ORAL ARGUMENT REQUESTED

No. 11-2055 and 11-2059

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JEANNE PAHLS, et al.,
Plaintiffs-Appellees,

v.

MATTHEW THOMAS, et al.,
Defendants-Appellants.

JEANNE PAHLS, et al.,
Plaintiffs-Appellees,

v.

KERRY SHEEHAN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(C. LEROY HANSEN, U.S.D.J.)

BRIEF FOR APPELLEES

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JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. On February 22, 2011, the district court denied defendants' motions for summary judgment based on qualified immunity. Fed. Aplt. App. 190.[1] The denial of qualified immunity is appealable as a collateral order. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). On March 15, 2011, defendants Bernalillo County Sheriff's Department Lieutenant Matthew Thomas and Sergeant Edward Mims timely filed their notice of appeal. On March 23, 2011,

STATEMENT OF THE CASE

This case arises from the treatment of demonstrators outside an event attended by President George W. Bush. D.C. Op. 2; Aplee. Supp. App. 172. On August 27, 2007, President Bush visited the Albuquerque area to attend a fundraiser. D.C. Op. 3; Aplee. Supp. App. 172. His motorcade drove south along Rio Grande Boulevard in Los Ranchos de Albuquerque and turned right into the driveway of the estate where the fundraiser took place. D.C. Op. 2; Aplee. Supp. App. 167, 169. Two groups of demonstrators were on the scene. D.C. Op. 10, 15; Aplee. Supp. App. 168, 174-75. Defendant law enforcement officers required plaintiffs, who were expressing views critical of the President, to stand and display their messages approximately 150 yards south of the spot where the President turned into the driveway. D.C. Op. 11-12; Aplee. Supp. App. 168-69, 172-75. The motorcade did not pass by them. D.C. Op. 9-10; Aplee. Supp. App. 169, 175. They were blocked by horses and police cars and the President could not see them. D.C. Op. 20; Aplee. Supp. App. 169, 175-76.

Defendant law enforcement officers allowed the second group of demonstrators, expressing views supportive of the President, to stand across from the Mayor's driveway directly at the point where the President's motorcade slowed to turn and only feet from the car. D.C. Op. 20; Aplee. Supp. App. 175-76.

Plaintiffs filed this lawsuit on January 15, 2008 arguing that defendants violated their First Amendment rights by treating anti-Bush demonstrators differently from pro-Bush demonstrators based on their message. *See* District Court Docket Entries, Doc. No. 1, Fed. Aplt. App. 14. In their complaint, plaintiffs initially named the Board of County Commissioners for the County of Bernalillo, Bernalillo County Sheriff's Department ("BCSD"), the City of Albuquerque, and Albuquerque Police Department ("APD") as defendants, along with John/Jane Does in their individual capacities, because plaintiffs did not know the identities of law enforcement officers who made and implemented the viewpoint-discriminatory decisions. Fed. Aplt. App. 88. After completing discovery, plaintiffs amended their complaint and substituted the individually-named defendants, BCSD Lieutenant Matthew Thomas, BCSD Sergeant Edward Mims and Secret Service Special Agent Kerry Sheehan, for the Doe defendants. Fed. Aplt. App. 34. The district court granted summary judgment for the Board of County Commissioners for the County of Bernalillo and Bernalillo County Sheriff's Department and dismissed them from the case on June 23, 2010.[2] *See* District Court Docket Entries, Doc. No. 124, Fed. Aplt. App. 28.

On September 13, 2010, defendant Sheehan filed a motion for summary judgment based on qualified immunity. Fed. Aplt. App. 48. Subsequently on

[2] Although there are City defendants, those defendants did not move for summary judgment and are therefore not part of this appeal.

November 15, 2010, defendants Thomas and Mims (hereinafter “County

President's motorcade. D.C. Op. 11-12; Aplee. Supp. App. 72, 95; Fed. Aplt. App 158. Plaintiffs attempted to stand closer to the Mayor's residence but law enforcement forced all anti-Bush demonstrators to the south. For example, several plaintiffs were peacefully protesting north of the Mayor's driveway, near where the pro-Bush demonstrators ultimately stood, until law enforcement ordered them to move to the south end of Rio Grande Boulevard. D.C. Op. 14-15; Aplee. Supp. App. 173-75. Although law enforcement officers had initially given the anti-Bush demonstrators permission to stand in that location, at some point prior to the President's arrival, the officers changed their minds and forced the demonstrators to the south. Fed. Aplt. App. 41-42; D.C. Op. 14-15; Aplee. Supp. App. 174-75. The area where they were standing was outside the security perimeter. D.C. Op. 14, 26; Aplee. Supp. App. 173-74. Other anti-Bush demonstrators attempted to move north of the southern perimeter but were told by law enforcement that they could not proceed. D.C. Op. 13; Aplee. Supp. App. 168.

Some of the anti-Bush demonstrators also had the opportunity to stand on private property closer to the Mayor's

property on which they had permission to stand would have been more visible to the President as the President's motorcade drove past. Fed. Aplt. App. 44; D.C. Op. 13; Aplee. Supp. App. 168. As protestors began to enter the van to take advantage of the offer, a law enforcement officer appeared and told the woman in the van that she could not park there. D.C. Op. 13; Aplee. Supp. App. 168. The woman in the van explained that she was not parking, rather, she was picking people up to take them to a friend's private property to the north. D.C. Op. 13-14; Aplee. Supp. App. 169. The officer nonetheless told her that none of the other protestors could go north and that no one, other than her daughter, could go with her to her friend's house. D.C. Op. 14; Aplee. Supp. App. 169. Although one person had already gotten in the van and another person was stepping into the van, they both were forced to get out of the van and the woman driving the van left, all according to the officer's orders. D.C. Op. 14; Aplee. Supp. App. 169.

demonstrators held signs in support of the President and held American flags. D.C. Op. 15.

The pro-Bush demonstrators stood on or near the shoulder of the road, somewhere between six to 15 feet from the road. D.C. Op. 15; Aplee. Supp. App. 175. The private property line at the approximate location where supporters were standing is 8.9 feet from the edge of the pavement of Rio Grande Boulevard. D.C. Op. 16-17; Fed. Aplt. App. 163-65. Once the perimeter "hardened," approximately 30 minutes prior to the President's arrival, the supporters were located on either the edge of the private property line or on the public shoulder across the street from the Mayor's driveway. D.C. Op. 18; Aplee. Supp. App. 98, 148, 175.

When law enforcement "hardened" the perimeter, officers placed a barricade of police cars and officers on horseback across Rio Grande Blvd., further obstructing the anti-Bush demonstrators' views of the Mayor's driveway. D.C. Op. 19; Fed. Aplt. App. 44; Aplee. Supp. App. 169, 175-76. The horses were large, blocking the northern view of the demonstrators. D.C. Op. 19. There were at least 70 protestors at that point. D.C. Op. 19; Aplee. Supp. App. 169. In contrast, only a few law enforcement officers were posted near the smaller number of supporters who were located directly across the street from the Mayor's driveway. D.C. Op. 15, 18; Aplee. Supp. App. 175.

decided where protesters could and could not stand, and because all his decisions before and during the event were based on the security of the President and the public, not on the content of Plaintiffs' speech or viewpoint." D.C. Op. 1-2. On November 15, 2010, Lt. Thomas and Sgt. Mims filed a motion for summary judgment. County Aplt. App. 15. Again quoting the district court, they "similarly argue that they did not discriminate against or disparately treat Plaintiffs based on their viewpoint in violation of their constitutional rights." D.C. Op. 2.

On February 22, 2011, the district court denied both summary judgment motions. D.C. Op. 2. After setting out the qualified immunity and summary judgment standards, D.C. Op. 22-23, the court turned to the First Amendment analysis. D.C. Op. 23.

The court first identified the proper First Amendment standard to apply. D.C. Op. 24. It pointed to both Supreme Court and Tenth Circuit case law establishing that viewpoint-based restrictions in public fora are subject to the most exacting scrutiny under the First Amendment and that such restrictions are presumptively invalid and can only be upheld where the government demonstrates that they are necessary to serve a compelling government interest and are narrowly drawn to achieve that interest. D.C. Op. 23-24 (citing, *inter alia*, *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Perry Educ. Ass'n. v. Perry Local Educators'*

Ass'n., 460 U.S. 37, 45 (1983); *Mesa v. White*, 197 F.3d 1041 (10th Cir. 1999)). Given this longstanding case law, the court concluded that "First Amendment law forbidding viewpoint-based restrictions on speech was thus clearly established at the time of the event and would put a reasonable official on notice that disparate treatment of protesters based on their viewpoint was unlawful." D.C. Op. 24 (citing *Mesa*, 197 F.3d at 1047; *Mahoney v. Babbitt*, 105 F.3d 1452, 1455 (D.C. Cir. 1997)).

The court then applied this rule to the evidence and concluded that,

> The evidence construed in Plaintiffs' favor shows that law enforcement at the event interfered with the protestors' rights to demonstrate on the public shoulder across from and to the north of the Mayor's driveway and to go to private property north of the Mayor's driveway. In contrast, law enforcement did not interfere with the pro-Bush supporters' demonstration across from the Mayor's driveway, in view of the Presidential motorcade.

D.C. Op. 25. The court recognized that defendants contended that security concerns justified keeping the anti-Bush demonstrators to the south and that the pro-Bush supporters were allowed to stand directly across from the driveway because they were on private property. D.C. Op. 25. However, it held that plaintiffs' evidence—which must be credited at summary judgment—was sufficient to establish that these rationales were pretextual. D.C. Op. 25-26. Addressing defendants' security rationales, the court wrote:

> Many of the protestors initially "gathered" at the southern perimeter because law enforcement indicated to them that the southern

perimeter was the only location permitted for demonstrating. Additionally, there is evidence

134, 137-38. "Given his active involvement in ordering the placement of demonstrators at the event, the inference of viewpoint discrimination that may be drawn from the manner in which his subordinate officers carried out their instructions can be ascribed to him." D.C. Op. 32.

Finally, the district court concluded that there was "sufficient evidence of an affirmative link between the disparate treatment of the anti-Bush protestors and the pro-Bush supporters by subordinate officers and Special Agent Sheehan's adoption of the order showing his authorization or approval of such misconduct." D.C. Op. 34. Law enforcement testified that Secret Service had overall control of security on the day of the event. Fed. Aplt. App. 123-25, 137, 140; County Aplt. App. 53-54. County defendants repeat that assertion in their brief to this Court. County Aplt. Br. 10. Agent Sheehan was responsible for site security at the Mayor's residence and supervised and monitored the secure perimeter, including restricting access to portions of Rio Grande Boulevard. D.C. Op. 32; Fed. Aplt. App. 71-72, 149, 153-54. In conjunction with local law enforcement, Agent Sheehan also decided on the placement of the southern perimeter, which was established approximately 150 yards south of the Mayor's driveway. D.C. Op. 7; Fed. Aplt. App. 93-94, 153-54.

The court found that Sheehan knew of and did not interfere with the pro-Bush supporters' demonstration across from the Mayor's driveway. D.C. Op. 32; Fed. Aplt. App. 156. Sheehan himself admitted he made the decision to allow the

pro-Bush demonstrators to be at their location. Fed. Aplt. App. 156. In addition, Sheehan participated in the briefing where law enforcement instructed that all demonstrators be kept to the south of the Mayor's residence. D.C. Op. 32; Aplee. Supp. App. 103. At least one officer left that meeting with the understanding that the directive to keep all demonstrators south of the property meant that a protestor who was invited by a property owner to protest on private property north of the barricade would not have been permitted to do so. D.C. Op. 6-7; Aplee. Supp. App. 153. The court concluded "[g]iven that other BCSD officers enforced the order . . . and two Secret Service agents ordered [Albuquerque Police Department] not to allow anyone north of the southern perimeter, it is reasonable for a jury to infer that the officers were executing the order in the manner intended by the superiors who issued and/or approved it." D.C. Op. 33; Fed. Aplt. App. 111, 114, 119, 133, 161-62. As such, the district court concluded that each defendant could be held personally liable.

This appeal followed.

SUMMARY OF THE ARGUMENT

When President Bush came to Albuquerque, New Mexico for a fund-raiser, plaintiffs sought to peacefully hold signs expressing their disapproval of his policies. Defendants forced plaintiffs to stand 150 yards from the President's

motorcade and behind a row of horses and police cars, rendering them invisible to the motorcade. Other individuals sought to peacefully hold signs expressing their approval of the President's policies. Defendants allowed them to stand at a location directly across the street from a driveway into which the motorcade turned, rendering their message highly visible to the motorcade.

Defendants do not dispute these facts, but do dispute other facts. The district court found that those disputed facts required it to deny defendants' motions for summary judgment. This Court has held that it should generally not review a district court conclusion that there are disputed facts.

The undisputed facts clearly establish a violation of the First Amendment's prohibition against viewpoint discrimination. Defendants raise three arguments. First, each defendant argues that the other defendants were responsible for decisions regarding placement of demonstrators. The district court properly found that this dispute renders summary judgment inappropriate. The district court further found that there was sufficient evidence to enable a jury to find each defendant responsible. Second, defendants argue that the differential treatment was justified for reasons of security. The district court properly found that there was sufficient evidence to conclude that this rationale was pretextual. Third, defendants argue that the pro-Bush demonstrators were treated differently because they were on private property and the anti-Bush demonstrators were not. The

district court properly found that plaintiffs were prohibited from standing in areas on both private and public property that were equivalent to the location in which the pro-Bush demonstrators were able to stand and that therefore there was also sufficient evidence that this rationale too was pretextual.

This Court should affirm the district court's ruling.

STANDARD OF REVIEW

This case arises in the context of a motion for summary judgment on the basis of qualified immunity. In this context, the Court reviews the district court's abstract legal conclusions de novo, but refrains from "review[ing] a district court's factual conclusions, such as the existence of a genuine issue of material fact for a jury to decide, or that a plaintiff's evidence is sufficient to support a particular factual inference." *Fogarty v. Gallegos*, 523 F.3d 1147, 1154 (10th Cir. 2008).

ARGUMENT

I. The District Court Properly Denied Summary Judgment Because There Are Material Facts In Dispute And Evidence Construed In Plaintiffs' Favor Would Enable A Reasonable Jury To Conclude That Defendants Engaged In Unconstitutional Viewpoint Discrimination.

"[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

248 (1986); *see Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1058 (10th Cir. 2009). The inquiry at this stage is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250. Because "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions," at this stage "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Pinkerton*, 563 F.3d at 1058 (quoting *Anderson*, 477 U.S. at 255). These principles apply even in the context of a motion for summary judgment based on qualified immunity. In that context, this Court has stated that although it may review the district court's abstract legal conclusions, it is "not at liberty to review a district court's factual conclusions, such as the existence of a genuine issue of material fact for a jury to decide, or that a plaintiff's evidence is sufficient to support a particular factual inference." *Fogarty*, 523 F.3d at 1154. *See also Dodds v. Richardson*, 614 F.3d 1185, 1191-92 (10th Cir. 2010); *Zia Trust Co. ex rel. Causey v. Montoya*, 597 F.3d 1150, 1152 (10th Cir. 2010).

Defendants do not dispute that their actions during the President's visit on August 27, 2007 treated anti-Bush demonstrators less favorably than pro-Bush demonstrators. However, there are genuine disputes over whether the disparate treatment was justified by defendants' security or private property rationales as

well as who was responsible for the decisions regarding the demonstrators. The district court properly held that these disputes precluded summary judgment because the evidence construed in plaintiffs' favor would enable a reasonable jury to conclude that defendants engaged in unconstitutional viewpoint discrimination. D.C. Op. 30-34. This Court "must scrupulously avoid second-guessing the district court's determinations regarding whether [plaintiff] has presented evidence sufficient to survive summary judgment." *Garrett v. Stratman*, 254 F.3d 946, 952 (10th Cir. 2001) (quoting *Clanton v. Cooper*, 129 F.3d 1147, 1153 (10th Cir.1997)). The major material factual disputes are as follows:

Dispute over Personal Responsibility

There is a dispute over which law enforcement agency was responsible for the viewpoint-discriminatory decisions, with each defendant blaming defendants from the other agency. One such dispute is over which defendant was responsible for the decision to keep anti-Bush demonstrators to the south and prevent them from moving north closer to the Mayor's residence and within sight of the President's motorcade. For example, an APD officer, claiming he was following Lt. Thomas's directive, told protestors to stay south of the Mayor's driveway. D.C. 0.0d laq

Secret Service agents who authorized keeping demonstrators to the south. Fed. Aplt. App. 110-11, 113-14, 118-20, 133. Several officers assigned to the south end of the perimeter testified that two Secret Service agents came by in a golf cart and told them the protestors were located in a good place there and not to allow them any farther north on the road. D.C. Op. 12; Fed. Aplt. App. 111, 114, 119, 133, 161-62. Agent Sheehan was in a golf cart on the day of the event. Fed. Aplt. App. 152, 155.

Agent Sheehan asserts that the Secret Service generally permits members of the public to walk along the shoulder of a ro

establishing the secure zone and/or perimeter"). Anti-Bush demonstrators were prevented from entering a van to go to private property closer to the Mayor's residence where they had permission to stand. Aplee. Supp. App. 23-24, 157-58, 168-69. Responsibility for this decision is especially unclear given a BCSD officer's statement to an anti-Bush demonstrator prior to the event that she could demonstrate in any public areas and on private property if she had permission of the property owner. D.C. Op. 11; County Aplt. App. 49-50.

In addition, although several anti-Bush demonstrators were initially permitted by a BCSD officer to stand north of the Mayor's driveway on the east side of Rio Grande Boulevard, Fed. Aplt. App. 39; D.C. Op. 14, at some point prior to the President's arrival, members of BCSD changed their minds and forced the demonstrators to the south. Fed. Aplt. App. 42; D.C. Op. 14-15; Aplee. Supp. App. 174-75. Defendants dispute responsibility for the decision to move the demonstrators from the north end to the south end of Rio Grande Boulevard. *See, e.g.*, Fed. Aplt. Br. 40-41 (asserting that there was no evidence that Agent Sheehan had anything to do with decision to keep plaintiffs at southern location instead of near pro-Bush demonstrators); County Aplt. Br. 26 (arguing that Lt. Thomas and Sgt. Mims did not place any restrictions on where protestors could stand).

Because all defendants deny liability or blame the other law enforcement agency for the decisions made during the President's visit, the district court

In addition, the proffered manpower concern also used to justify keeping demonstrators in one place could be considered pretextual. D.C. Op. 28. There is evidence that a separate group of law enforcement officers was stationed in front of pro-Bush supporters in the same area where anti-Bush protestors attempted to stand and that additional manpower was present at the event but went unused. D.C. Op. 28; County Aplt. App. 46, 64; Aplee. Supp. App. 9, 13, 16-17. "[A] reasonable jury could disbelieve [d]efendants' purported non-discriminatory reasons for the disparate treatment of supporters and protestors" and instead conclude that law enforcement targeted the anti-Bush demonstrators because of their message. D.C. Op. 27.

Defendants' Private Property Rationale

Whether the disparate treatment of the demonstrators can be justified by the fact that pro-Bush demonstrators were located on private property is also a disputed fact. Both or either Agent Sheehan and the BCSD officers permitted the pro-Bush demonstrators to stand on or near private property directly across from the Mayor's driveway. Fed. Aplt. App. 155-56; County Aplt. App. 134, 137-38. These pro-Bush demonstrators ultimately stood near where the anti-Bush demonstrators had originally attempted to stand. D.C. Op. 15, 26; Aplee. Supp. App. 175.

II. A Reasonable Jury Could Find That Defendants Personally Engaged In Viewpoint Discrimination In Violation Of The First Amendment.

A. First Amendment Law Forbidding Viewpoint Discrimination On Speech Was Clearly Established At The Time Of The Event And Would Put A Reasonable Official On Notice That Disparate Treatment Of Protestors Based On Their Viewpoint Was Unlawful.

Qualified immunity is only appropriate where the conduct at issue "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The qualified immunity inquiry usually involves two prongs: "whether plaintiff's allegations, if true, establish a constitutional violation," *Hope v. Pelzer*, 536 U.S. 730, 736, 739 (2002) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)), and whether the violated right was "clearly established" at the time of the relevant action, *Saucier*, 533 U.S. at 201; *See also Montoya*, 597 F.3d at 1154-55. The district court properly held "First Amendment law forbidding viewpoint-based restrictions on speech was thus clearly established at the time of the event and would put a reasonable official on notice that disparate treatment of protestors based on their viewpoint was unlawful." D.C. Op. 24.

"Viewpoint discrimination is an egregious form of content discrimination," and "receive[s] even more critical judicial treatment." *Mesa,* 197 F.3d at 1047. Neither the County defendants nor Agent Sheehan dispute that viewpoint restrictions on speech are presumptively unconstitutional. *R.A.V.*, 505 U.S. at 382.

Instead defendants claim that they were not personally involved in any restrictions and even if they did restrict plaintiffs' speech, any such restrictions were justified by safety reasons or explained by the location of the demonstrators. The district court dismissed these arguments and found that a reasonable jury could conclude that law enforcement discriminated against the anti-Bush demonstrators because of their message. D.C. Op. 27.

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

freedom of speech" and "cannot survive in a country which has the First Amendment." *Schacht v. United States*, 398 U.S. 58, 63 (1970); *see also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (internal quotation marks omitted); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (holding that, even in a nonpublic forum, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject"). And in this instance, the viewpoint at issue involves core political speech. *See, e.g.*, *McIntyre v. Ohio Elec. Comm'n*, 514 U.S. 334, 346-47 (1995).

Further, "suspicion that viewpoint discrimination is afoot is at its zenith when the speech restricted is speech critical of the government, because there is a strong risk that the government will act to censor ideas that oppose its own." *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 86 (1st Cir. 2004). The district court properly concluded that the law forbidding viewpoint-based restrictions on speech was clearly established at the time and there was "a question of fact as to whether the [defendants] can meet the exacting scrutiny required for the purported viewpoint-based restrictions." D.C. Op. 24, 28.

Rather than disputing whether viewpoint discrimination was clearly established, Agent Sheehan argues instead that there is no existing precedent

anti-Bush demonstrators were originally standing on the eastern shoulder of Rio Grande Boulevard to the north of the Mayor's driveway, outside the security perimeter. D.C. Op. 14, 26; Aplee. Supp. App. 173-74. Yet defendants forced the anti-Bush demonstrators south, out of view of the President. A restriction is not neutral if it applies to some demonstrators and not others for no legitimate reason.

This Court should affirm the district court's conclusion that "First Amendment law forbidding viewpoint-based restrictions on speech was thus clearly established at the time of the event and would put a reasonable official on notice that disparate treatment of protestors based on their viewpoint was unlawful." D.C. Op. 24.

B. The District Court Properly Found That A Reasonable Jury Could Disbelieve Defendants' Purported Private Property and Security Rationales.

Defendants contend that security concerns promoted keeping demonstrators in one group, that they chose the southern perimeter as a location for demonstrators because the majority of demonstrators voluntarily gathered there, and that the pro-Bush supporters were permitted to remain in a separate group across the street from the Mayor's driveway solely because they were on private property. County Aplt. Br. 25-26, 30-31; Fed. Aplt. Br. 24-25. "[C]ourts must examine viewpoint-based restrictions with an especially critical review of the government's asserted justifications for those restrictions." *Church on the Rock v. City of Albuquerque*, 84

F.3d 1273, 1279-80 (10th Cir. 1996). The dist

vehicle," County Aplt. Br. 12, 19, 21, but they permitted demonstrators to be in two separate locations: 150 yards south of the motorcade route for those carrying anti-Bush signs, and on or near the shoulder of the road at the spot where the President's motorcade slowed to its slowest speed for those carrying pro-Bush signs and American flags. Aplee. Supp. App. 28, 148-49, 175-76.

The County defendants have offered no viewpoint neutral justifications for limiting these safety concerns to the anti-Bush demonstrators, and there are none considering that the anti-Bush demonstrators did not pose a security risk. D.C. Op. 26 ("Defendants have shown no evidence that these women posed any security risk . . . ."); Aplee. Supp. App. 72, 95; Fed. Aplt. App. 158. Indeed, the district court found that there is "evidence in the record indicating that the specific restrictions imposed did not actually serve that security interest." D.C. Op. 27-8.

Second, the County defendants repeatedly refer to a content-neutral "security zone." County Aplt. Br. 30-31. However, the testimony of law enforcement officers regarding the security zone was hopelessly inconsistent. *See, e.g.*, Aplee. Supp. App. 92-93, 97, 118. Even if such a security zone had been drawn up, the perimeter was mere feet from the motorcade route at the point where the pro-Bush demonstrators were standing, while it was 150 yards from the

viewpoint discrimination. *See Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (holding the allegation that the state redefined the boundaries of a city to a "strangely irregular twenty-eight sided figure," if proven, would lead to an "irresistible" conclusion of discriminatory animus).

Further, even when plaintiffs attempted to stand outside the "security zone," they were prohibited from doing so. Indeed, the district court found there is evidence indicating that the eastern public shoulder of Rio Grande Boulevard was outside the security perimeter, yet law enforcement forced several plaintiffs, who were standing on that public shoulder near where the pro-Bush supporters were allowed to stand, to move south. D.

naturally gathered to the south of the Mayor's driveway and Defendants' only requested "that the protestors gather in one group." County Aplt. Br. 26. However the district court found that "[m]any of the protestors initially 'gathered' at the southern perimeter because law enforcement indicated to them that the southern perimeter was the only location permitted for demonstrating." D.C. Op. 26. Lt. Thomas did not merely "request" that anti-Bush demonstrators remain in one group; he ordered that they be placed south of the driveway and that they be told to remain there, prohibited from walking north on the shoulder. Aplee. Supp. App. 84. Sgt. Mims briefed officers on these orders and carried them out. Aplee. Supp. App. 102-03, 138. BCSD officers confined anti-Bush demonstrators in one group far to the south, prohibited them from being north of the driveway, prohibited them from walking north from the location to which they had been relegated, and prohibited them from going north to stand on private property closer to the motorcade. Their gathering in one place was not voluntary but rather the result of defendants ordering them to move south under the guise of safety, while permitting pro-Bush demonstrators to stand directly across from the Mayor's driveway.

Moreover, the district court properly dismissed as pretextual County defendants' assertion that the concern over adequate manpower motivated keeping protestors in one group to the south of the southern perimeter. D.C. Op. 28. The court noted that there was enough manpower to station a separate group of law

enforcement officers in front of pro-Bush supporters in the same place where anti-Bush protesters attempted to stand. D.C. Op. 28; County Aplt. App. 46, 64; Aplee. Supp. App. 13, 16-17. Officers were also stationed in a staging area in an empty field close to the event in case they were needed. This additional manpower went unused. D.C. Op. 28; Aplee. Supp. App. 9-10, 17.

2. A Reasonable Jury Could Conclude That Defendants' Proffered Private Property Justification Was Pretextual.

Defendants argue that pro-Bush demonstrators were permitted to stand directly across from the Mayor's driveway because law enforcement believed they were standing on private property. Agent Sheehan contends that because of this, the pro-Bush demonstrators were not similarly situated and therefore there can be no viewpoint discrimination.[5] However, as plaintiffs argued in the district

[5] Agent Sheehan supports his argument that there was no viewpoint discrimination because all demonstrators were not "similarly situated" by citing to *Moss v. U.S. Secret Service*, 572 F.3d 962 (9th Cir. 2009) and *Menotti v. City of Seattle*, 409 F.3d 1113 (9th Cir. 2005). Fed. Aplt. Br. 25-26. First, in both those cases demonstrators were being treated differently from *non-demonstrators*, rather than two groups of demonstrators being treated differently depending on their message. Here both groups of demonstrators were similarly situated – both were attempting to communicate their viewpoint, both attempted to be on private property, both wanted to stand as close as possible to the

court,[6] Agent Sheehan disavowed the relevance of the private property distinction in his prior testimony. Fed. Aplt. App. 148. Further, "Defendants have proffered no legitimate reason as to why the anti-Bush protestors could not stand near the pro-Bush supporters on the adjacent public shoulder." D.C. Op. 26. Nor have they explained why plaintiffs were prohibited from standing on private property along the motorcade route. The district court properly concluded that there was "evidence suggesting that the proffered private property . . . reasons are pre-textual." D.C. Op. 26.

Agent Sheehan previously rejected any reliance on the fact that the pro-Bush demonstrators were on private property. Fed. Aplt. App. 55, 148. Rather, he stated that the determining factor in assessing the location of any person is the safety of

[6] Agent Sheehan erroneously argues that plaintiffs waived the pretext argument because they did not raise it below. Plaintiffs asserted this issue in their Opposition to Defendant Sheehan's Motion for Summary Judgment, arguing that Agent Sheehan cannot defend his actions merely by asserting that pro-Bush demonstrators were on private property when he previously disavowed this distinction. Fed. Aplt. App. 102. That plaintiffs did not use the word "pretext" is irrelevant as the issue was clearly raised. In any event, the Supreme Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), makes clear there was no waiver. In that First Amendment case, the Court wrote that, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Id.* at 893 (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995)). The fact that Citizens United had consistently asserted a First Amendment violation was sufficient to preserve *all* arguments that the amendment had been violated. *Id.* By extension, the fact that plaintiffs here have consistently asserted that their First Amendment rights were violated is sufficient to preserve their argument that Agent Sheehan's arguments are pretextual. Of course, the court need not reach the question of how to interpret *Citizens United* because plaintiffs did in fact argue that Agent Sheehan was not motivated by property distinctions.

A "reasonable official [would most definitely be] on notice that [the] disparate treatment of protestors based on their viewpoint was unlawful." D.C. Op. 24.

Moreover an APD officer testified that under the orders in force that day, the anti-Bush demonstrators were not allowed on private property to the north of the southern perimeter, in closer proximity to the motorcade. Aplee. Supp. App. 153. Obviously, the pro-Bush demonstrators were. The district court therefore properly concluded that a reasonable jury could disbelieve defendants' purported private property rationale and conclude, based on the actions of law enforcement officers, that law enforcement targeted the anti-Bush demonstrators because of their message. D.C. Op. 27.

Agent Sheehan also asserts that since he has a seemingly neutral justification, he did not discriminate "because of" the protestors' message and therefore is not liable for viewpoint discrimination. Fed. Aplt. Br. 38. However, "intent to discriminate can be inferred from the effect of the policy" and from the facts in the case. *Perry Educ. Ass'n*, 460 U.S. at 64-65 (Brennan, J. dissenting) (rejecting argument that there was no indication defendants *intended* to discriminate). A court can conclude that, despite the seemingly neutral justification offered by the government, the decision to exclude certain speech is a form of impermissible discrimination. *Ridley*, 390 F.3d at 87; *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny County*, 653 F.3d 290, 297 (3rd Cir.

2011). Moreover where the justification is not actually served very well by the specific governmental action at issue, this raises the inference of viewpoint discrimination.

"Viewpoint discrimination concerns arise when the government intentionally tilts the playing field for speech; reducing the effectiveness of a message, as opposed to repressing it entirely."

addition, each defendant-supervisor is also liable for the consequences of the orders they gave to their subordinates. This Court recently held that "defendant-supervisors may be liable under § 1983 where an 'affirmative' link exists between the unconstitutional acts by their subordinates and their 'adoption of any plan or policy . . . – express or otherwise – showing their authorization or approval of such misconduct.'" *Dodds*, 614 F.3d at 1200-01, (quoting *Rizzo v. Goode*, 423 U.S. 362, 371 (1976)), *cert. denied*, 131 S.Ct. 2150 (2011); *See also Buck v. City of Albuquerque*, 549 F.3d 1269, 1276, 1280, 1287 (10th Cir. 2008).

Each defendant attempts to shift the responsibility for the viewpoint-discriminatory practices onto the other law enforcement agency. County Aplt. Br. 11, 17, 18; Fed. Aplt. Br. 52. County defendants assert that the Secret Service was responsible for the decisions regarding the demonstrators; Secret Service claims the County defendants made all relevant decisions. County Aplt. Br. 11, 17, 18; Fed. Aplt. Br. 52. The district court, however, concluded that each defendant could be held personally liable for the First Amendment violations. *See* Procedural History, *supra* 12-16.

Agent Sheehan was not only directly responsible for the disparate treatment of the protestors, but a reasonable jury could also infer that the actions of the local and federal officers were undertaken pursuant to Agent Sheehan's express direction. First, Agent Sheehan contends that although he set the secure perimeter

around the Mayor's residence, he did not intend those perimeters to prevent plaintiffs from standing closer to the Mayor's driveway or along the motorcade route north of the driveway. Fed. Aplt. App. 157-58. At the most basic level it is difficult to understand the purpose of a perimeter that is entirely permeable. Agent Sheehan admits he told local law enforcement to set up the southern perimeter and where it should be. He described the outer perimeter as "to control access in and out of the site." Fed. Aplt. App. 150-51. It would have been reasonable for local law enforcement to believe that when he set up a perimeter, he meant it to prohibit people from entering inside the perimeter. *See* D.C. Op. 32-3.

Second, there is evidence that Agent Sheehan specifically ordered local law enforcement not to permit anti-Bush demonstrators to move north of their location. Fed. Aplt. App. 111, 114, 119, 133. "Special Agent Sheehan had a golf cart that he used to get from one part of the site to the other parts to quickly check on things during the visit." D.C. Op. 8. During the event, two Secret Service agents drove to the southern perimeter in a golf cart and ordered officers not to allow anyone north. D.C. Op. 12. It is reasonable for a juror to conclude that Agent Sheehan was one of those Secret Service agents. Either way, "it is reasonable for a jury to infer that the officers were executing the order in the manner intended by the superiors who issued and/or approved it." D.C. Op. 33.

Finally, Agent Sheehan participated in the briefing where Sgt. Mims instructed law enforcement officers to keep demonstrators to the south of the Mayor's residence. D.C. Op. 33. Both Secret Service and local law enforcement were involved in the briefing. D.C. Op. 33. The district court properly concluded that there was an affirmative link between the disparate treatment of the demonstrators and Agent Sheehan's instruction as well as his adoption of the orders showing his approval of such treatment. D.C. Op. 34. Thus, Sheehan's argument, that the sole evidence linking him to the viewpoint discriminatory actions in this case was his attendance at the morning briefing, is simply incorrect.

Lt. Thomas had direct control over the disparate treatment of the demonstrators. D.C. Op. 30; Aplee. Supp. App. 111; County Aplt. App. 121. Lt. Thomas was the "point of contact and immediate supervisor of all local police officers assigned to duty at the event." D.C. Op. 30. *See also* Aplee. Supp. App. 83-84, 111; County Aplt. App. 121-22. The court found evidence that Lt. Thomas "ordered the officers under his command to keep the demonstrators in one group south of the southern perimeter, yet he knowingly acquiesced in the decision not to interfere with the pro-Bush supporters who remained on or near their private property during the event." D.C. Op. 30. The district court properly held that a reasonable jury could find that Lt. Thomas' orders "indicated that he contemplated exactly the actions taken by his subordinates." D.C. Op. 30.

The district court found that defendant Mims was similarly responsible for the disparate treatment of the demonstrators, as well as liable for the consequences of his orders to subordinate officers. Sgt. Mims was in charge of the perimeter and had the authority to decide whether to let demonstrators through it. D.C. Op. 31-32; County Aplt. App. 121-22. He conducted the morning briefing at which he informed officers that demonstrators would be confined to the south and not permitted to cross the perimeter. Aplee. Supp. App. 102-103, 138, 153; Fed. Aplt. App. 110-11. Sgt. Mims himself acknowledged that he told the anti-Bush demonstrators to gather on the south side outside the perimeter and had told other officers to advise anti-Bush demonstrators in the same manner. County Aplt. App. 138-39. Given Sgt. Mims active involvement in ordering the placement of demonstrators at the event, the district court properly concluded that the inference of viewpoint discrimination may be ascribed to him from the manner in which his subordinate officers carried out their instructions. D.C. Op. 32. Defendant Mims promulgated, created, implemented, or possessed responsibility for the policy that caused the restrictions on plaintiffs' speech. *See Dodds*, 614 F.3d at 1199; *Buck*, 549 F.3d at 1276, 1280, 1287.

CONCLUSION

For the foregoing reasons, the order denying summary judgment to the County defendants and Agent Sheehan should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

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

Respectfully submitted this 28th day of October, 2011.

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CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1 plaintiffs make the following disclosures:

The following plaintiffs do not have parent companies, nor do any publicly held companies own ten percent or more of their stock: CODEPINK Women for Peace, Albuquerque Chapter and Stop the War Machine.

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 10,933 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2011, I electronically filed and served the foregoing Brief for Appellees with the Clerk of the court by means of this Court's electronic filing system, which will provide a notice of filing to counsel for all parties. I also sent seven hard copies to the Court via UPS and one hard copy of the brief to the following addresses via UPS:

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