Case No. 09-1085

**UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

LESLIE WEISE,
ALEX YOUNG,
Plaintiffs – Appellants,
vs.
MICHAEL CASPER, JAY BOB KLINKERMAN,
GREG JENKINS, STEVEN A. ATKISS,
JAMES A. O'KEEFE, and
JOHN/JANE DOES 1-2, all in their individual capacities,
Defendants-Appellees.

On appeal from the United States District Court for the District of Colorado
The Honorable Wiley Y. Daniel
Case Nos. 2005-cv-02355-WYD-CBS, 2007-00515-WYD-WEH
(consolidated cases)

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# REPLY BRIEF FOR APPELLANTS

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### I. Defendants Violated Plaintiffs' First Amendment Rights.

This appeal arises in the context of a motion to dismiss. The facts are therefore not in dispute. The President of the United States spoke at an event in Denver. The event was described by the White House as a Town Hall meeting on Social Security. It was an official, governmental event, paid for by taxpayers. It was open to the public.[1]

Plaintiffs lawfully obtained tickets. They intended to sit quietly and peacefully in the audience and listen to the President's speech. They were ejected from the event by the defendants/appellees upon the orders of employees of the Office of Presidential Advance in the White House pursuant to a policy adopted by the White House. They were ejected because a bumper sticker on the car they drove to the event contained a slogan critical of the war in Iraq.

Plaintiffs rely on the long-standing and fundamental First Amendment doctrine that the government may not discriminate against individuals on the basis of their viewpoint. Plaintiffs cite numerous holdings that explicitly

[1] Defendants criticize plaintiffs for characterizing the event as a Town Hall meeting. It was the White House, and Republican Congressman Beauprez, from whom plaintiffs obtained their tickets, that gave the event that name. Newsletter from Rep. Bob Beauprez, *US Fed News*, Mar. 18, 2005, *available at* http://www.lexis.com.

apply this fundamental doctrine to hold that it is unconstitutional for Presidents to exclude people from public events because the President knows (or fears) they disagree with him. *Sparrow v. Goodman*, 361 F. Supp. 566, 568 (W.D.N.C. 1973) *aff'd sub nom. Rowley v. McMillan*, 502 F.2d 1326 (4th Cir. 1974); *Glasson v. City of Louisiana*, 518 F.2d 899 (6th Cir. 1975); *Mahoney v. Babbitt*, 105 F.3d 1452 (D.C. Cir. 1997); *Butler v. United States*, 365 F. Supp. 1035 (D. Haw. 1973); *Pledge of Resistance v. We the People*, 665 F. Supp. 413 (E.D. Pa. 1987); *Rank v. Hamm*, 2007 WL 894565 (S.D. W. Va. March 21, 2007). *See also Farber v. Rizzo*, 363 F. Supp. 386 (E.D. Pa. 1973).

Defendants (and the trial court) rely essentially on just one case, *Sistrunk v. City of Strongsville*, 99 F.3d 194 (6th Cir. 1996). That case holds that the Republican party — by definition a non-governmental entity — can exclude its political opponents from an explicitly political campaign rally open only to members of and supporters of the party. Given that diametric difference, *Sistrunk* is no more relevant here than *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (declining to apply the First Amendment to a non-state actor).[2]

[2] Defendants also cite this Court's decision in *Wells v. City and County of Denver*, 257 F.3d 1132 (10th Cir. 2001), and the recent Supreme Court decision in *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009). These

The primary dispute in this case, however, is not about First Amendment doctrine. Defendants concede that the government may not engage in viewpoint discrimination, asserting that if the government had excluded plaintiffs from the sidewalk in front of the event, it would have been a clear First Amendment violation. Brief for Appellee Klinkerman at 16; Response Brief for Appellee Michael Casper at 21. Ignoring the fact that the seats in the hall, like the sidewalk outside, were explicitly open to the general public,[3] defendants assert that the First Amendment prohibition against viewpoint discrimination is inapplicable because plaintiffs sought to engage in speech that would be attributed to the government. Defendants' argument rests on factual characterizations that are contrary to the facts alleged in the Complaint and also contrary to common experience and common sense.

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cases, holding that when the government is the speaker it can control its own message, are inapplicable here because plaintiffs did nothing to interfere with the President's control of his own message, as explained below.

[3] Defendant Klinkerman seeks to distinguish *City of Madison v. Wisc. Employment Rel. Comm.*, 429 U.S. 167 (1976), by asserting that this case contains no "allegations that the event was a 'public meeting to conduct public business…'" and by describing it as a "private event." Brief for Appellee Klinkerman at 20, 21. But of course, the Complaint alleges this *was* a public event open to the public, Aplt. App. at 162-63 (Complaint paragraphs 11-13), and for the purposes of a motion to dismiss, the factual allegations of the Complaint must be taken as true. *Bell Atlantic Corp. v. Twombly*, 550 U. S. 544 (2007).

First, defendants assert that plaintiffs sought to engage in speech inside the hall that was off-topic (*i.e*. not about Social Security) or contrary to the views of the President. See *e.g.* Brief for Appellee Klinkerman at 11 ("he need not allow any person the opportunity to express a contrary viewpoint during his speech"), 22 (may discriminate on the basis of content); Response Brief of Appellee Michael Casper at 13. But this case is not about the plaintiffs' right to speak inside the hall. Plaintiffs did not seek to sit on the stage or take a turn at the podium. They did not seek to shout from the audience or hold up a banner. Plaintiffs sought only to sit quietly and peacefully in the audience, listening to the program.[4] Plaintiffs do not assert a right to speak at a Presidential speech, but do assert that they cannot be evicted from the audience at a Presidential speech that is open to the public because of their protected, non-disruptive, political expression outside

[4] To the extent that defendants are asserting that plaintiffs were excluded to avoid "disruption" or for "security" reasons (see Brief for Appellee Klinkerman at 10, 22) there is nothing in the record to support that assertion. The notion that anyone who disagrees with the President is likely to "disrupt" a speech is fundamentally incompatible with the First Amendment. See, *e.g., Glasson*, 518 F.2d at 912 ("The record is thus unmistakably clear that appellees intended to permit no criticism of the President that day. A more invidious classification than that between persons who support government officials and their policies and those who are critical of them is difficult to imagine. Appellees drew a line that was not merely invidious but one that also struck at the very heart of the protection afforded all persons by the First and Fourteenth Amendments.").

the hall. Defendants' first argument is therefore unrelated to the case before the Court.

Second, defendants argue — and the district court agreed — that even if plaintiffs did not intend to speak in the hall, every member of the audience is, by his or her mere presence, joining the President as a speaker. This defense is based on the proposition that, as a matter of law, the views of every member of the audience at an official public event can be imputed to the government. *See* Brief for Appellee Klinkerman at 14 ; Response Brief of Appellee Michael Casper at 13. The appropriate analysis, they therefore suggest, is to apply the government speech doctrine, and not classic First Amendment doctrine.

The notion that the views of the audience may be imputed to the speaker has, of course, been rejected in cases involving people who sought to wear at public meetings t-shirts or buttons that were critical of the public body or speaker. See, *e.g. Rank v. Hamm, supra*. Equally important, defendants' sweeping claim that the government may engage in viewpoint discrimination against audience members at official events would have wide-reaching and unprecedented consequences.

As noted, the undisputed fact (at this stage) is that neither plaintiff sought to speak at the event.[5] Indeed there is no basis in the record for any assertion that plaintiffs intended to disclose their views about the war in Iraq or any other issue to anyone inside the event. Thus, defendants' argument is based on the notion that if the government knows an individual holds views different from the President's, on any topic, that individual may be excluded from the audience of an official Presidential event, taxpayer-funded and open to the public, even if those views are never expressed at the event.

The viewpoint attributed to plaintiffs was expressed on a bumper sticker in plaintiff Weise's car in the parking lot. Thus, according to defendants, the determination of the views held by audience members need not be based on their speech at the event, but may be based on any evidence about their views. Indeed, there is no evidence that both plaintiffs held similar views since the bumper sticker involved was on a car owned by plaintiff Weise and not plaintiff Young. Under defendants' legal theory, the government would be free to exclude audience members based on views their friends expressed or that they had expressed even years earlier in letters to the editor, in comments overheard at a local pub, or in casual conversations in the home that came to the government's attention.

[5] If the President had agreed to take questions from the audience, Mr. Young did indicate a desire to seek recognition to ask a question.

The assertion that the views (even the unexpressed views) of all audience members are to be deemed the expression of the official speaker is not limited by defendants (nor could it be, logically) to events at which the President speaks. If the views of audience members at government events are, as a matter of law, the government's views, then the principles applied by the defendants would permit school boards to exclude from public meetings local parents and taxpayers who may once have expressed disagreement with the Superintendent. It would permit city councils to exclude from public meetings residents who once supported a council member's election opponent. It would permit this Court to exclude from its courtroom a law professor who had written a law review article critical of a ruling by the Court.

Defendants may argue that their assertions are not as sweeping as these examples suggest. But in truth they are exactly that sweeping. The undisputed facts are that this event was billed by the White House as a Town Hall meeting. It was billed as open to the public. Plaintiffs lawfully obtained tickets.

Defendants suggest only two limiting principles. First, they assert that the ticketing process itself was evidence of the government's desire to control the viewpoints of the audience members. Thus, for example, they

distinguish the audience at a parade from the audience at a speech because one requires tickets and the other does not. *See e.g.* Brief for Appellee Klinkerman at 15-16, 21; Response Brief for Appellee Michael Casper at 20. The record, of course, contradicts the assertion that the ticketing process was designed to exclude people on the basis of viewpoint. The event was described as open to the public and there was no suggestion that only Presidential supporters could attend. Defendants proffer nothing to contradict the record.[6]

Second, defendants assert that the museum at which the speech took place is not a traditional public forum and thus cases cited by plaintiffs involving Presidential speeches held in locations defendants describe as public fora are inapplicable. Brief for Appellee Klinkerman at 18-27 and n. 3. But as plaintiffs have already explained, public forum analysis is irrelevant in this case because viewpoint discrimination is impermissible in any forum. Brief for Appellants at 27 n. 4. Moreover, if the views of the audience at a Presidential speech are government speech, then the forum in

[6] In any event, for the reasons already given, the government could not constitutionally have limited the distribution of tickets at an official, non-partisan, taxpayer-supported government event to individuals known not to disagree with the President.

which the government is exercising its own speech rights would seem irrelevant. *Pleasant Grove City v. Summum*, 129 S.Ct. 1125 (2009).[7]

If the spoken or unspoken views of every audience member at every official occasion at which a government official speaks constitute government speech even if the event is open to the public and paid for by taxpayers, then defendants should prevail. Because those views are not government speech, however, this instance of viewpoint discrimination by government is unconstitutional.

Finally, defendants appropriately raise no questions concerning the Supreme Court's recent decision in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). More specifically, *Iqbal* concerned the pleading requirements for cases raising claims pursuant to *Bivens v. Six Unknown Federal Agents*, 403 U.S. 388 (1971). The Complaint in this case fully complies with *Iqbal*'s requirements. In addition, *Iqbal* contains dicta in which the Supreme Court says "…we have declined to extend *Bivens* to a claim sounding in the First

[7] Defendant Klinkerman's inability to apply forum analysis to this case is evidenced by the internal contradictions in his argument. He mixes up First Amendment doctrines when he not only describes this case as one involving "content" discrimination rather than viewpoint discrimination but also as one involving "only a reasonable time place and manner regulation." *Compare* Brief for Appellee Klinkerman at 26 and Brief for Appellee Klinkerman at 4 (plaintiffs were ejected pursuant to "a White House…policy prohibiting anyone from attending the event if they held a viewpoint contrary to that held by the President.").

Amendment." 129 S.Ct. at 1948. The Court then assumes that a First Amendment claim can be bought under *Bivens. Id.* In addition, the Court's dicta cites *Bush v. Lucas*, 462 U.S. 367 (1983). In *Bush*, the Court described its holding: "Because [these] claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, we conclude that it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy." 462 U.S. at 369. Because the rationale for *Bush v. Lucas* does not apply in this case, defendants appropriately do not rely on it.

**II. Defendants are Not Entitled to Qualified Immunity.**

Defendants argue that even if they violated plaintiffs' constitutional rights, they are entitled to qualified immunity because the relevant law was not clearly established. To the contrary, the prohibition of viewpoint discrimination is a bedrock principle of First Amendment law, established by Supreme Court decisions in a wide variety of First Amendment contexts. *See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Texas v. Johnson*, 491 U.S. 397 (1989); *Niemotko v. Maryland*, 340 U.S. 268, 282

(1951) (expression may not be forbidden "merely because public officials disapprove the speaker's views." (Frankfurter J., concurring).

Indeed, as this Court recognized a decade ago, "viewpoint discrimination is almost universally condemned and rarely passes constitutional scrutiny." *Mesa v. White*, 197 F.3d 1041, 1047 (10th Cir. 1999). In that case a citizen was prevented from speaking at a county commission meeting because the commissioners "knew what [he] planned to say" and didn't want to hear it. *Id*. at 1048. This Court reversed a grant of summary judgment for the defendants because "the restriction on [plaintiff's] speech resulted from viewpoint discrimination." *Id*. at 1047. Defendants cannot seriously contend that the law prohibiting governmental viewpoint discrimination was not clearly established, in this Circuit as elsewhere, in March 2005.

Nor can defendants seriously contend that the prohibition on viewpoint discrimination did not obviously apply to the circumstances of this case. Plaintiffs have cited above a plethora of cases in which courts found conduct parallel to defendants' self-evidently unconstitutional, based on fundamental principles. It was no less evident here.

With considerable rhetorical flourish (plaintiffs view is "folly"), defendant Casper seeks to avoid the necessary conclusion of the

overwhelming caselaw by arguing that because the district judge in this case thought there was no constitutional violation, then by definition the law could not have been clearly established. Response Brief of Appellee Michael Casper at 4, 18. But both the Supreme Court and this Court have directly rejected this argument. *Hope v. Pelzer*, 536 U.S. 730 (2002); *Andersen v. McCotter*, 100 F.3d 723 (10th Cir. 1996); *Bass v. Richards*, 308 F.3d 1081 (10th Cir. 2002). In *Hope*, the Supreme Court was asked to determine whether shackling a prisoner to a hitching post in the hot sun was unconstitutional and whether that unconstitutionality was clearly established although there were no prior cases holding such actions unconstitutional. The Court rejected qualified immunity and found the plaintiff entitled to damages. The dissenters cited several cases from the lower courts that had found no constitutional violation in virtually identical situations. 536 U.S. at 755-758 (Thomas, J. dissenting). The dissent argued, as defendants do here, that "the outcome of those cases effectively forecloses petitioner's claim that it should have been clear to respondents in 1995 that handcuffing petitioner to a restraining bar violated the Eighth Amendment." *Id* at 755. But they made this argument in dissent, and it was implicitly rejected by the Court.

In *Andersen*, the district court had granted summary judgment to governmental defendants on the ground that they had not violated the

plaintiff's First Amendment rights. This Court held not only that the First Amendment had been violated but also that the relevant law had been clearly established, precluding qualified immunity. *See* 100 F.3d at 725, 729.[8] Likewise in *Bass*, the district court granted the defendants qualified immunity but this Court reversed, finding the law clearly established despite the trial judge's contrary view.

Thus, the fact that the district judge in this case mistakenly found no constitutional violation provides no support for defendants' argument that the law was not clearly established.

## CONCLUSION

For these reasons, the judgment of the district court should be reversed and the case remanded for further proceedings

[8] After remand, discovery and trial, the district court again ruled against the plaintiff, and this Court affirmed based on that new factual record. *Andersen v. McCotter*, 205 F.3d 1214 (10th Cir. 2000). That decision does not detract from the reasoning or the authority of the earlier decision.

Respectfully submitted this 17th day of June 2009.

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**CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPE FACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 2,879 words, excluding the parts of Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionately spaced typeface using a 14-point Times New Roman font.

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Dated: June 17, 2009

## CERTIFICATION OF DIGITAL SUBMISSIONS

I hereby certify that:

(1) All required privacy redactions have been made,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 2009, I electronically filed the foregoing Reply Brief for Appellants using the Court's electronic filing system and mailed the required hard copies to the Court. I also sent the brief to the following addresses via Federal Express:

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