as the backdrop), and at least one squad should be 'roaming' throughout the perimeter of the event to look for potential problems.

Being aware of Demonstrators

It is important for the Advance Team and all volunteers to be on the lookout for potential demonstrators. Volunteers should be instructed to contact the Advance person on site (whether it is the Lead, Press or Site Advance) when they see demonstrators. Always check with local police to inquire of any demonstration permits issued prior to a visit.

Handling Demonstrators

Once a group of demonstrators has been identified, the Advance person must decide what action to take. If it is determined that the media will not see or hear them and that they pose no potential disruption to the event, they can be ignored. On the other hand, if the group is carrying signs trying to shout down the President, or has potential to cause some greater disruption to the event, action needs to be taken immediately to minimize the demonstrator's effect.

Before reacting to demonstrators, the Advance person should inform the rest of the Advance Team, the Tour Director, and the Press Advance Director of the situation. Be prepared to give the number of demonstrators, location(s), a description, and their issue/ organization.

If the demonstrators appear to be a security threat notify the Secret Service immediately. If demonstrators appear likely to cause only a political disruption, it is the Advance person's responsibility to take appropriate action. Rally squads should be dis-

patched to surround and drown out demonstrators immediately.

Remember - <u>avoid physical contact with demonstrators!</u> Most often, the demonstrators want a physical confrontation. Do not fall into their trap! Also, do not do anything or say anything that might result in the physical harm to the demonstrators. Before taking action, the Advance person must decide if the solution would cause more negative publicity than if the demonstrators were simply left alone.

[Pages 36-66 redacted]

The White House Office of Administration (OA)

[redacted]

Events

While on the road, you will encounter two classifications of events: Official and Political. Official events are those that the President is participating in on behalf of the Administration. These may include Education, Welfare, Defense or any topic on which the President is introducing or advocating an issue. All costs from these events are handled by OA, regardless of the source of payment. Your OA Representative will be responsible for payment for all costs associated with the event, such as sound, light, staging, pipe and

drape, bike rack, etc. It is extremely important that you collect invoices from vendors as soon as possible, allowing you and the OA Representative to review the invoice for inaccuracies and validity.

The OA Representative handles no part of and is not responsible for any cost incurred for a political event. Political events are those held on behalf of a particular candidate or officeholder and typically involve fund-raising activities. Federal law prohibits OA Representatives from having any participation in such events.

[redacted]

If you are handling the political part of a trip, the Republican National Committee will handle your per diem and expenses.

[Pages 68-103 redacted]