No. 10-67

IN THE

Supreme Court of the United States

LESLIE WEISE AND ALEX YOUNG, *Petitioners*,

v.

MICHAEL CASPER AND JAY BOB KLINKERMAN,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF FOR RESPONDENT MICHAEL CASPER IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

In 2005, President George W. Bush delivered a speech in Denver, Colorado at a private venue to a limited audience. Michael Casper and Jay Bob Klinkerman were local volunteers working at the event for the White House Advance Office. Carrying out the instructions of his White House supervisors, Casper asked petitioners—who had arrived in a car with a "No More Blood for Oil" bumper sticker—to leave the President's speech.

The question presented is whether the court of appeals correctly held that Casper and Klinkerman have immunity from petitioners' *Bivens* suit seeking money damages for an alleged First Amendment violation.

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STATEMENT

On March 21, 2005, President George W. Bush delivered a speech in Denver, Colorado, on the topic of Social Security. Compl. ¶ 9.[1] The event was held at the Wings Over the Rockies Air and Space Museum, a private museum.[2] Admission was limited (but not guaranteed) to those who held a ticket, possessed proper identification, and went through security. *Id.* ¶¶ 12, 19. Petitioners Leslie Weise and Alex Young obtained tickets through a congressional office. *Id.* ¶ 13. They drove to the event in Weise's car, which had a bumper sticker that read "No More Blood for Oil." *Id.* ¶¶ 15-16.

After petitioners arrived, Young showed identification, passed through security, and entered the museum. *Id.* ¶ 20. Before she could enter, Weise was asked to wait with respondent Jay Bob Klinkerman, who identified himself as a local volunteer. *Id.* ¶ 19. Respondent Michael Casper, who was wearing a suit, an earpiece, and a lapel pin, soon arrived. *Id.* ¶ 22.

According to the complaint, "Casper told Ms. Weise that she had been 'ID'd,' and that if she had any ill intentions she would be arrested." *Id.* ¶ 23. It is also alleged that Casper told Weise that if she "tried any 'funny stuff' * * * [she] would be arrested, but that he

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[1] An official transcript is available at http://georgewbush-whitehouse.archives.gov/news/releases/2005/03/20050321-13.html.

[2] As the Tenth Circuit recognized, the President's speech was held on private property. Pet. App. 10a. Although not alleged in the complaint, a court may take judicial notice of the fact that the Wings Over the Rockies Air and Space Museum is a private venue. *See* www.wingsmuseum.org.

was going to let [her] in." *Id.*[3]

Weise entered the museum and proceeded to the seating area. *Id.* ¶ 25. Casper then consulted with White House officials, who instructed him to eject petitioners from the event. *Id.* ¶¶ 25, 27, 33. Casper told Young "this is a private event, and you have to leave." *Id.* ¶ 27. Young "did as ordered" and exited the museum, as did Weise. *Id.*

The complaint alleges that "[a]fter the event, the Secret Service confirmed to Ms. Weise and Mr. Young that they were ejected from the event as a result of the bumper sticker on Ms. Weise's vehicle." *Id.* ¶ 32. The complaint does not allege, however, that Casper or Klinkerman ever saw the bumper sticker, commented on it, or even knew about it.

The complaint also avers that petitioners "wanted to listen to President Bush's views on Social Security" and that "[t]hey had no intention of disrupting the event in any way," although "[i]f the president had allowed questions from the floor, plaintiff Young would have sought to ask a question." *Id.* ¶ 18.[4]

Petitioners filed a complaint against Casper, Klinkerman, and several John/Jane Doe defendants asserting a single cause of action under *Bivens* v. *Six*

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[3] We note that the allegations in petitioners' complaint (C.A. App. 14-22) have not been proven, and respondents dispute many of those allegations.

[4] Although not revealed in petitioners' complaint, Weise has told the press that she and Young (and others who came to the President's speech with them) all wore t-shirts under their clothes that read "Stop the Lies." *See, e.g.*, Elisabeth Bumiller, *Evicted "Denver Three" Gain Support in Quest*, N.Y. Times, June 27, 2005.

Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Petitioners alleged that Casper and Klinkerman ejected them from President Bush's speech based on their viewpoint, in violation of the First Amendment. Compl. ¶ 38. The only relief requested in the complaint was money damages. The complaint did not request a declaratory judgment or injunctive relief.

Respondents moved to dismiss the complaint based on qualified immunity. The District Court denied the motion, without prejudice. The court reasoned that private parties such as Casper and Klinkerman could assert the defense of qualified immunity only if they were acting under the close supervision of federal officials, and that discovery was necessary on that issue. Respondents appealed the District Court's ruling, but the Tenth Circuit dismissed the appeal for lack of jurisdiction. *Weise* v. *Casper*, 507 F.3d 1260 (10th Cir. 2007).

While the appeal was pending, petitioners' counsel deposed Casper and Klinkerman "for the limited purpose of identifying other potential defendants so Plaintiffs could file claims within the relevant statute of limitations." *Id.* at 1263 n.2. Based on the record developed in those depositions, petitioners "now agree that [Casper and Klinkerman] were closely supervised by public officials and are entitled to assert qualified immunity." *Id.* *See* Pet. 3 n.1 ("Casper and Klinkerman [are] entitled to assert qualified immunity"); Pet. App. 7a. Thus, it is now undisputed that both Casper and Klinkerman were "volunteers acting under close government supervision." Pet. App. 6a.

Casper testified at his deposition that, after peti-

tioners had entered the museum, several members of the audience had separately approached him and stated that Weise and Young "had come in with a group of people that were known to protest at events. And they had gone to the back row where they're out of the way and can't be gotten to quickly when they upset events." Casper Dep. 7. The audience members who approached Casper told him "that these people back here—and they pointed out numerous people—were known to protest events of the Republican party." *Id.* *See also id.* at 19 (petitioners were identified "multiple times" "as people that were going to cause trouble").

After Casper radioed in this information, two White House officials, James O'Keefe and Steven Atkiss, instructed him to ask Weise and Young to leave. *Id.* at 6-8. Casper testified that O'Keefe was "a lead advance person for the White House" and that Atkiss was "the trip director for the White House." *Id.* at 6, 8. Casper testified that O'Keefe and Atkiss gave him the same instruction with regard to petitioners: "Ask them to please leave." *Id.* at 8, 10.

After the depositions, petitioners filed a separate action against Atkiss, O'Keefe, and Greg Jenkins, the former Director of the White House Advance Office. *See Weise, et al.* v. *Jenkins, et al.*, No. 07-cv-515 (D. Colo.). This new action was consolidated with the suit against respondents in the District of Colorado. The complaint filed against Atkiss and O'Keefe expressly alleges that they told Casper to ask petitioners to leave President Bush's speech. Compl. ¶ 26 (C.A. App. 165).

Following petitioners' concession that respondents

could raise qualified immunity as a defense, Casper and Klinkerman again moved to dismiss the complaint. The District Court granted the motions, holding that respondents were entitled to qualified immunity. Pet. App. 36a-55a.

The District Court granted qualified immunity on two grounds. First, the court held "that there has been no constitutional violation." *Id.* at 54a. Second, it held that "even assuming *arguendo* that Plaintiffs' constitutional rights were violated, they have failed to demonstrate that those rights were 'clearly established.' " *Id.*

The District Court also dismissed the suit as to Greg Jenkins for lack of personal jurisdiction. Pet. App. 39a-45a. Petitioners did not appeal that ruling. Pet. 4 n.2. Instead, they filed a third lawsuit—against Jenkins and his successor, Todd Beyer—in federal court in the District of Columbia. *Id.* *See Weise, et al.* v. *Jenkins, et al.*, No. 07-cv-1157 (D.D.C.).

Petitioners took an interlocutory appeal of the District Court's qualified immunity ruling to the Tenth Circuit.[5] The Tenth Circuit affirmed, finding it "obvious" and "plain" that the putative constitutional right asserted by petitioners was "not clearly established." *Id.* at 8a, 16a. The court stated that petitioners "simply have not identified any First Amendment doctrine that prohibits the government

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[5] The appeal was interlocutory because proceedings in the District of Colorado are ongoing. Petitioners' claims against Atkiss and O'Keefe have not been resolved. Atkiss and O'Keefe have filed motions to dismiss; those motions are still pending. Pet. 4 n.2.

from excluding them from an official speech on private property on the basis of their viewpoint." *Id.* at 10a. It found that "no specific authority instructs this court (let alone a reasonable public official) how to treat the ejection of a silent attendee from an official speech based on the attendee's protected expression outside the speech area." *Id.* at 16a.[6]

Judge Holloway dissented. Rehearing en banc was denied on an equally divided vote.

REASONS FOR DENYING THE WRIT

I. The Decision Below Does Not Conflict With Any Other Court Decision.

Contrary to petitioners' assertion, the Tenth Circuit's decision does not conflict with any other decision by any other court. That is, petitioners cite no case that involves similar facts, applies modern qualified immunity doctrine, and holds that conduct of the sort alleged here violates a clearly established First Amendment right of which a reasonable official (in this case, a volunteer) would have known. Because there is no conflict, there is no need to review the decision below. *See Braxton* v. *United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals and state courts * * *.").

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[6] Contrary to petitioners' claim (Pet. 5, 9), the Tenth Circuit did not suggest that Weise's bumper sticker lacked First Amendment protection. The court said that petitioners' speech was not restricted in this case. Instead, petitioners were not allowed to be present at the President's speech. *See* Pet. App. 12a-13a. Regardless, this Court "reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quotation marks omitted).

Petitioners claim that the Tenth Circuit's decision conflicts with *Sparrow* v. *Goodman*, 361 F. Supp. 566 (W.D.N.C. 1973), *aff'd*, *Rowley* v. *McMillan*, 502 F.2d 1326 (4th Cir. 1974). It does not. *Sparrow* is petitioners' leading case for the supposed "split" among the lower courts. Pet. 6. It is the only case for which petitioners venture to describe the facts. *See id.* 6-7. Yet *Sparrow* differs from this case in several relevant respects.

Sparrow involved a public rally honoring the Reverend Dr. Billy Graham and attended by President Nixon. A class action was filed alleging that numerous individuals were "unconstitutionally arrested and assaulted, and excluded from 'Billy Graham Day' at the Charlotte Coliseum." 361 F. Supp. at 568.

This case differs from *Sparrow*, first, in that President Bush's speech took place at a private museum before a limited audience whereas the Billy Graham rally occurred at "a public facility" to which "[t]he public generally was invited." 502 F.2d at 1329. *See* 361 F. Supp. at 582 ("The Coliseum is a public building; Billy Graham Day was a public event"). The public setting of the event was essential to the District Court's ruling in *Sparrow*. The court limited the scope of the plaintiff class to persons "arbitrarily excluded from the general *public* presence of the President of the United States at *public* gatherings." *Id.* at 585 (emphases added).

Second, the *Sparrow* plaintiffs alleged, not only that they were excluded from the Charlotte Coliseum, but "that they were unconstitutionally arrested and assaulted." *Id.* at 568. No one arrested or assaulted petitioners. And *Sparrow* involved the arrest, assault, and exclusion of numerous people—

so many that a class was certified. *See id.* at 585 ("The class is so numerous that joinder of all members is impractical.").

Third, the relief granted by the District Court in its opinion at 361 F. Supp. 566 was a preliminary injunction, not damages. An immunity defense was not available as to injunctive relief. *See* 502 F.2d at 1330-32. The District Court stated that if the defendant officers acted in a good faith, reasonable belief that their actions were necessary, "I do not see where they would have any liability to any injured citizen." 361 F. Supp. at 586 (citing *Bivens*).

Furthermore, as a decision granting a preliminary injunction, the District Court's ruling was not on the merits. Preliminary injunctions are awarded, not on the merits, but on the *likely* merits. Nor did the Fourth Circuit rule on the merits. Preliminary injunctions are reviewed for abuse of discretion, and the Fourth Circuit held only that the District Court did not commit such abuse. *See* 502 F.2d at 1334. ("We cannot say that it abused that discretion in concluding that interim injunctive relief was proper"). The Fourth Circuit's opinion, moreover, did not analyze the First Amendment issue in the case. *See Mahoney* v. *Babbitt*, 105 F.3d 1452, 1459 (D.C. Cir. 1997) (noting that the Fourth Circuit "affirmed with virtually no discussion of the constitutional issue").[7]

There is no conflict between the decision below and

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[7] The District Court's analysis was likewise sparse. Indeed, as the Fourth Circuit admitted, the District Court failed to make an explicit finding that the *Sparrow* plaintiffs were likely to succeed on the merits. *See* 502 F.2d at 1334.

Sparrow, but even if there were, a conflict between the Tenth Circuit's decision and the District Court decision in *Sparrow* would not warrant review. And there clearly is no conflict between the decision below and the Fourth Circuit's decision. The Fourth Circuit merely upheld a preliminary injunction under the abuse of discretion standard. It did not hold that the defendants violated clearly established constitutional rights and hence lacked qualified immunity. Indeed, the "clearly established" rights test for judging qualified immunity claims had not yet been developed by this Court. *See Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); *Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978); *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975). In any event, the defendants had no immunity defense because the District Court granted injunctive relief only.

Petitioners also allege a conflict with *Glasson* v. *City of Louisville*, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975). In that case, Glasson stood along the route of President Nixon's motorcade and displayed a sign protesting war and poverty. Police officers took the sign from her and tore it up, believing it to be detrimental to the President. *Glasson* is a different case, for two reasons. First, unlike petitioners, who were ejected from a private venue, Glasson was "standing on a public sidewalk," "a place where she had a right to be." 518 F.2d at 901, 905. Second, unlike Weise's bumper sticker, Glasson's sign was confiscated and destroyed.

In *Mahoney*, *supra*, the plaintiffs were threatened with arrest when they sought a permit from the National Park Service to stage an anti-abortion protest along the route of the 1997 presidential

inaugural parade. Central to the court's decision to grant an injunction[8] was the fact that the plaintiffs did not seek to join the parade but only to stand on a public sidewalk. *See* 105 F.3d at 1456 ("All they seek is the First Amendment-protected right to stand on the sidewalk and peacefully note their dissent as the parade goes by."); *id.* at 1457 ("[T]he location of the proposed protest, that is the sidewalks of Pennsylvania Avenue, decidedly constitute a public forum."). This case would be like *Mahoney* if petitioners had sought to stage a protest on a public sidewalk outside of the Wings Over the Rockies Air and Space Museum. But that is not this case.

The other allegedly conflicting cases that petitioners cite (Pet. 7-8) are even further afield than *Sparrow*, *Glasson*, and *Mahoney*. None of these cases involved a presidential appearance or a private venue. And all of them involved the actual suppression of speech in a public forum. *See Wickersham* v. *City of Columbia*, 481 F.3d 591, 598 (8th Cir.) (plaintiffs prevented from distributing anti-war flyers at air show held at municipal airport; court recognized that the case would be different if it involved "private property, over which [the defendant] had the right to decide who was welcome and who was not") (footnote omitted), *cert. denied*, 552 U.S. 950 (2007); *Gathright* v. *City of Portland*, 439 F.3d 573, 575 (9th Cir.) (plaintiff prevented from preaching "in various public locations in the City of Portland, including the Pioneer Courthouse Square and Waterfront Park"; case involved "the classic right of an individual to speak in the town square"), *cert. denied*, 549 U.S. 815

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[8] *Mahoney* was not a suit for damages, and so the case did not involve the issue of qualified immunity.

(2006); *Parks* v. *City of Columbus*, 395 F.3d 643 (6th Cir. 2005) (similar case; street preacher evicted from public street during arts festival held in downtown Columbus); *Monteiro* v. *City of Elizabeth*, 436 F.3d 397 (3d Cir.) (city council member ejected by council president from council meeting and arrested on disorderly conduct charge), *cert. denied*, 549 U.S. 820 (2006); *Musso* v. *Hourigan*, 836 F.2d 736 (2d Cir. 1988) (member of public removed by police from school board meeting and arrested for disorderly conduct).

To the extent that petitioners allege a conflict with *Worrell* v. *Henry*, 219 F.3d 1197 (10th Cir. 2000), *cert. denied*, 533 U.S. 916 (2001), with respect to the Tenth Circuit's requirements for a First Amendment retaliation claim, *see* Pet. 11-12, such an alleged intra-circuit conflict does not warrant review. *See Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Furthermore, as the Tenth Circuit observed, petitioners failed to raise a retaliation claim. *See* Pet. App. 11a n.1 ("No such argument appears in the briefs.").

II. Petitioners Still Have Pending Claims Against Other Defendants.

Petitioners' First Amendment claims have not been resolved by the lower courts. While their claims against Casper and Klinkerman have been dismissed, petitioners still have pending claims against four other defendants in two federal district courts arising from the very events at issue here. And petitioners' claims against Steven Atkiss, James O'Keefe, Greg Jenkins, and Todd Beyer represent superior vehicles for deciding the First Amendment issue raised by the events of March 21, 2005, for two

reasons. First, unlike respondents, who were volunteers, the remaining defendants were White House officials. Second, petitioners in their suit against Jenkins and Beyer have requested declaratory relief, for which qualified immunity is not available.

Petitioners learned in discovery that two White House officials—Atkiss and O'Keefe—instructed Casper to exclude petitioners from the President's speech in Denver. Petitioners then filed a separate lawsuit against Atkiss and O'Keefe. *See Weise, et al.* v. *Jenkins, et al.*, No. 07-cv-515 (D. Colo.). Like their suit against Casper and Klinkerman, petitioners' suit against Atkiss and O'Keefe is a *Bivens* action seeking money damages. Petitioners' second suit is "based on the same set of facts occurring on March 21, 2005." Compl. ¶ 40 (C.A. App. 168).

Petitioners' suit against Atkiss and O'Keefe is a better vehicle for adjudicating their First Amendment claims because Atkiss and O'Keefe were White House officials who instructed Casper to eject petitioners from the President's speech whereas Casper and Klinkerman were merely local volunteers who carried out that instruction. Thus, petitioners' claims against Atkiss and O'Keefe do not implicate the Volunteer Protection Act of 1997, 42 U.S.C. §§ 14501-14505, or the question whether *Bivens* suits should be recognized against federal volunteers. *See infra* at 23-25.

Petitioners have a third lawsuit pending in a different circuit arising from the events of March 21, 2005. *See Weise, et al.* v. *Jenkins, et al.*, No. 07-cv-1157 (D.D.C.). In that suit, petitioners allege that Greg Jenkins and Todd Beyer are responsible for policies that caused petitioners to be excluded from

President Bush's speech in Denver. Jenkins served as Director of the White House Advance Office from January 2003 to November 2004, and Beyer held that office at the time of the President's speech.

In addition to seeking damages from Jenkins and Beyer, petitioners in that action also seek a declaration that their First Amendment rights were violated. That claim for declaratory relief is not barred by qualified immunity. *See Morse* v. *Frederick*, 551 U.S. 393, 400 n.1 (2007). Thus, the District Court may reach the merits of the First Amendment issue whether or not Jenkins and Beyer have qualified immunity from damages.

This Court should allow petitioners' two pending lawsuits against the four White House officials to percolate rather than reviewing the grant of qualified immunity to the two volunteers in this case. Other plaintiffs also have pending claims alleging exclusion from presidential appearances based on viewpoint and in violation of the First Amendment. *See Pahls* v. *Board of County Comm'rs for County of Bernalillo*, No. 08-cv-53 (D. N.M.). The plaintiffs in *Pahls* are represented by the same ACLU lawyers who represent Weise and Casper. *See also* Pet. App. 21a-22a (Holloway, J., dissenting) (stating that "there have been several cases" in recent years involving "somewhat similar circumstances").

III. The Tenth Circuit Did Not Decide Whether Petitioners' First Amendment Rights Were Violated.

Another reason to deny review is that the Tenth Circuit's holding in this case is limited to the issue of qualified immunity. That court did "not reach the question of whether [respondents] violated [petition-

ers'] constitutional rights." Pet. App. 16a. It held only that "the constitutional right claimed was not clearly established at the time of the alleged violation." *Id.*[9]

In electing to resolve only the qualified immunity issue, the Tenth Circuit followed *Pearson* v. *Callahan*, 129 S. Ct. 808 (2009). Revisiting *Saucier* v. *Katz*, 533 U.S. 194 (2001), *Pearson* held that lower courts have discretion to dismiss a damages suit based on qualified immunity without deciding whether the alleged facts state a constitutional violation.

The Tenth Circuit's decision to tackle only the qualified immunity issue was proper. The question whether, under the circumstances, petitioners' exclusion from President Bush's limited-audience speech at a private venue violated the First Amendment "is so fact-bound" that deciding it would have "provide[d] little guidance for future cases." *Pearson*, 129 S. Ct. at 819. For the same reason, reviewing the Tenth Circuit's decision would contribute little to the development of First Amendment law.

IV. Respondents Are Immune From This *Bivens* Suit Seeking Money Damages.

A. Other Courts Have Rejected Similar First Amendment Claims or Granted Qualified Immunity on Similar Facts.

Casper and Klinkerman did not violate petitioners' clearly established constitutional rights. On the

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[9] The District Court held that petitioners' First Amendment rights were not violated, *see* Pet. App. 54a, but that ruling is "unpublished and not precedential." *Id.* at 22a (Holloway, J., dissenting).

contrary, prior cases involving similar facts undermine petitioners' First Amendment claim.

In *Sistrunk* v. *City of Strongville*, 99 F.3d 194 (6th Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997), the plaintiff showed up at a Bush-Quayle rally during the 1992 presidential campaign wearing a Bill Clinton button. The Bush-Quayle campaign committee had obtained a city permit to hold the rally on public property, the Strongville Commons. Although the plaintiff had a ticket to attend the rally, a committee official required her to surrender her button before she could enter. The Sixth Circuit found no First Amendment violation. Calling it "[t]he most similar case," the Tenth Circuit found that *Sistrunk* "weighs against [petitioners'] argument that the alleged constitutional right was clearly established." Pet. App. 15a.

So does *Katz* v. *United States*, 194 F.3d 962 (9th Cir. 1999), *rev'd, Saucier v. Katz*, 533 U.S. 194 (2001). In that case, Katz attended a speech by Vice President Al Gore in San Francisco celebrating the Presidio Army Base's conversion to a national park. As Vice President Gore was speaking, Katz approached the fence separating the public from the stage and removed from his jacket a banner stating "Please Keep Animal Torture Out of Our National Parks." Saucier, a military police officer, seized Katz, took the banner from him, and rushed him out of the area. *See* 533 U.S. at 197-198. Katz filed a *Bivens* suit alleging violations of his First and Fourth Amendment rights. As to Katz's First Amendment claim, the District Court granted Saucier qualified immunity. *See* 194 F.3d at 966. The District Court concluded that because the Presidio

was in a "transitional stage" the "constitutional rights of protestors at the base were not well settled" and "a reasonable military officer could have concluded that preventing protests at the base was constitutional." *Id.* (quoting the District Court) (brackets omitted). Katz did not appeal that ruling.[10]

In *McIntosh* v. *Arkansas Republican Party-Frank White Election Committee*, 766 F.2d 337 (8th Cir. 1985), McIntosh bought a ticket to a luncheon fundraiser for the Governor of Arkansas at which Vice President George H.W. Bush was to speak. The fundraiser was to be held in a banquet hall within the Little Rock convention center available for private gatherings. McIntosh, a known opponent of the Governor, sent a letter to the Governor's office stating that he intended to speak at the luncheon. When McIntosh arrived at the event, he was met by the head of the Governor's reelection committee and two Arkansas state troopers, who told McIntosh he could not attend the luncheon and asked him to leave. McIntosh persisted and was arrested and charged with disorderly conduct. McIntosh filed a Section 1983 suit, claiming a First Amendment violation. The Eighth Circuit, however, held that "McIntosh has suffered no constitutional deprivation." *Id.* at 341.

The Eighth Circuit noted that "McIntosh does not assert that he was denied the right to express his

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[10] As to Katz's Fourth Amendment claim, this Court held that qualified immunity shielded Saucier from damages, stating that "neither [Katz] nor the Court of Appeals has identified any case demonstrating a clearly established rule prohibiting the officer from acting as he did, nor are we aware of any such rule." 533 U.S. at 209.

views in the public or common access areas of the convention center or that he was actually exercising his first amendment rights at the time he was arrested." *Id.* at 340. "The purchase of the ticket," the court wrote, "gave rise to no first amendment rights in the context of this case. The luncheon was in all respects private." *Id.* at 341. And the court noted that "McIntosh had no constitutional right to enter and disrupt this private event * * * ." *Id.*

Like McIntosh, petitioners were not denied the right to express their views in any public area and were not engaged in expressive activity when they were asked to leave. Like McIntosh, petitioners had tickets but the event was held in a private forum. And like McIntosh, petitioners had no First Amendment right to attend and disrupt the event.

Given *McIntosh*, *Katz*, and *Sistrunk*, it cannot be said that Casper and Klinkerman violated a clearly established constitutional right.

B. General First Amendment Principles Do Not Show a Violation of Clearly Established Law.

Respondents contend that this case can be decided by invoking the general First Amendment principle that the government may not discriminate against speech based on the viewpoint of the speaker. But as Justice Holmes once observed: "General propositions do not decide concrete cases." *Lochner* v. *New York*, 198 U.S. 45, 76 (1905) (dissenting).

To begin with, this Court has repeatedly held that qualified immunity decisions are not to be made based on general principles. The inquiry into whether a right is clearly established, "it is vital to

note, must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201. *See also, e.g.*, *Brosseau* v. *Haugen*, 543 U.S. 194, 198-199 (2004); *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987).

Furthermore, although it is true that the government generally may not discriminate against speech based on viewpoint, there are a number of other competing doctrines, principles, and considerations that cut against petitioners' First Amendment claim.

First, as the Tenth Circuit recognized, this case implicates "the President's rights as a speaker under the government speech doctrine." Pet. App. 11a n.1. *See Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125 (2009). President Bush had a right to speak and to control his message, and the job of the Advance Office and its local volunteers was to assist him in that endeavor.

This case also involves the President's "rights to expressive association." Pet. App. 11a n.1. And the "First Amendment freedom to gather in association for the purpose of advancing shared beliefs," this Court has said, "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107, 121, 122 (1981). "That is to say, a corollary of the right to associate is the right not to associate." *California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000). Simply put, the President and his staff had broad discretion to decide who could attend his speech in Denver and who could not.

Second, the alleged First Amendment violation

occurred on private property. The Wings Over the Rockies Air and Space Museum is a private venue. There is no general right to engage in expressive activity on private property owned by another, even if that property is usually open to the public. *See Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972) (upholding ejection of persons distributing anti-war handbills from privately owned shopping center). When individuals engage in unwanted expressive activities on private property, they may be asked to leave the premises. *See id.* at 556 (security guards asked handbill distributors to relocate to public streets and sidewalks outside the shopping center). The First Amendment has never meant that "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." *Adderley* v. *Florida*, 385 U.S. 39, 48 (1967). If the Advance Office officials decided that persons bearing the message "No More Blood for Oil" should be asked to leave this event held on private property, they violated no clearly established First Amendment right in doing so.

Third, the President's address in Denver event was "not a forum for speech" by private individuals. *Locke* v. *Davey*, 540 U.S. 712, 720 n.3 (2004). The Government was "speaking on its own behalf," not "providing a forum for private speech." *Pleasant Grove*, 129 S. Ct. at 1132. Petitioners contend that the Government cannot discriminate against speech based on viewpoint whether the speech occurs in a public forum, a limited public forum, or a nonpublic forum. But petitioners fail to recognize that the Denver event was "not a forum *at all*." *Arkansas Educ. Tel. Comm'n* v. *Forbes*, 523 U.S. 666, 678 (1998) (emphasis added).

The fact that President Bush's speech was opened to members of the public on a limited basis did not transform the event into a forum for private speech. This Court has rejected the notion "that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment." *Greer* v. *Spock*, 424 U.S. 828, 836 (1976). "Such a principle of constitutional law has never existed, and does not exist now." *Id.*

Fourth, there is no First Amendment right to disrupt someone else's speech. *See, e.g.*, *Startzell* v. *City of Philadelphia*, 533 F.3d 183, 198 (3d Cir. 2008) ("The right of free speech does not encompass the right to cause disruption"); *McIntosh*, 766 F.2d at 341 ("McIntosh had no constitutional right to enter and disrupt this private event"). A concern that petitioners might try to disrupt the President's speech clearly motivated Casper's conduct. *See* Compl. ¶ 23 (alleging that Casper told Weise "he was going to let [her] in" but that she should not try "any 'funny stuff' "); *see also* Casper Dep. 7, 19.

Even if petitioners did not intend to disrupt the speech, they did not have a constitutional right to attend it. *See* Pet. App. 12a. There is no constitutional right to see the President. *See Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965) ("entry into the White House [is not] a First Amendment right"). Petitioners had tickets to attend the President's speech, but tickets did not guarantee admission. All ticket holders, for example, had to show identification and pass through metal detectors. Compl. ¶ 19. A ticket to attend an event with the President comes with conditions attached and is not irrevocable.

Fifth, petitioners' speech was not suppressed or prevented in any respect. *See* Pet. App. 11a (Casper and Klinkerman "did not suppress [petitioners'] bumper sticker speech nor did the government prosecute [petitioners] for the speech"). No one attempted to remove or obscure Weise's bumper sticker or otherwise keep petitioners from expressing any view. *Cf. Glasson*, 518 F.2d at 902 (police took and tore up sign critical of President Nixon). Petitioners "did not intend to speak at the President's speech," Pet. App. 12a, so their ejection from the event did not deprive them of any speech.

C. Casper's Alleged Conduct Was That of a Reasonable Volunteer.

As this Court has explained, qualified immunity shields a government officer from a damages suit unless "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. Here, Casper was not a professional, full-time, highly-trained law enforcement officer or other government official but a local volunteer working under the close supervision of the White House Advance Office. And his alleged conduct was consistent with that of a reasonable volunteer in the circumstances. On his own, Casper decided to allow Weise to enter the museum. Compl. ¶¶ 23, 25 (alleging that Casper told Weise "that he was going to let [her] in," which he did). When Casper later told Weise and Young that they had to leave, he was carrying out the directions of his White House supervisors. *Id.* ¶¶ 25, 33. Thus, Casper ejected petitioners only because he was instructed to do so. He did exactly what is expected of volunteers, and his doing so should not make him liable for money damages.

It would not be clear to a reasonable volunteer in Casper's situation that his conduct was unlawful. While escorting them out of the museum, Casper explained to Weise and Young that "this is a private event, and you have to leave." *Id.* ¶ 27. He had previously expressed concern that Weise might try some "funny stuff" during the President's speech. *Id.* ¶ 23. Casper could have reasonably believed that it would violate no constitutional right to carry out his supervisors' instructions to ask petitioners to leave the museum, a private venue, in order to ensure that the President's speech would not be disrupted. Only woefully deficient conduct forfeits qualified immunity. *See Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"); *Saucier*, 533 U.S. at 202 (same). Casper behaved as a reasonable volunteer under the circumstances.

D. As Government Volunteers, Respondents Are Immune From This *Bivens* Suit.

Hui v. *Castaneda*, 130 S. Ct. 1845 (2010), handed down after the Tenth Circuit's decision, confirms that Casper and Klinkerman are immune from petitioners' suit for money damages. In *Hui*, an immigration detainee filed a *Bivens* action against employees of the U.S. Public Health Service ("PHS") alleging they were indifferent to his medical needs. This Court held that a federal statute, 42 U.S.C. § 233, immunized the defendants from the *Bivens* suit because the statute bars all civil actions against PHS employees arising from the performance of medical functions within the scope of their employment. *See* 130 S. Ct. at 1851. This Court said "an

action under *Bivens* will be defeated if the defendant is immune from suit." *Id.* at 1852.

Here, petitioners' *Bivens* suit against Casper and Klinkerman is barred by the Volunteer Protection Act of 1997, 42 U.S.C. §§ 14501-14505. Congress enacted this statute for the purpose of "clarifying and limiting the liability risk assumed by volunteers." *Id.* § 14501(a)(7). The Act provides that "no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity." *Id.* § 14503(a). This liability protection applies so long as (1) "the volunteer was acting within the scope of the volunteer's responsibilities * * *"; (2) "if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities * * *"; (3) "the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer"; and (4) the harm was not caused by the volunteer operating a motor vehicle. *Id.* § 14503(a)(1)-(4). All four provisos are met in this case. The Volunteer Protection Act thus immunizes respondents from this *Bivens* suit for money damages. Congress has "resolved the question presented by this case by expressly denying petitioner[s] the judicial remedy [they] seek[ ]." *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983).[11]

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[11] Although respondents did not raise the Volunteer Protection Act in the courts below, the Act is properly considered here. *See Elder* v. *Holloway*, 510 U.S. 510, 512 (1994) (qualified immunity rulings are reviewed in light of all relevant legal authority, whether or not cited below).

V. This Court Has Never Extended *Bivens* to First Amendment Claims or to Suits Against Federal Volunteers.

A final reason to deny review is that this Court has never extended *Bivens* to First Amendment claims, of any sort, or to suits against federal government volunteers. *Bivens*, decided in 1971, involved a Fourth Amendment claim against federal law enforcement officers. This Court has also approved of *Bivens* suits against a Member of Congress for sex discrimination in violation of the Fifth Amendment's Due Process Clause, *see Davis* v. *Passman*, 442 U.S. 228 (1979), and against prison officials for violations of the Eighth Amendment's Cruel and Unusual Punishment Clause, *see Carlson* v. *Green*, 446 U.S. 14 (1980). In the last four decades, however, this Court has not approved any other extension of *Bivens*. In *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), this Court stated that "[b]ecause implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.' " *Id.* at 1948 (quoting *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001)).

Here, petitioners propose to extend *Bivens* to a brand new context—First Amendment free speech claims—and to a brand new category of defendants—federal volunteers carrying out the directions of their supervisors. The propriety of that proposed extension is extremely doubtful given that this Court previously (1) has "declined to extend *Bivens* to a claim sounding in the First Amendment," *Iqbal*, 129 S. Ct. at 1948 (citing *Bush* v. *Lucas*, 462 U.S. 367 (1983)), and (2) has declined to extend *Bivens* "to confer a right of action for damages against private

entities, acting under color of federal law." *Correctional Services Corp.*, 534 U.S. at 519.[12]

Reviewing the question presented regarding respondents' qualified immunity would not be a constructive use of this Court's resources. The question whether a *Bivens* suit exists is logically prior to the question whether a defendant has qualified immunity from such suit. Thus, to reach the question presented here this Court would probably have to assume the existence of a *Bivens* remedy against federal volunteers for First Amendment free speech violations—a remedy that in all likelihood does not even exist. *See* Volunteer Protection Act, 42 U.S.C. § 14503(a). The Court should not spend time deciding whether an immunity defense bars a *Bivens* claim that the Court likely would not recognize in the first place.[13]

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[12] At least two members of this Court believe that no new *Bivens* actions should be recognized. *See Wilkie* v. Robbins, 551 U.S. 537, 568 (2007) (Thomas, J., concurring) ("*Bivens* and its progeny should be limited 'to the precise circumstances that they involved.' ") (quoting *Correctional Services Corp.*, 534 U.S. at 75 (Scalia, J., concurring)).

[13] If review were granted, Casper would defend the judgment below on the ground that *Bivens* should not be extended to cover petitioners' First Amendment claim against respondents.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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