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)

BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF RELATED CASES

There was a prior appeal in this case. *Weise v. Casper*, 507 F.3d 1260 (10th Cir. 2007). There are no other prior or related appeals.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. On January 29, 2009, pursuant to Federal Rule of Civil Procedure 54(b), the district court certified the decision under review as a final judgment. Aplt. App. at 152. Weise and Young timely filed their notice of appeal on February 25, 2009. Aplt. App. at 154. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether appellees Casper and Klinkerman violated the First Amendment rights of Weise and Young to be free from discrimination based on their viewpoint?

2. Whether, assuming the First Amendment rights of Weise and Young were violated, Casper and Klinkerman are entitled to qualified immunity because the First Amendment right to be free from discrimination based on viewpoint was not clearly established?

STATEMENT OF THE CASE

This case presents a relatively simple application of the most fundamental

First Amendment principles. On March 21, 2005, President George W. Bush spoke at the Wings Over the Rockies Air and Space Museum in Denver, Colorado. Although this event was an official Presidential visit, open to the public, and although Weise and Young held authorized tickets to the event, they were ejected from the audience solely because of the perception that they disagreed with the President's policies.

Weise and Young filed a *Bivens* action for damages to vindicate their First Amendment rights. The district court dismissed Weise and Young's case on the ground that they failed to allege a constitutional violation. The district court held that, as a matter of law, the President has a right to exclude from his *official, public appearances*, all individuals who disagree with his policies. Weise and Young filed this appeal.

STATEMENT OF FACTS

On March 21, 2005, President Bush came to the Wings over the Rockies Museum to hold a "town meeting" on Social Security. Aplt. App. at 162 (Complaint ¶¶ 10-11). It was an official governmental event, not a political rally or fundraiser. *Id*. The event was paid for by taxpayers. *Id.* at 162 (¶ 11).

The White House set the policies and procedures as to who could attend. *Id.* at 163 (¶ 12). Tickets were made available to any member of the public. *Id.* at 163

(¶ 13). They were distributed, in part, by the office of Representative Bob Beauprez. *Id.*

Following those procedures, plaintiffs Leslie Weise and Alex Young obtained tickets to the event from the office of Representative Beauprez. *Id.* at 163 (¶ 14). Before obtaining the tickets, they were asked to show their driver's licenses and to write their names on a piece of paper. *Id.* No one told them that they could not attend or that attendance was limited to persons with a viewpoint identical to that of the President. *Id.* at 163 (¶ 15).

Weise and Young had no intention of disrupting the event in any way. *Id.* at 164 (¶ 19). Both of them wanted to listen to the President's views on social security. *Id.* Young, if given an opportunity, would have asked a question. *Id.*

Although the President's speaking event was put forward as open to the public, not all members of the public were in fact welcome to attend. At some point prior to the event, White House Advance Office Director Greg Jenkins, together with one or more of the John/Jane Doe defendants, set a policy of excluding those who disagree with the President from the President's official, public appearances. *Id.* at 167-168 (¶¶ 36, 37). Defendants Steven A. Atkiss and James A. O'Keefe were Advance Office employees in charge of implementing the policy at the event. *Id.* at 161-162 (¶¶ 7, 8); *id.* at 167 (¶ 36).

On March 21, 2005, Weise and Young arrived at the event in a vehicle owned and driven by Weise. *Id.* at 163 (¶ 16). The vehicle had a bumper sticker that expressed a particular viewpoint. *Id.* at 163 (¶ 17). It read, "No More Blood For Oil." *Id.*

After Weise waited in line to pass through security, defendant Jay Bob Klinkerman informed Weise and a friend that they had to wait for the Secret Service to speak with them. *Id.* at 164 (¶¶ 20, 22). Defendant Michael Casper arrived a few minutes later and said that they had been "ID'd" and would be arrested if they disrupted the event. *Id.* at 164 (¶¶ 23, 24). Casper made these statements solely because of the bumper sticker on Weise's car and his perception, along with those of the other defendants, that Weise had a viewpoint that was different from the President's. *Id.* at 165 (¶ 25).

Young's identification was checked by a different person. *Id.* at 164 (¶ 21). He passed through the security checkpoint without incident and proceeded to a seat. *Id.*

Sometime after permitting Weise to enter, Casper consulted with defendants Atkiss and O'Keefe, who told him to ask Weise and Young to leave the event. *Id.* at 165 (¶ 26). Casper then approached Weise and Young in the audience and removed them from the premises. *Id.* at 165 (¶ 28). At no time did Weise or

Young disrupt the event or give any indication that they would disrupt the event. *Id.* at 167 (¶ 33).

After the event, Weise and Young were told by the Secret Service that they had been removed because they arrived at the President's speech in a car with a bumper sticker that read, "No More Blood for Oil." *Id.* at 163, 167 (¶¶ 17, 34).

All of the defendants agreed to deny entry to or to expel people with viewpoints opposed to the President's, or persons perceived to hold such viewpoints, including Weise and Young. *Id.* at 167 (¶ 36). Specifically, Atkiss and O'Keefe, who made the decision to eject Weise and Young, acted in concert with Jenkins who established the policies that were being enforced by the ejection, and with Casper and Klinkerman, who carried out the ejection. *Id.*

This is not an isolated incident. *Id.* at 165 (¶ 27). At other presidential public speaking engagements around the country, individuals with viewpoints that differ from the President's have been denied entry, ejected and even arrested. *Id.*

PROCEDURAL BACKGROUND

On November 21, 2005, Weise and Young filed this lawsuit against defendants Casper, Klinkerman, and John/Jane Doe defendants. Aplt. App. at 14. At the time, Casper and Klinkerman were the only defendants whom Weise and Young could identify.

Casper and Klinkerman moved to dismiss the Complaint on the ground that they are entitled to qualified immunity. Aplt. App. at 5 (Doc. Nos. 20, 27). On October 30, 2006, the district court denied that motion without prejudice, reasoning that discovery was necessary before it could determine whether these private party defendants were entitled to invoke the defense of qualified immunity, a defense reserved to governmental actors. Aplt. App. at 7 (Doc. No. 52). Casper and Klinkerman appealed. Aplt. App. 7-8 (Doc. Nos. 54, 57)

While the appeal was pending, and because the statute of limitations on Weise and Young's ability to name additional defendants was about to run, on February 15, 2007, this Court allowed Weise and Young to depose Casper and Klinkerman for the limited purpose of identifying the John/Jane Doe defendants. *Weise v. Casper*, 507 F.3d 1260, 1263 n.2 (10th Cir. 2007). The depositions revealed the roles of Jenkins, Atkiss, and O'Keefe. However, because their case against Casper and Klinkerman was already on appeal to the Tenth Circuit, Weise and Young could not simply amend their existing Complaint against Casper and Klinkerman to add Jenkins, Atkiss and O'Keefe as defendants. Instead, on March 15, 2007, they had to file a separate action against these individuals. *Weise v. Jenkins*, Case No. 07-00515 (D. Colo.). On April 25, 2007, Weise and Young then filed a motion to consolidate the two cases, which the district court granted. Aplt.

App. at 10 (Doc. Nos. 88, 89).

The depositions also revealed that Casper and Klinkerman were acting pursuant to instructions from government employees Atkiss, O'Keefe and Jenkins and were therefore entitled to invoke the defense of qualified immunity. On November 20, 2007, this Court dismissed Casper and Klinkerman's appeal of the district court's discovery order for lack of jurisdiction, ruling that the Order granting discovery was an unappealable Order. *Weise,* 507 F.3d at 1268. The case then returned to the district court.

In February 2008, Casper and Klinkerman again filed motions to dismiss based on qualified immunity. Aplt. App. at 23, 40. Because Weise and Young had previously obtained discovery that demonstrated that Casper and Klinkerman were governmental actors entitled to plead the defense of qualified immunity, Weise and Young responded to the motion on the merits rather than requesting more discovery. Aplt. App. at 57. Jenkins moved to dismiss for lack of personal jurisdiction. Aplt. App. at 11 (Doc. No. 99). Atkiss and O'Keefe filed answers to the Complaint and did not seek dismissal. *Id.* at 11 (Doc. Nos. 100, 101).

On November 6, 2008, the district court granted Casper's and Klinkerman's motions to dismiss. Aplt. App. 136. The district court concluded that "there has been no constitutional violation." Aplt. App. at 150. It explained that "Plaintiffs

complaint is essentially that they were not permitted to participate *in the President's speech*." *Id.* (emphasis in original). It reasoned that "President Bush had the right, at his own speech to ensure that only his message was conveyed. When the President speaks, he may choose his own words." *Id.* The district court also granted Jenkins' Motion to Dismiss for lack of personal jurisdiction. *Id.*

Because the district court's rationale, if upheld by this Court, is necessarily fatal to Weise and Young's claims against *all* defendants, the parties jointly invoked Federal Rule of Civil Procedure 54(b) and asked the district court to designate its November 6 order as a final order. Aplt. App. at 12 (Doc. No. 113). On January 29, 2009, the district court granted the parties' request. Aplt. App. at 152.

Weise and Young appealed the portion of the order granting Casper and Klinkerman's Motion to Dismiss. They have elected not to appeal the district court's dismissal of their claims against Jenkins.[1]

[1] Because of the possibility the Colorado district court would dismiss Weise and Young's claims against Jenkins for lack of personal jurisdiction, Weise and Young filed a protective suit against Jenkins in the United States District Court for the District of Columbia. *Weise v. Jenkins*, Case. No. 07-cv-1157 (CKK) (D. D.C. filed June 28, 2007).

SUMMARY OF THE ARGUMENT

The district court erred when it held that, as a matter of law, the President has a right to exclude from his *official, public appearances*, all individuals who disagree with his policies. Casper and Klinkerman violated the First Amendment rights of Weise and Young and are not entitled to qualified immunity. It is clearly established First Amendment law that individuals have a right to be free from discrimination based on viewpoint.

ARGUMENT

I. Casper and Klinkerman Are Not Entitled to Qualified Immunity.

A. Standard of Review and Approach to Qualified Immunity

This circuit applies de novo review to a district court's grant of a motion to dismiss. *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007). In reviewing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court must "assume the truth of the plaintiff's well-pleaded factual allegations and view them in the light most favorable to the plaintiff." *Id.* Dismissal is not proper where "the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "The issue in reviewing the sufficiency of a complaint is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to

support her claims." *Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10th Cir. 2002).

Casper and Klinkerman claim they are entitled to qualified immunity. Qualified immunity is only appropriate where the conduct at issue "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The qualified immunity inquiry usually involves two prongs. First, courts determine "whether plaintiff's allegations, if true, establish a constitutional violation." *Hope v. Pelzer*, 536 U.S. 730, 736, 739 (2002) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Next, courts ask whether the violated right was "clearly established" at the time of the relevant action. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Although the Supreme Court recently held that lower courts are no longer required to address these prongs in order, it recognized that it is "often beneficial" to do so. *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009). The two-part inquiry is the "better approach to resolving" this appeal. *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n. 5 (1998). Skipping over the constitutional question in a situation where the district court has already ruled on it effectively insulates the district court holding from appellate review. This result is undesirable in general because it creates uncertainty regarding the correctness of a district court holding, but would be especially detrimental in this case, given the dangerously flawed

reasoning of the district court. The district court held that being present in the audience is functionally equivalent to "participat[ing] in the President's speech." Aplt. App. at 150. Based on this equivalence, the district court was able to rebuff Weise and Young's claims by reasoning that "[w]hen the President's speaks, he may choose his own words." *Id.* This Court should not leave uncorrected the district court's conclusion that being part of the audience *at an official government event* is the same as being part of the speaker's message.

This Court should also reach the constitutional question in this case because the "two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Pearson*, 129 S. Ct. at 818. This is such a case. Weise and Young allege that the White House Advance Office had an unconstitutional policy of prohibiting those who disagree with the President from attending his speaking events. Aplt. App. at 165, 167-168 (¶¶ 27, 36, 37). In theory, there are two ways to challenge this policy: a claim for damages under *Bivens* and a claim for injunctive relief. In practice, for these plaintiffs there is only one: a claim for damages. Injunctive claims have proven difficult if not impossible given the standing principles set out in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). Individuals in Weise and Young's shoes will have difficulty

convincing courts that their probability of future injury—*again* having the opportunity to attend an open-to-the-public presidential speaking event, and *again* being ejected because of their viewpoint under a different President—is sufficient to confer standing for injunctive relief. Indeed, in cases similar to this one, plaintiffs have tried and failed to establish standing for injunctive relief. *See, e.g.*, *Elend v. Basham*, 471 F.3d 1199, 1206-07 (11th Cir. 2006) (holding that plaintiffs lacked standing for prospective relief against alleged Secret Service policy of requiring anti-Bush speakers to relocate to protest zone, even though plaintiffs "fully intend to peacefully express their viewpoints in the future . . . in concert with presidential appearances," because of the "entirely speculative inquiry of whether Plaintiffs will protest again, and—even assuming that such a protest will take place—the unspecified details of where, at what type of event, with what number of people, and posting what kind of security risk."); *Moss v. United States Secret Service*, No. 06-3045, 2007 WL 2915608 (D. Or. Oct. 7, 2007) (holding that plaintiffs lacked standing to pursue injunctive relief against alleged Secret Service policy of, inter alia, "barring or forcing anti-government demonstrators from areas where pro-government demonstrators are allowed to be present," because "[t]he 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."); *Acorn v. City of Philadelphia*, No. 03-4312, 2004 WL 1012693 (E.D. Pa. 2004) (holding that plaintiffs did not have standing for injunctive relief against Secret Service policy of "treat[ing] anti-government protestors less favorably than pro-government protestors" because, despite "numerous examples" in which plaintiffs and others around the country were discriminated against in the past, plaintiffs' claims were "too amorphous" to support claim for injunctive relief).

Because of *Lyons*, the only way for Weise and Young to obtain a court ruling that what happened to them was unconstitutional is for them to pursue a claim for damages. For this Court to then skip over the constitutional question would have the fundamentally unfair effect of insulating an unconstitutional White House policy from any form of judicial review. Weise and Young would be unable to obtain a court ruling on whether their rights were violated through an injunctive suit because of *Lyons* and through a damages suit because of *Pearson*. This Catch-22 cannot be the law.

B. The Government Unconstitutionally Excluded Weise and Young from a Public Forum on the Basis of Their Viewpoint.

Casper and Klinkerman ejected Weise and Young from the President's speech on the basis of viewpoint. Aplt. App. at 163, 167 (Complaint ¶¶ 17, 34). Specifically, they removed Weise and Young from the President's speech because

of the viewpoint expressed in the bumper sticker on Weise's car. *Id.* at 165 (¶ 25). The legal question on this appeal—may the government discriminate against individuals in these circumstances on the basis of their viewpoint—is a simple one.

President Bush's speech on Social Security was an official event, paid for by taxpayers and open to the public. *Id.* at 162 (¶ 10). Tickets were available to the public and Weise and Young were given tickets through the normal processes. *Id.* at 163 (¶¶ 12-13). Weise and Young were ejected from the event solely because the government disagreed with their viewpoint as expressed by a bumper sticker on the car they drove to the event and parked in the parking lot. *Id.* at 163, 166 (¶¶ 17, 34). The bumper sticker, which said "No More Blood for Oil," was an example of core political speech. *Id.* at 163 (¶ 17).

Disagreement with the political viewpoints expressed by Weise and Young is a constitutionally unacceptable reason for ejecting them from this public event. Indeed, viewpoint discrimination is among the most condemned governmental actions in First Amendment analysis. "There are some purported interests—such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that" they cannot stand. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

This is not the first time that presidents or other federal officials have sought to insulate themselves from opposing viewpoints. In other instances that have been litigated, courts have generally found the legal issues simple and well established. For instance, in 1971, President Nixon spoke at an event for which tickets were freely available to the public. *Sparrow v. Goodman*, 361 F. Supp. 566, 568 (W.D.N.C. 1973). The Secret Service excluded numerous individuals from the event in a manner "directed towards the suppression of dissent or prevention of any expression or demonstration of dissent, from reigning points of view." *Id.* at 584. The court found that this represented a "wholesale" violation of at least six constitutional rights. *Id.* The Fourth Circuit affirmed. *Rowley v. McMillan*, 502 F.2d 1326 (4th Cir. 1974).

Similarly, in *Butler v. United States*, 365 F. Supp. 1035 (D. Haw. 1973), President Nixon flew to Hawaii, where he appeared in an event open to the public. *Id.* at 1037-8. Plaintiffs in that case went to the event, where they intended to carry signs expressing their disagreement with the President. *Id.* They were refused admittance. *Id.* The Court refused to dismiss plaintiffs' claims. In *Farber v. Rizzo*, 363 F. Supp. 386 (E.D. Pa. 1973), people who disagreed with President Nixon congregated outside a hall where he was to speak. *Id.* at 389-90. The police arrested those with signs opposed to Nixon's policies. *Id.* at 389-94. The court

found "that the First and Fourteenth Amendments of the Constitution guarantee that persons may peacefully express or propagate ideas, either verbally or otherwise, in areas open to the public." *Id*. at 395. A similar incident occurred in Louisville. *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975). In condemning the actions, the court said, "[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." *Id*. at 912.

The Nixon administration was not alone in its efforts to prevent the President from being exposed to opposing viewpoints. The government forbade anti-war protest groups from entering a public celebration of the 200th anniversary of the Constitution at which then-Vice President George W.H. Bush appeared. *Pledge of Resistance v. We the People 200, Inc.*, 665 F. Supp. 414, 416-417 (E.D. Pa. 1987). The Court granted a preliminary injunction preventing government entity defendants from denying permission to engage in various forms of expressive activity on the basis of the message that individuals sought to convey. *Id.* at 419.

In *Mahoney v. Babbitt*, 105 F.3d 1452 (D.C. Cir. 1997), the Clinton Inaugural Parade organizers sought to exclude those with opposing views from standing on the sidewalk along the parade route. In that case, the court quoted

approvingly from an amicus brief that "[i]t is a bedrock principle of First Amendment law that in administering a public forum, the government may not permit speech that expresses one viewpoint while prohibiting speech that expresses the opposite viewpoint." *Id*. at 1454.

In short, the government's actions in this case, in excluding Weise and Young on the basis of their viewpoint, violated the First Amendment.

C. Casper and Klinkerman's Actions Violate Clearly Established Law.

In order to deny a motion to dismiss on the basis of qualified immunity, it is not sufficient to find that the defendant violated the law. The Court must also determine that the law was "clearly established." The affirmative defense of qualified immunity generally protects government officials performing discretionary functions from liability insofar as their conduct does not violate clearly established statutory or constitutional rights that a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Casper and Klinkerman are not entitled to qualified immunity if they had "fair warning" that their conduct deprived Weise and Young of their constitutional rights. *Hope*, 536 U.S. at 741. Courts deny qualified immunity where the "contours of the right" are "sufficiently clear that a reasonable official would understand that what he is doing

violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

As long ago as 1959, the Court held that the government cannot engage in viewpoint discrimination. In *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684 (1959), the Court held that government could not "prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior." *Id.* at 688. Even viewpoints antithetical to democracy itself are protected under the Constitution. *Brandenberg v. Ohio*, 395 U.S. 444, 448-49 (1969) (invalidating a statute that, among other things, criminalized the "mere advocacy" of violence "as a means of accomplishing industrial or political reform."). "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Taxpayers for Vincent*, 466 U.S. at 804.

Viewpoint discrimination strikes "at the very heart of constitutionally protected liberty." *Kingsley Int'l Pictures Corp.*, 360 U.S. at 688. "Punishment [on the basis of viewpoint] would be an unconstitutional abridgment of freedom of speech" and "cannot survive in a country which has the First Amendment." *Schacht v. United States*, 398 U.S. 58, 63 (1970). *See also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some

viewpoints or ideas at the expense of others."); *Cornelius v. NAACP*, 473 U.S. 788, 806 (1985) (holding that, even in a nonpublic forum, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985) ("The state may not ordain preferred viewpoints. . . . The Constitution forbids the state to declare one perspective right and silence opponents."), *aff'd*, 475 U.S. 1001 (1986). And in this instance, the viewpoint at issue involves core political speech. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-347 (1995).

Likewise, it has been clear for decades that the government cannot discriminate against speakers on the basis of the viewpoint of their message. *See, e.g.*, *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92 (1972) (striking down an ordinance that prohibited picketing within 150 feet of a school but exempted labor picketing); *Boos v. Barry*, 485 U.S. 312 (1988) (striking down a law forbidding protesting within 500 feet of a foreign embassy where the protest brings the foreign government into "public disrepute."); *Cohen v. California*, 405 U.S. 15 (1971) (reversing conviction of individual arrested for wearing "Fuck the Draft" jacket in public building); *see also City of Madison, Joint Sch. Dist. No. 8 v. Wisc. Employment Relations Comm'n*, 429 U.S. 167 (1976) (state may not limit

participation in public meeting on the basis of viewpoint).

The government ejected Weise and Young on the basis of their viewpoint. The government forced Weise and Young from the President's town hall meeting on Social Security because the government disagreed with the viewpoint expressed on the bumper sticker of their car. Because it is clearly established that viewpoint discrimination is constitutionally impermissible, Casper and Klinkerman had fair warning that their conduct deprived Weise and Young of their constitutional rights. Consequently, qualified immunity should be denied.

This is true even though there is not a reported Supreme Court or Tenth Circuit case involving the ejection of spectators from an official Presidential speech based on their unexpressed viewpoints. The Supreme Court articulated the relevant test in *Hope*. Did "the state of the law" give defendants "fair warning" that their actions were unconstitutional? 536 U.S. at 741. "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640 (internal citation omitted). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741; *see also United States v. Lanier*, 520 U.S. 259, 271 (1997) ("[G]eneral

statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.") (internal quotation marks omitted). Under the circumstances of this case, the government had more than "fair warning" that viewpoint discrimination was constitutionally unacceptable.

In Section I.B, *supra*, Weise and Young cited a number of cases from around the country in which presidents attempted to prohibit viewpoints other than their own. What is most striking about those cases is not the holdings, but the firmness with which the courts describe those holdings as applications of clearly established law. For example, in *Sparrow*, the district court concluded that the Secret Service's exclusion of individuals who disagreed with the President from one of his public appearances constituted a "wholesale assault upon the civil rights and liberties" of the excluded individuals. 361 F. Supp. at 584. In *Butler*, the court recognized that even then, as of 1972, there was "ample authority" for plaintiffs' First Amendment claims.[2] 365 F. Supp. at 1041. In *Farber*, the court ruled against

[2] The court denied the government's request for immunity, albeit under a different immunity analysis than current qualified immunity doctrine. *Id.* at 1046.

the government, finding the violations "clear beyond doubt." 363 F. Supp. at 395. In *Glasson*, the circuit held that the attempt to prevent certain viewpoints "struck at the very heart of the protection afforded all persons by the First and Fourteenth Amendments."[3] 518 F.2d at 912. In *Mahoney*, the D.C. Circuit said that "[i]t is well established law that '*content-based* restriction on *political speech* in a *public forum*… must be subjected to the most exacting scrutiny.'" 105 F.3d at 1455 (quoting *Boos*, 485 U.S. at 321) (emphasis in original) (underlining added). The court added that "[i]f the free speech clause of the First Amendment does not protect the right of citizens to 'interject' their own convictions and beliefs into a public event on a public forum then it is difficult to understand why the Framers bothered including it at all." *Id.* at 1459.

Furthermore, two district courts adjudicating incidents very similar to this one have had little difficulty concluding that the law was clearly established and denying qualified immunity on this ground. In *Rank v. Hamm*, the district court wrote that "it was abundantly clear at the time of the event [July 4, 2004] that the First Amendment would not tolerate an individual, clothed with the authority of the state, commanding law enforcement to seize and expel a person from a public event based upon the content of that individual's speech." *Rank v. Hamm*, 2007

[3] Again, a case for damages went forward in the face of an immunity claim close in definition to the modern qualified immunity doctrine.

WL 894565 at *8 (S.D. W.Va. March 21, 2007). And in *Moss*, where plaintiffs alleged that, on October 14, 2004, defendant Secret Service agents "engaged in viewpoint discrimination in ordering local law enforcement officials to remove the [anti-Bush] demonstrators while allowing pro-Bush supporters" to remain in the area, the court concluded that "such conduct would violate clearly established law of which a reasonable officer would be aware." 2007 WL 2915608 at * 20.

These rulings acknowledge the fundamental nature of the doctrine that Weise and Young invoke in this case and its unmistakable application to the facts here. The law was clearly established. Because Casper and Klinkerman had "fair warning" that their actions violated Weise and Young's rights, they are not entitled to qualified immunity.

D. The District Court's Contrary Reasoning Is Incorrect.

i. *Hurley* is inapplicable to a public event in a public place.

To reach the conclusion that the President can exclude those with contrary viewpoints from his official, taxpayer-funded public appearances, the district court relied on *Sistrunk v. City of Strongsville*, 99 F.3d 194 (6th Cir. 1996) which, in turn, relies on the Supreme Court's decision in *Hurley v. Irish-American Gay. Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995). Aplt. App. at 149. In *Hurley*, a private group obtained a permit to hold the St. Patrick's Day parade in

Boston. *Id.* at 560-61. A gay Irish group sought to march in the permit holder's parade. *Id.* at 561. The Supreme Court described the issue this way: "whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey." *Id.* at 559. Concluding that government could not compel private individuals or groups to engage in speech with which they disagree, the Court held that the First Amendment prohibited government from requiring the parade organizers to include speakers with which the organizers disagreed. *Id.* at 574-75.

Similarly, *Sistrunk* involved an event held by a private organization. In that case, the sponsor of the rally was the entirely private Strongsville Republican Organization. The court expressly identified this critical fact:

> The law . . . may prohibit the City . . . from denying any access to the Commons for expressive activity and from granting or denying permits based on the content of an applicant's speech, but it does not prohibit the city from issuing permits to groups seeking to make exclusive use of the Commons for expressive activity during a limited period of time.

99 F.3d at 198.

In this case, the Complaint alleges that the sponsor was not a private organization; instead this was "an official Presidential visit, open to the public." Aplt. App. at 160 (Complaint ¶ 1). "This was an official visit by the President. It

was paid for by taxpayers. It was open to the public." *Id.* at 162 (¶ 11). Weise and Young further allege that "[a]t all times, the policies concerning attendance at the event were set by federal officials acting as federal officials . . ." *Id.* at 167 (¶ 35).

Unlike *Hurley* and *Sistrunk*, there was no danger that Weise and Young's speech would be seen as having been endorsed by the President. Their bumper sticker was on one of hundreds of cars in the parking lot. Other cars undoubtedly bore bumper stickers expressing a wide variety of views on a wide variety of subjects. No one could reasonably have assumed that every such bumper sticker reflected the President's views, or that, in a "town hall" event open to the public, the entire audience would agree with the President's views.

The Sixth Circuit itself recognized these distinctions in a subsequent case, *Parks v. City of Columbus*, 395 F.3d 643, 651 (6th Cir. 2005). There, the plaintiff did "not seek inclusion in the speech of another group" but instead wanted to wander through an Arts Festival engaged in speech with which the organizers disagreed but which did not interfere with the organizers' message. *Id.* The Sixth Circuit found *Hurley* and *Sistrunk* inapplicable and allowed the plaintiff to attend the event and to engage in his desired expression. *Id.*

Several other courts since *Hurley* have addressed its applicability in this

context. The most complete discussion, perhaps, is the D.C. Circuit's discussion in *Mahoney*:

> There are two distinctions between *Hurley* and this controversy which are so critical as to make the cases not remotely parallel. In the first place, the organizer of the parade in *Hurley* was a private group exercising its own First Amendment rights. In the present case, NPS [the National Park Service] is the government. … [Second, t]he protesting demonstrators in *Hurley* sought to compel the private organizers to allow their participation in the parade. Mahoney and his co-plaintiffs do not seek compulsion or even permission to participate in the Inaugural Parade . . . .

105 F.3d at 1456. *See also Gathright v. City of Portland*, 439 F.3d 573, 577 (9th Cir. 2006) (*Hurley* inapplicable to those attending event); *Startzell v. City of Philadelphia*, 533 F.3d 183 (3d Cir. 2008) (same). In this case, of course, both distinctions also apply.

In a case involving a non-public forum, the government sought to rely on *Hurley* and *Sistrunk*, and even in that context, the court rejected the argument "[b]ecause the Corporation is a state actor in the context of this First Amendment dispute, *Hurley* is irrelevant." *Wickersham v. City of Columbia*, 371 F. Supp.2d 1061, 1084 (W.D. Mo. 2005), *aff'd* 481 F.3d 591 (8th Cir. 2007). There, the court held that "[t]here is a distinction between participating in an event and being present at the same location. Merely being present at a public event does not make

one part of the event organizer's message for First Amendment purposes . . . ."[4] *Id.* at 1085.

Thus, the issue in this case is not whether a private permit holder may exclude people from a parade or meeting on the basis of viewpoint, but whether the government can exclude well-behaved spectators from a public event on the basis of viewpoint. For the reasons stated above, it is clearly established that it cannot.

ii. *Rust* is inapplicable to non-government speech.

The district court also held that because the speech involved was government speech, the government can censor it. The district court relied on *Wells v. City and County of Denver*, 257 F.3d 1132 (10th Cir. 2001) which relied on *Rust v. Sullivan*, 500 U.S. 173 (1991). Aplt. App. at 150.

Rust involved a federally funded program of family planning. 500 U.S. at 178-81. Federal regulations prohibited doctors who received money under the program from using that money to engage in speech about abortion with which the government disagreed. *Id.* The Court upheld the regulations, asserting that "Congress has . . . not denied [the doctors] the right to engage in abortion-related

[4] This Court need not engage in classic forum analysis in this case. Even if this were considered a non-public forum, government may not prohibit speech as part of an "effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Wickersham v. City of Columbia, supra*.

activities. Congress has merely refused to fund such activities out of the public fisc . . . ." *Id.* at 198. The Court expressly distinguished attempts to restrict speech in public fora, even if the fora were paid for by the government. *Id.* at 200. Similarly, relying on *Rust*, this Court found in *Wells* that a Denver holiday display was governmental speech, relying on a four-part test to conclude that the government controlled the speech and additionally finding that all reasonable observers would know that the display was government speech. 257 F.3d at 1141, 1143.

Rust and *Wells* are inapplicable to this case for the simple reason that Weise and Young were not engaged in governmental speech. They just wanted to attend a Presidential speech but were excluded because the government suspected they held political views different from the President's. The notion that their attendance at a public, Presidential visit amounted to forcing the government to adopt views with which it did not agree strains credulity.

Because the government discriminated on the basis of the viewpoint held by Weise and Young, it does not matter whether Weise and Young had engaged in such speech through the bumper sticker on their car (Aplt. App. at 163, 167 (Complaint ¶¶ 17, 34)), or would have engaged in such speech, in the form of respectful questions at an event labeled "town hall" discussion by organizers (Aplt.

App. at 164 (Complaint ¶ 19)). For the same reason, this case does not require a discussion of the right to receive information. *Virginia State Bd. v. Virginia Citizens*, 425 U.S. 748 (1976). (Aplt. App. at 164 (Complaint ¶ 19)) (Weise and Young wanted to hear the President's views). In each of these instances, it cannot seriously be argued that the government was being forced to adopt (or even perceived as adopting) any views held by Weise and Young.

The question presented here is straightforward: May individuals be ejected from a public event by the government simply because the government suspects they may disagree with that government? The negative answer to that question is, and was, clearly established. Yet that is exactly what happened here. Defendants' claim of qualified immunity is not even colorable.

CONCLUSION

For all of these reasons, Weise and Young ask this Court to reverse the district court's dismissal of their claims on the basis of qualified immunity, and to remand this case with instructions that it proceed to discovery and trial.

STATEMENT REGARDING ORAL ARGUMENT

Counsel request oral argument. Counsel believe that this Court's disposition of this case would be aided by oral presentation to this Court.

Respectfully submitted this 28th day of April 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 6,465 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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CERTIFICATION OF DIGITAL SUBMISSIONS

I hereby certify that:

(1) All required privacy redactions have been made,

(2) The ECF submission is an exact copy of the hard copy submissions, and

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 2009, I electronically filed the foregoing Brief for Appellants with the Clerk of Court using the email address esubmission@ca10.uscourts.gov and mailed the required hard copies to the court. I also sent the brief to the following addresses using both email and Federal Express:

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ADDENDUM

United States District Court,
D. Colorado.
Leslie WEISE and Alex Young, Plaintiffs,
v.
Michael CASPER, in his individual capacity; Jay Bob Klinkerman, in his individual capacity; Steven A. Atkiss, in his individual capacity; James A. O'Keefe, in his individual capacity; and John/Jane Does 1-5, all in their individual capacities, Defendants.
Civil Action No. 05-cv-02355-WYD-CBS.

Nov. 6, 2008.

ORDER

WILEY Y. DANIEL, Chief Judge.

***1** THIS MATTER is before the Court on Defendant Jenkins' Motion to Dismiss or in the Alternative for Summary Judgment [FN1], filed February 1, 2008 (docket # 99); Defendant Klinkerman's Motion to Dismiss Based on Qualified Immunity, filed February 4, 2008 (docket # 105); and Defendant Casper's Motion to Dismiss Plaintiffs' Complaint for Failure to State a Claim Upon Which Relief May Be Granted on the Basis of Qualified Immunity, filed February 1, 2008 (docket # 102).

> FN1. Defendant Klinkerman incorrectly filed this motion as both and Motion to Dismiss and a Motion for Summary Judgment. These motions should have been filed in two separate pleadings. Plaintiffs, in their response, treated the motions as a motion to dismiss and did not address the motion for summary judgment as such. In the interest of fairness and to preserve a clear record, I will only address Defendant's motion to dismiss. Defendant may file a separate motion for summary judgment if he wishes to do so. Therefore, Defendant's Motion for Summary Judgment is denied with leave to refile.

I. FACTUAL BACKGROUND

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

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

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

I also note the procedural history of this case. On October 30, 2006, I denied Defendants Michael Casper's and Jay Klinkerman's Motions to Dismiss without prejudice, allowing Plaintiffs limited discover related to Defendants' assertion of the qualified immunity defense in this case. Defendants appealed to the Tenth Circuit. The appeal was dismissed for lack of appellate jurisdiction. Plaintiffs were allowed to take depositions of Casper and Klinkerman for the limited purpose of identifying other potential defendants so Plaintiffs could file claims against them within the relevant statute of limitations. See Order, Feb. 15, 2007. As a result of the information obtained during those

depositions, Plaintiffs now agree that Defendants were closely supervised by public officials and are entitled to assert qualified immunity. Plaintiffs also agreed on the record at the status conference on January 7, 2008, that Defendants were closely supervised by government officials.

II. ANALYSIS OF MOTIONS TO DISMISS

A. Defendant Jenkins

i. The Parties Positions

***2** Defendant Jenkins asserts that I should dismiss Plaintiffs' claims against him because Plaintiffs cannot satisfy their burden of establishing that he is subject to personal jurisdiction. Jenkins asserts that his alleged establishment of a national policy is insufficient to establish a jurisdictional nexus in a state where the policy is applied. Defendant Jenkins served as Director of the White House Office of Advance from January 15, 2003 to November 30, 2004. Defendant Jenkins asserts that after departing the Advance Office, he played no role in organizing, planning or supervising any domestic or international trips by the President. Further, Defendant Jenkins asserts that he played no role in planning, organizing or supervising the March 21, 2005, presidential event in Denver. Defendant Jenkins did not attend the presidential event in Denver, and asserts that he had no knowledge of the event until after it occurred. Defendant asserts that he had no communications with the other Defendants concerning the event or during its occurrence. Defendant Jenkins is currently a resident of Texas. He has never been a resident of Colorado, nor has he owned property or assets in Colorado. Jenkins asserts that he has never engaged in any transactions or activities in Colorado during the time he was Director of the Advance Office, and that he has not visited Colorado for any reason since at least 2001.

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

ii. Personal Jurisdiction Analysis

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

***3** The Court must engage in a two-step analysis in determining whether the exercise of personal jurisdiction is appropriate. *Wenz v. Memery Crystal*, 55 F.3d 1503, 1507 (10th Cir.1995). The Court “must initially determine whether the exercise of jurisdiction is sanctioned by the Colorado long-arm statute, which is a question of state law, ... and then determine whether the exercise of jurisdiction comports with the due process requirements of the Constitution.” *Id.* at 1506-07.Because Colorado's long-arm statute has been construed by the Colorado Supreme Court as allowing personal jurisdiction to the full extent permitted under federal law, *Safari Outfitters, Inc. v. Superior Ct.*, 167 Colo. 456, 448 P.2d 783, 784 (Colo.1968), “[the court's] analysis collapses into a single inquiry, whether the exercise of personal jurisdiction over [the defendant] comports with due process.” *Nat. Business Brokers, Ltd. v. Jim Williamson Prods., Inc.*, 115 F.Supp.2d 1250, 1253 (D.Colo.2000), *aff'd*, 16 Fed. Appx. 959 (10th Cir.2001).

"[D]ue process requires only that ... [the defendant] have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Trierweiler v. Croxton and Trench Holding Corp.*, 90 F.3d 1523, 1532 (10th Cir.1996) (quotation omitted). Critical to the due process analysis " 'is that the defendant's conduct and connection with the forum State are such that [it] should reasonably anticipate being haled into court there.' " *Id.* (quotations omitted). The reasonable anticipation requirement is satisfied if the defendant has engaged in "some act by which [it] purposefully avails itself of the privilege of conducting activities with the forum State, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

The "minimum contacts" requirement of due process may be met in two ways, through showing the existence of either specific jurisdiction or general jurisdiction. *Trierweiler*, 90 F.3d at 1532. It appears that Plaintiffs are relying upon the doctrine of specific jurisdiction. Thus, I must address whether the exercise of specific personal jurisdiction over Defendant would offend due process.

The specific jurisdiction inquiry involves two steps. *Id.* First, the court must "ask whether the nonresident defendant has 'minimum contacts' with the forum state such that 'he should reasonably anticipate being haled into court there.' " *Id.* (quotation omitted). "A defendant may reasonably anticipate being subject to suit in the forum state 'if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities.' " *Id.* (quotation and internal quotation marks omitted). Second, if the defendant has sufficient minimum contacts, "we ask whether the court's 'exercise of personal jurisdiction over the defendant offends traditional notions of fair play and substantial justice.' " *Id.* (quotation and internal quotation marks omitted). "This question turns on whether the exercise of personal jurisdiction is 'reasonable' under the circumstances of a given case." *Id.* (quotation omitted).

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

In this case, although not explicit, it appears that Plaintiffs also assert that Jenkins purposefully availed himself to the forum because his agents committed the deprivation. They rely heavily upon, *Elmaghraby v. Aschcroft*, 2005 WL 2375202 (E.D.N.Y. Sept.27, 2005), rev'd on other ground sub nom. *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir.2007), emphasizing the *Elmaghraby* language where the court explained, a court may constitutionally exercise jurisdiction over a non-domiciliary "if a person or *through an agent*, he ... commits a tortuous act within the state....*Id.* at *9 (emphasis added by Plaintiffs). I do not find that case to be persuasive. It is distinguishable from the instant case because Defendant Jenkins had left the White House prior to March 21, 2005 and had no ability to control the conduct of the other Defendants.

Finally, Plaintiffs contend that *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984) directs that jurisdiction is appropriate here. In *Calder*, the Supreme Court held that California had jurisdiction over Florida reporters who had written an allegedly libelous article for the National Enquirer about a California actress. The Court noted that California "[was] the focal point both of the story and the harm suffered."*Id.* at 789.Here, it is clear that Colorado was not the focal point of policy at issue. It is undisputed that Defendant Jenkins had no knowledge of Plaintiffs or the event until afterwards. I find that Plaintiffs have not established a prima facie showing of minimum contacts with Colorado and Defendant Jenkins Motion to Dismiss is granted.

B. Defendants Casper and Klinkerman

i. Standard of Review

In ruling on a Motion to Dismiss pursuant to 12(b)(6), the standard used to be that the court " 'must accept all the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff.'

" *David v. City and County of Denver*, 101 F.3d 1344, 1352 (10th Cir.1996), *cert. denied*,522 S.Ct. 858 (1997) (quoting *Gagan v. Norton*, 35 F.3d 1473, 1474 n. 1 (10th Cir.1994)). Thus, until recently, a dismissal was only warranted where "it appear[ed] beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *The Ridge at Red Hawk, L.L.C. v.Schneider*, 493 F.3d 1174, 2007 WL 1969681 at *3 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). "However, the Supreme Court recently decided that 'this observation has earned its retirement,' and it has prescribed a new inquiry for us to use in reviewing a dismissal: whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.' " *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, ----, 127 S.Ct. 1955, 1969, 167 L.Ed.2d 929 (2007)). "The Court explained that a plaintiff must 'nudge [ ][his] claims across the line from conceivable to plausible' in order to survive a motion to dismiss." *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. at 1974). "Thus, the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for these claims." *Id.*

ii. The Positions of the Parties as to Qualified Immunity

***5** Defendant Klinkerman asserts that he is entitled to qualified immunity because (1) he acted as an agent of, and was substantially supervised by the White House, (2) he was acting as a volunteer, and (3) his conduct did not violate a constitutional right.

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

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

iii. Analysis

In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the Supreme Court held that government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known. *Harlow* places a presumption in favor of immunity of public officials acting in their individual capacities. *Schalk v. Gallemore*, 906 F.2d 491 (10th Cir.1990). The Tenth Circuit has indicated that the defense of qualified immunity should be raised in the answer or in a motion to dismiss or for summary judgment. *Quezada v. County of Bernalillo*, 944 F.2d 710, 718 (10th Cir.1991)."Defendants who are unsuccessful in having a lawsuit dismissed on qualified immunity grounds before trial may reassert the defense at trial or after trial."*Id.*

Once the defense is raised by a defendant, the burden shifts to the plaintiff to come forward with facts or allegations sufficient to show both " 'that the defendant's actions violated a constitutional or statutory right' " and that the right "was clearly established at the time of the defendant's unlawful conduct." *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir.2001) (quoting *Albright v. Rodriguez*, 51 F.3d 15531, 1534 (10th Cir1995)).*See also Workman v. Jordan*, 32 F.3d 457, 479 (10th Cir.1994); *Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir.1996).

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

Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2131, 2156, 150 L.Ed.2d 272, ---- (2001) (citations omitted). In other words, once a defendant pleads a defense of qualified immunity, the judge should consider "not only the applicable law, but whether that law was clearly established at the time an action occurred...." *Siegert v. Gilley*, 500 U.S. 226, 231, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73

L.Ed.2d 396 (1982))."A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert*, 500 U.S. at 232.

***6** A plaintiff cannot defeat a defense of qualified immunity merely by alleging a violation of "extremely abstract rights." *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Rather, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized sense." *Id.* at 640." 'To be clearly established, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " *Brewer*, 76 F.3d at 1134 (quotation omitted); *see also Snell v. Tunnell*, 920 F.2d 673, 696 (10th Cir.1990)(quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)), *cert. denied*, 111 S.Ct. 1622 (1991).*See also Cram*, 252 F.3d at 1128. Ordinarily, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Id.* (quoting *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir.1992)); *see also Patrick v. Miller*, 953 F.2d 1240 (10th Cir.1992). This requires " 'some, but not necessarily precise, factual correspondence" between cases predating the alleged violation and the facts in question in this case. *Calhoun v. Gaines*, 1992 WL 387385 at 4 (10th Cir.1992). In essence, this standard requires officials to know well developed legal principles and to relate and apply them to analogous factual situations." *Id.* However, "a single case from another circuit is not sufficient to clearly establish the law of this circuit." *Stump v. Gates*, 986 F.2d 1429 (10th Cir.1993) (unpublished opinion)(1993 WL 33875); *see Woodward v. City of Worland*, 977 F.2d 1392, 1397 (10th Cir.1992). The burden is on the plaintiffs to show that the law was clearly established at the time of the alleged violation. *Patrick*, 953 F.2d at 1243; *Dixon v. Richer*, 922 F.2d 1456, 1460 (10th Cir.1991).

If the law is clearly established, the question becomes whether the Defendants' conduct was objectively reasonable in light of the clearly established law. *Breidenbach v. Bolish*, 126 F.3d 1288, 1291 (10th Cir.1997). The test is one of objective reasonableness, in light of the law at the time of the alleged violation. *Juntz v. Muci*, 976 F.2d 623, 627 (10th Cir.1992). The issue of whether the law is clearly established is not a jury question. *Lutz v. Weld County School Dist.*, 784 F.2d 340, 343 (10th Cir.1986); *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 646 (10th Cir.1988). Plaintiff's failure to show that the law is clearly established "calls for the entry of judgment in favor the defendants who raised the defense."*Id.* Where the court concludes that the law controlling the constitutional violations alleged is "murky", the proper conclusion is that a reasonably objective person would not necessarily have known that the acts complained of were clearly violative of constitutional rights. *Eckhart v. Crofoot*, 1988 WL 10440 at *4 (D.Colo.1988).

***7** On the other hand, if the law was clearly established, the defense "ordinarily should fail, since a reasonably competent public official should know the law concerning his conduct." *Lutz*, 784 F.2d at 342; *Street v. Parham*, 929 F.2d 537, 540 (10th Cir.1991). The only exception to this is where the official pleading an immunity defense " 'claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard.' " *Street*, 929 F.2d at 540 (quoting *Harlow*, 457 U.S. at 819. According to *Lutz*, this issue would be the only fact issue that could be submitted to the jury. *Lutz*, 784 F.2d at 343;*see also Walker v. Elbert*, 75 F.3d 592, 598-99 (10th Cir.1996) (noting that qualified immunity is a jury question only when special circumstances are presented, *i.e.*, when the defendant raises the defense of exceptional circumstances); *Street*, 929 F.2d at 540 ("[w]hen the jury decided Instruction No. 18 in the affirmative, it decided that the force used by the officer was unreasonable under the circumstances. There could, therefore, be no 'extraordinary circumstances' excusing the defendant's conduct").

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

Here, both Defendants assert that they are entitled to qualified immunity because their conduct did not violate Plaintiffs' constitutional rights. In this case, Plaintiffs assert that Defendants Klinkerman and Casper violated their First Amendment rights by committing viewpoint discrimination. Defendants argue that, when the President chooses to speak, he need not allow any person the opportunity to express a contrary viewpoint during his speech. Defendants cite to *Sistrunk v. City of Strongville*, 99 F.3d 194, 196-200 (6th Cir.1996), for the proposition that

when the government itself is speaking it not only has the right to speak, but also the complementary right to exclude from its speech those who express a contrary message.

In *Sistrunk*, which I find to be persuasive, the plaintiff obtained a ticket to a Bush-Quayle rally but was denied entry because she wore "a political button endorsing Bill Clinton for President."*Id.* at 196.She was not allowed to enter the rally until she relinquished her button. *Id.* Relying on the Supreme Court's decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995), the *Sistrunk* court held that there was no constitutional violation, since "even if plaintiff has alleged sufficient facts to establish that the city authorized the committee to exclude members of the public who sought to express a discordant message, plaintiff has not alleged that the city violated plaintiff's free speech rights; rather plaintiff has only established that the city permitted the committee to exercise its free speech rights and autonomy over the content of its own message."*Id.*

***8** The court reasoned that "Plaintiff's only claim is that she was not permitted to participate *in the committee's speech* while expressing her own discordant views."*Id.* at 199 (emphasis in the original). Further, "[t]o require that the organizers include the buttons and signs for Bill Clinton in the demonstration would alter the message the organizers sent to the media and other observers, even if the holders of the signs and wearers of buttons did not otherwise interfere with the pro-Bush rally."*Id.*

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

Finally, even assuming *arguendo* that Plaintiffs' constitutional rights were violated, they have failed to demonstrate that those rights were "clearly established." Plaintiffs do not cite any Tenth Circuit or Supreme Court case that defines the contours of this right as it applies to a situation in which the President, speaking in a limited private forum or limited nonpublic forum, excludes persons for the reasons identified in this Order. As such, I find that Defendants Casper and Klinkerman are entitled to qualified immunity.

Based on the foregoing, it is

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

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

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

D.Colo.,2008.
Weise v. Casper
Slip Copy, 2008 WL 4838682 (D.Colo.)