No. 10-67

IN THE

Supreme Court of the United States

LESLIE WEISE, ALEX YOUNG,

Petitioners,

v.

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,

Respondents.

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

BRIEF FOR RESPONDENT JAY BOB KLINKERMAN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN S. ZAKHEM
ZAKHEM LAW, LLC
700 17th Street,
Ste. 2000
Denver, CO 80202
(303) 228-1200

BRETT R. LILLY
Counsel of Record
BRETT R. LILLY, LLC
6730 West 29th Avenue
Wheat Ridge, CO 80214
(303) 233-0973
BrettLilly@comcast.net

Counsel for Respondent Jay Bob Klinkerman

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

Blank Page

QUESTIONS PRESENTED

I. Whether respondent Klinkerman, a private citizen voluntarily assisting at a federally-sponsored event, is entitled to invoke the protections of qualified immunity in the absence of proof that he was closely supervised by federal officials?

II. Whether Respondents are entitled to qualified immunity because there was no First Amendment violation under the government speech doctrine when the President delivers a speech on the topic of Social Security, with tickets required for admission in a limited private forum?

III. Whether Petitioners have presented compelling reasons to grant the Petition, where the Tenth Circuit's Opinion affirming the grant of qualified immunity on the narrow ground that the law was not clearly established does not conflict with a decision of this Court or a Court of Appeals?

IV. Whether Respondents are entitled to qualified immunity because any First Amendment rights of Petitioners that were violated were not clearly established?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Federal Rules

Blank Page

INTRODUCTION

Petitioners have presented no "compelling reasons" for their Petition for a Writ of *Certiorari* to be granted ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioners fail to demonstrate that the Tenth Circuit's January 27, 2010 Opinion ("Opinion") is in conflict with a decision of this Court or another Court of Appeals, or that the Tenth Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). The Opinion's narrow holding affirming the grant of qualified immunity because the law was not clearly established is correct and the Petition should be denied.

In terms of First Amendment jurisprudence, this is either a relatively easy case of government speech, or it is a complicated case involving the intersection of government speech on private property, rights of access, and limited private or nonpublic forums. As a matter of pure government speech, the First Amendment does not apply and there is no violation of Petitioners' rights. The alternative approach involves questions of first impression and, as such, the law is not clearly established. In either event, because respondent Jay Bob Klinkerman was a volunteer closely supervised by government officials, who only detained Petitioners upon entry and did not physically participate in their ejection from the President's speech, he is entitled to qualified immunity.

The museum where the President gave his speech was private property, and because tickets were required for admission, the event was a limited private forum. Under these circumstances, the government speech doctrine applies and there is no First Amendment violation. The District Court agreed, stating Petitioners' "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." (Pet. App. at 54a) (emphasis in original). Assuming, *arguendo*, that Petitioners' First Amendment rights were violated, such rights were not clearly established as evidenced by the fact that the Petitioners do not cite any "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 alleged in the Complaint. (Pet. App. at 55a). The Tenth Circuit agreed, holding solely that "[b]ecause the constitutional right asserted by the [Petitioners] was not clearly established at the time of the alleged violation, we affirm the grant of qualified immunity." (Pet. App. at 3a).

Following *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009), the Tenth Circuit determined that it was appropriate to skip the constitutional question so as to conserve judicial resources, indicating that the facts may offer little guidance for future cases and that there was a risk of deciding the case incorrectly

given the insufficient record on the constitutional violation. (Pet. App. 7a-8a); *see also Weise v. Casper*, 507 F.3d 1260, 1266-67 (10th Cir. 2007) ("[T]he district court determined that whether qualified immunity was even available as a defense was unclear because the allegations in the complaint were not well-pleaded, and ordered limited discovery to correct that problem."); *id.* at 1268 n.1 (McConnell, J., dissenting) ("The allegations in the complaint do not set forth the terms of the alleged federal policy the defendants were enforcing or its asserted authority or justifications, which would make constitutional analysis extremely difficult."); *see also Pearson*, 129 S. Ct. at 819 ("When qualified immunity is asserted at the pleading stage, the precise factual basis for the plaintiff's claim or claims may be hard to identify."). The Opinion even questions Petitioners' formulation of the legal theory of the case. (Pet. App. 11a n.1). Ultimately, the Opinion concludes that while "it is unclear whether [Respondents'] alleged conduct violated [Petitioners'] constitutional rights, it is obvious that the rights were not clearly established at the time of the violation." (Pet. App. at 8a).

This conclusion is a sound exercise of judicial discretion for several reasons. *Pearson*, 129 S. Ct. at 818. First, no case holds that the public forum doctrine applies to private property.[1] (Pet. App. at

[1] As a general matter, exclusion of speakers from private property does not violate the First Amendment. *Hudgens v. NLRB*, 424 U.S. 507, 519 (1976) (rejecting argument that private shopping center "open to the public" was dedicated to

10a). Second, no case holds that there is a right of access under the First Amendment to attend a Presidential speech, or whether a ticket to the event is a merely a revocable license. (Pet. App. at 12a and n.2). Third, no case evaluates how the government speech doctrine relates, if at all, to the issues of rights of access to limited private forums or limited non-public forums. (Pet. App. at 11a and n.1; 14a). Finally, there was no actual restriction of Petitioners' bumper sticker. (Pet. App. at 11a). In short, Petitioners assume that there is a First Amendment right of individuals to attend public events sponsored by the government on private property. But this issue has never been decided;

---

public use for free speech). Further, "the extent to which private property can be designated a public forum" has yet to be decided. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 742 (1996) (plurality opinion); *see id.* at 793 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("We need not decide here any broad issue whether private property can be declared a public forum by simple governmental decree."); *id.* at 827 (Thomas, J., concurring in the judgment in part and dissenting in part) ("The public forum doctrine is a rule governing claims of 'a right of access to public property,' and has never been thought to extend beyond property generally understood to belong to the government.") (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 44 (1983)); *see also International Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 681 (1992) (evidence of expressive activity at rail stations, bus stations, wharves, and Ellis Island was "irrelevant to *public* fora analysis, because sites such as bus and rail terminals traditionally have had *private* ownership.") (emphasis in original).

therefore the law cannot be clearly established. (Pet. App. at 10a). These issues are apparent in Petitioners' framing of the question presented, and the "potential relevance of these doctrines reveals that the proper categorization of this case is far more complicated than the dissent acknowledges and that [Petitioners'] rights are far from clearly established." (Pet. App. at 11a n.1).

For these reasons, the Opinion does not conflict with *Rowley v. McMillan*, 502 F.2d 1326, 1329 (4th Cir. 1974), as Billy Graham Day "was a rally at the Charlotte Coliseum, a public facility" and the plaintiffs alleged "that they were denied admission or were ejected or were arrested . . . ." Petitioners have again failed "to recognize a crucial distinction" that *Rowley* and all of the cases cited by Petitioners involved plaintiffs who "wished to speak or demonstrate in a public forum." (Pet. App. at 14a). Petitioners' argument amounts to an unwarranted expansion of the forum doctrine by applying it for the first time to private property, as opposed to the traditional understanding of the public forum doctrine as regulating access to speech and events on public property owned or controlled by the government. Additionally, the appearance by the President at the Billy Graham Day event is not alleged to have involved a government speech on an important public issue like Social Security. The Opinion properly noted that *Rowley* was decided well before the development of both the government speech doctrine and the qualified immunity doctrine. (Pet. App. at. 14a.-15a.). Further, the Petitioners'

speech at issue here – the bumper sticker – was not suppressed "nor did the government prosecute Plaintiffs for the speech." (Pet. App. at 11a). Finally, because the Opinion did not reach the constitutional issue, a narrow holding that the law was not clearly established does not conflict with a decision of this Court or a Court of Appeals.

As a matter of judicial economy, there is no need to reach the constitutional question on a limited record with only limited discovery, as this is not a case where the "constitutional question . . . is . . . easily decided." *Scott v. Harris*, 550 U.S. 372, 377 n.4 (2007). To the contrary, because this is a case "where the constitutional question is relatively difficult and the qualified immunity question relatively straightforward," the Opinion is correct that deciding only the question of qualified immunity is the "better approach," and the Petition should be denied. *Id.* (quotation marks and citations omitted).

STATEMENT OF THE CASE

On March 21, 2005, the President delivered a speech on Social Security at the Wings Over the Rockies Air and Space Museum, in Denver, Colorado. (Pet. App. at 3a; 37a). The White House set the policies and procedures regarding who could attend, and tickets were made available to the public. (Pet. App. at 3a). The White House solicited the assistance of staff and volunteers, including Respondents, to carry out the attendance policies at

the event. (Pet. App. at 3a). Admission was limited to those who obtained a ticket. (Complaint ¶¶ 10, 12).

To obtain tickets to the event, Petitioners were required to show their drivers licenses and provide their names and addresses. (Pet. App. at 4a). Petitioners arrived at the event in Weise's car, which had a bumper sticker that read "No More Blood For Oil." (Pet. App. at 4a). Casper and Klinkerman were present at the President's speech, carrying out the instructions and policies of federal officials, including White House Advance Office employees Atkiss and O'Keefe. (Pet. App. at 4a). While Young was permitted to enter, Weise was directed to wait with Klinkerman. Klinkerman identified himself as a "volunteer," and told Weise the Secret Service wanted to speak with her. (Pet. App. at 4a). Soon thereafter, Casper approached, and Klinkerman said, "that's him" or "here he comes." (Complaint ¶ 22). Casper told Weise "she had been 'ID'd', and that if she had any ill intentions" or "tried any 'funny stuff' [she] would be arrested, but that he was going to let [her] in." (Pet. App. at 4a).

Casper then consulted with White House Advance Office employees Atkiss and O'Keefe who instructed Casper to eject Petitioners from the event. (Pet. App. at 3a-4a). A few minutes later, Casper approached Petitioners, who had reached their seats, and asked them to leave the event. (Pet. App. at 4a). Petitioners were escorted out of the event and were not allowed to reenter. (Pet. App. at 4a). After the

event, the Secret Service confirmed that Petitioners were asked to leave because of the bumper sticker on their car. (Pet. App. at 5a).

REASONS FOR DENYING THE PETITION

The decision below does not conflict with a decision of this Court or any Court of Appeals, nor does it implicate a question of federal law that should be settled by this Court. Accordingly, Petitioners have not carried their burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. KLINKERMAN IS ENTITLED TO ASSERT QUALIFIED IMMUNITY AS A VOLUNTEER SUPERVISED BY THE GOVERNMENT

The Complaint alleges that Respondents were selected as staff or volunteers, and that they acted at the direction of and were substantially supervised by federal officials. (Complaint ¶¶ 11, 25, 33, 34). Klinkerman argued that as a volunteer, he is entitled to assert qualified immunity under *Eagon ex rel. Eagon v. City of Elk City*, 72 F.3d 1480, 1489 (10th Cir. 1996); *see Weise v. Casper*, 507 F.3d 1260, 1271-73 (McConnell, J., dissenting). (Pet. App. at 6a-7a; 46a-47a).

The doctrine of qualified immunity protects public officials performing discretionary functions unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S.

800, 818 (1982). Prior to *Richardson v. McKnight*, 521 U.S. 399 (1997), the rule in the Tenth Circuit was that "a private individual who performs a government function pursuant to a state order or request is entitled to qualified immunity if a state official would have been entitled to such immunity had he performed the function himself." *Eagon*, 72 F.3d at 1489 (cited in *Richardson*, 521 U.S. at 402) (internal quotation marks omitted).

As articulated by Judge McConnell, *Weise*, 507 F.3d at 1271-73 (McConnell, J., dissenting), the justifications for denying qualified immunity in *Richardson* do not apply to private persons like Klinkerman volunteering to assist federal officials in the conduct of public functions. Volunteers receive no payment, benefits, or other economic advantage; and no private employer is forced to obtain insurance on their behalf. In this regard, qualified immunity is of greater necessity for persons voluntarily assisting the government than it is for government officials, who at least are being paid to do the job and might be fired for lax performance. If government officials need qualified immunity because the "fear of being sued . . . dampen[s] the ardor of all but the most resolute, or the most irresponsible," *Harlow*, 457 U.S. at 814 (internal quotation marks omitted), then private citizens cooperating with the government out of motives of public service deserve it even more. Any other rule will result in a chilling effect for government volunteerism.

Although the Opinion did not decide the issue of whether private citizens voluntarily assisting at a

federally-sponsored event are entitled to invoke the protections of qualified immunity absent proof that they were closely supervised by federal officials, Klinkerman's volunteer status clearly informs the qualified immunity analysis. (Pet. App. at 7a). The volunteer status of Klinkerman is important because qualified immunity is "an immunity from suit rather than a mere defense to liability . . . ." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Volunteers in particular have an interest to ensure that "insubstantial claims" can "be resolved prior to discovery[,]" *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987), or at the "earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam). A volunteer could also claim "extraordinary circumstances" that "he neither knew nor should have known of the relevant legal standard. . . ." *Harlow*, 457 U.S. at 819. (Pet. App. at 51a).

Alternatively, Petitioners have conceded that the government substantially supervised Klinkerman. (Pet. App. at 7a). This concession of close supervision by government officials entitles Klinkerman to assert qualified immunity under *Richardson*. Given that the White House set all relevant policies, and directed Respondents what to do pursuant to those policies, there can be no reasonable dispute that Respondents were "private individual[s] briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, [and] acting under close official supervision." *Richardson*, 521 U.S. at 413.

II. KLINKERMAN DID NOT VIOLATE A CONSTITUTIONAL RIGHT

This was a speech by the President on the topic of Social Security, and the access sought by Petitioners was to *listen* to the President's speech. (Complaint ¶ 18 ("Plaintiffs wanted to listen to President Bush's views on Social Security.")). Petitioners' arguments regarding viewpoint discrimination do not apply because this is not a classic case of a *speaker* being denied access to a forum owned or controlled by the government. Petitioners were not themselves seeking access to the Museum to deliver a speech. Just because Petitioners had tickets does not mean that the Free Speech Clause guarantees them a right of access to the President's speech. Instead, this case is about government speech and Petitioners' First Amendment rights are not implicated.

To the extent that this case is about the removal of Petitioners based on their bumper sticker, the President is entitled to avoid a controversy or a disruption during his own speech. The President was well within his right to limit his speech to a specified subject matter, and the bumper sticker was off the topic of Social Security. The removal of Petitioners was reasonable in light of the purpose of the event and the nature of the access that Petitioners sought. Accordingly, Klinkerman's alleged conduct did not violate Petitioners' constitutional rights.

A. The President's speech was government speech

The President visited Denver to deliver a speech promoting his policies and ideas related to Social Security. (Pet. App. at 3a; 37a). This is government speech. When the President is engaging in his own expressive conduct, the Free Speech Clause "has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum,* 129 S. Ct. 1125, 1131 (2009). The rationale for this doctrine is that "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000).

When the President chooses to speak, he need not allow any person the opportunity to express a contrary viewpoint during his speech. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573-74 (1995); *Sistrunk v. City of Strongsville*, 99 F.3d 194, 196-200 (6th Cir. 1996).[2]

---

[2] Petitioners' characterization of the right of the speaker to control his own message as "limited" is inaccurate. The notion of being able to control what one says and the concurrent idea that the government or another speaker cannot force one to adopt their ideas or message is central to the very idea of free speech. *See West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642 (1943) (government may not compel affirmance of a belief

This is because a government entity has the right to speak for itself, to say what it wishes, "and to select the views that it wants to express." *Pleasant Grove City*, 129 S. Ct. at 1126, 1131 (citing cases). Under the governmental speech doctrine, the government has the power and the right to control its own speech in a way that is "virtually identical" to that of private actors. *See Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 814 n.31 (1984). Thus, Petitioners have no constitutional right to require the President, at his own speech, to adopt or even allow their dissenting speech, just as one "could not seriously claim the right to attach 'Taxpayer for Vincent' bumper stickers to city-owned automobiles." *Id.*;

---

with which the speaker disagrees). The general rule of autonomy to control one's own speech applies "equally to statements of fact the speaker would rather avoid." *Hurley*, 515 U.S. at 573. As opposed to a "limited" right, "when dissemination of a view contrary to one's own is forced upon a speaker . . . , the speaker's right to autonomy over the message is compromised." *Id.* at 576. Thus, the Petitioners' and the dissent's reliance on *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87-88 (1980), is misplaced because California's compelled access rule is not a concurrent federal right and because the "principle of speaker's autonomy was simply not threatened in that case." *Hurley*, 515 U.S. at 580. A shopping mall is like a festival or an event in a public park where it is easy to "expressly disavow any connection" with the message. *PruneYard Shopping Center*, 447 U.S. at 87. Conversely, a speech is like a rally in that audience approval of the speaker's message is part and parcel of the message. *Sistrunk*, 99 F.3d at 199 (rally sought to "convey a pro-Bush message . . . by use of pro-Bush speakers and largely pro-Bush attendees.").

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995); *Hurley*, 515 U.S. at 575-76; *Rust v. Sullivan*, 500 U.S. 173, 192-95 (1991); *Wells v. City and County of Denver*, 257 F.3d 1132, 1143-44 (10th Cir. 2001).

The elements for government speech are met in this case. Expressive activity that is meant to convey and has "the effect of conveying a government message . . . constitute[s] government speech." *Pleasant Grove City,* 129 S. Ct. at 1134. The President "made a visit to Denver . . . to deliver a speech on the topic of Social Security." (Complaint ¶ 9). Thus, the "central purpose" of the government speech was to deliver the President's message on Social Security. *Wells*, 257 F.3d at 1141. It is also clear that the President, not some private actor or Petitioners, was the "literal speaker." *Id.* Further, based on Petitioners' allegations, (*see* Complaint ¶¶ 11, 25, 27, 32, 33), the government "exercised editorial control over the content" and bore "ultimate responsibility for the contents" of the President's speech. *Wells*, 257 F.3d at 1141. Finally, any "objectively reasonable observer" would believe that the President was "the speaker," as it was literally his speech. *Id.* at 1142. "In this context, there is little chance that observers will fail to appreciate the identity of the speaker." *Pleasant Grove City*, 129 S. Ct. at 1133.

In this case, there is no substantial question presented as to "who is the speaker." *Wells,* 257 F.3d at 1139; *see Pleasant Grove City*, 129 S. Ct. at 1132 ("There may be situations in which it is

difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation."). The President advocating his policies and ideas regarding an important social and political issue, Social Security, is quintessential governmental speech. Petitioners' own Complaint alleges that the purpose of the President's visit was "*to deliver a speech* on the topic of Social Security." (Complaint ¶ 9) (emphasis added); (*see also* Pet. at 2 ("President George W. Bush gave a speech on social security"); *id.* at 6 ("government officials who are speaking at events"); *id* at 10 ("the President's speech took place on private property"); *id.* at 14 ("speeches by the President")). Because Petitioners just "wanted to listen" to the Presidential speech, this case is about the President's free speech rights. (Complaint ¶ 18). The rights of Petitioners are not implicated.

B. The Opinion correctly relied on *Sistrunk*

Confronted with a situation nearly identical to this one, the Sixth Circuit upheld the "exclusion of all speech opposing then-President George Bush's reelection at a political rally held on public property." *Sistrunk,* 99 F.3d at 195. *Sistrunk* stands for the proposition that it is not a constitutional violation for the President to "exclude members of the public who sought to express a discordant message . . . [and to exercise] autonomy over the content of [his] own message." *Id.* at 200. Here, as in *Sistrunk*, the President exercised his speech rights by excluding Petitioners from *his*

speech because they expressed a subject matter contrary to his own. (Complaint ¶¶ 12, 13, 16, 32). *Sistrunk* and *Wells* confirm that the President has the right, at his own speech, to ensure that only his message is conveyed. When the President speaks, he may choose his own words.

Petitioners attempt to distinguish *Sistrunk* by arguing that *Sistrunk* involved "a private event with decisions made by private actors." (Pet. at 10). The President's speech in *Sistrunk* was organized by a private organization. But this fact was immaterial to that decision, as the court explicitly did not decide the issue of whether state action was involved: "Because we find that the plaintiff has not alleged a violation of her free speech rights, we have no occasion to address whether her exclusion from the Commons was state action." *Sistrunk,* 99 F.3d. at 196. The court found no constitutional violation – whether or not the government or a private organization was considered the actor. *Id.*

Petitioners then attempt to distinguish *Sistrunk* by citing the dissent's argument that there was no danger that Petitioners' speech would be seen as having been endorsed by the President. (Pet. at 14). But a speech is like a rally, there is a single unified message being presented of which the audience is a part. This is not a situation where people are wandering around a festival held in a public park or a street, or where a bystander is merely on the sidewalk next to a parade. More importantly, the distinction between participation and attendance does not apply here because the requirement of

admission tickets indicates that the President's speech on Social Security was intended for and restricted to the speaker and his invitees. *Sistrunk,* 99 F.3d at 196; *Startzell v. City of Philadelphia*, 533 F.3d 183, 193 n.7 (3d Cir. 2008) ("the events (Bush-Quayle campaign rallies) were not open to the general public but required attendees to obtain admission tickets."). Thus, this case is on par with *Sistrunk*: "Those seeking admission to the area that was covered by the permit – which area was reasonably necessary to the organizers expressive activity and was restricted to the use of the organizers and their invitees – were in effect seeking inclusion in the expressive activity itself." 99 F.3d at 200.

The instant situation is analogous to *Sistrunk* since in both cases the plaintiffs sought to participate as audience members in a Presidential speech. (Complaint ¶¶ 9, 13, 18); *Sistrunk*, 99 F.3d at 199 ("participating in a rally as a member of the audience is more akin to marching in the parade itself as one of the less visible marchers."). *Sistrunk* establishes that Klinkerman did not violate Petitioners' constitutional rights.

C. Petitioners' speech was not suppressed

Petitioners had the sidewalks, the parking lot and adjacent public forums to express their message, just as in *Sistrunk* the "plaintiff could have stood with her button on the sidewalk leading up to the rally." 99 F.3d at 199. Klinkerman does not dispute that Petitioners had a constitutional right to stand on the

sidewalk outside of the President's speech and express their views. Petitioners do not allege that the White House sought to infringe on the free expression of their views by, for instance, preventing their "No More Blood For Oil" bumper sticker from being viewed. Further, nothing prevented or prevents Petitioners from seeking to use the same forum for their own speech. Viewpoint discrimination is not an issue where the government makes "no effort to abridge the traditional free speech rights" that may be exercised by Petitioners and others in the forum at issue. *Pleasant Grove City*, 129 S. Ct. at 1135.

There was no actual restriction on Petitioners' speech. At worst, they were only reasonably required to exercise their First Amendment rights in a manner that did not force the President to adopt their message of "No More Blood For Oil" into his speech on Social Security. Nothing prevented Petitioners from speaking at a time and place other than the Museum while the President was speaking. Ejecting Petitioners under these circumstances and for these reasons does not amount to a constitutional violation, as *Sistrunk* and *Wells* make clear. In following the instructions of the White House, Klinkerman did not violate Petitioners' constitutional rights.

III. PETITIONERS HAVE NOT ESTABLISHED A CONSTITUTIONAL VIOLATION

The First Amendment question of access in this case depends generally on the nature of the forum

and the access sought by Petitioners. (Pet. at 10 ("relevant focus . . . is the access sought by the individual")).[3] Because the President delivered a speech on the topic of Social Security, the government speech doctrine must be factored into the First Amendment analysis as well.

If the access sought is to a public forum, then the answer depends, in part, on whether the event is limited to ticket holders, such as in *Sistrunk*. If the access sought is to a nonpublic forum, then the restriction need only be reasonable – especially when the government is the speaker. But the Museum is not a public forum because it is not property owned or controlled by the government, so forum cases do not apply. Since the access sought was to a limited private forum, such as the Museum, then the answer is almost certainly that the exclusion presents no

---

[3] Petitioners are incorrect that the status of the property at issue is "irrelevant." (Pet. at 10). For example, the Tenth Circuit has long held that the forum to be analyzed is the property or place, not the event. *Eagon*, 72 F.3d at 1485-87. Petitioners' contrary position seems to be that the event, the President's speech, should be the focus of the analysis, even though the Museum is private property. (*See also* Pet. App. at 24a ("public event")). Even if the forum is the President's speech, the underlying status of the Museum as private property still informs the analysis, just at the "special nature and function of the federal workplace" informed the analysis in *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 801-02 (1985), although the Combined Federal Campaign was considered the relevant forum. At a minimum, "the existence of divergent views as to the nature of the forum" proves the law was not clearly established. *Eagon*, 72 F.3d at 1490.

constitutional issue.

In this context, the cases cited by Petitioners can be put in three categories. The first is public forum cases involving access to a public meeting, a festival open to the public, or a public gathering.[4] The second is cases involving access to an adjacent public forum, such as a sidewalk.[5] The final category is

[4] *Sparrow v. Goodman*, 361 F. Supp. 566 (W.D.N.C. 1973) (Billy Graham Day was a public gathering in a public forum); *Musso v. Hourigan*, 836 F.2d 736 (2d Cir. 1988) (plaintiff ejected from public School Board meeting and arrested for disorderly conduct); *Parks v. City of Columbus*, 395 F.3d 643 (6th Cir. 2005) (general access to Arts Festival is not inclusion in message of permit holder); *Monteiro v. City of Elizabeth*, 436 F.3d 397 (3d Cir. 2006), *cert. denied sub nom., Perkins-Auguste v. Monteiro*, 549 U.S. 820 (2006) (plaintiff ejected from public City Council meeting and arrested for disorderly conduct); *Wickersham v. City of Columbia*, 481 F.3d 591 (8th Cir. 2007) *cert. denied*, 552 U.S. 950 (2007) (Air Base designated public forum for air show); *Startzell v. City of Philadelphia*, 533 F.3d 183 (3d Cir. 2008) (*Hurley* does not apply to a private-sponsored event in a traditional public forum that was free and open to the public, but restricting movement of those interfering with or disrupting the speech or permitted event upheld as reasonable time, place and manner restrictions).

[5] *Farber v. Rizzo*, 363 F. Supp. 386 (E.D. Pa. 1973) (demonstrators prevented from entering adjacent public forum); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975), *cert. denied*, 423 U.S. 930 (1975) (sidewalk of Presidential motorcade); *Pledge of Resistance v. We the People 200, Inc.*, 665 F. Supp. 414 (E.D. Pa. 1987) (signs and leaflets denied access to adjacent public forum); *Mahoney v. Babbitt*, 105 F.3d 1452 (D.C. Cir. 1997) (demonstration on sidewalk adjacent to Inaugural parade); *Gathright v. City of Portland*, 439 F.3d 573 (9th Cir. 2006), *cert. denied*, 594 U.S. 815 (2006) (permit holder attempt to exclude proselytizing on sidewalk around park).

that of a nonpublic forum.[6] (*See* Pet. at 10).

A. The Museum is not a public forum

As to the first and second categories, the public forum doctrine pre-supposes public property owned by the government, which is not alleged here. *See, e.g.*, *Cornelius*, 473 U.S. at 805-6 (workplaces in federal buildings are government property); *Perry Educ. Ass'n*, 460 U.S. at 44-45 (designated public forum "consists of public property"). While Petitioners argue that the event was open to the public, there are no allegations that public discussion was invited, or that the Museum is either traditionally or designated as a public place open to assembly and debate as a public forum. *Cornelius*, 473 U.S. at 802. There are no allegations that the event was a "public meeting to conduct public business and to hear the views of citizens." *City of Madison, Joint Sch. Dist. No. 8 v. Wisc. Employment Relations Comm'n*, 429 U.S. 167, 175 n.8 (1976). Thus, the cases cited by Petitioners holding that the government may not exclude from a public forum persons who wish to engage in protected First Amendment activity solely on the basis of viewpoint discrimination are distinguishable because they all deal with private speech in public forums.

---

[6] *Butler v. U.S.*, 365 F. Supp. 1035 (D. Hawaii 1973) (Presidential visit to Air Force base); *but see Greer v. Spock*, 424 U.S. 828 (1976) (Army base may ban political speeches and demonstrations while permitting other speech-related activities).

Because this case involves government speech in a limited private forum, the proper analytical tool is the government speech doctrine, not the public forum doctrine. Under the government speech doctrine, the court does not engage in the traditional public forum analysis. *See, e.g.*, *Wells*, 257 F.3d at 1139. This is just such a case where it is of "limited utility" to engage in the traditional public forum analysis because the government interest in controlling the autonomy of its own *speech* "essentially mirror[s the] analogous private interests" in autonomy over speech, and, thus framed, the issue in this case deals less with the designation of the *property* as a public forum. *Taxpayers for Vincent*, 466 U.S. at 815 n.32. Further, there is no government property or program at issue that must accommodate a large number of public speakers. Thus, "public forum principles . . . are out of place in the context of this case." *Pleasant Grove City*, 129 S. Ct. at 1137 (citations and quotation marks omitted).

B. The Museum is a limited private forum

An evaluation of the totality of circumstances alleged in the Complaint reveals that the President's speech on Social Security at the Museum was a limited private forum. As noted, there are no allegations that the government owned or controlled the Museum. There are no allegations that the Museum is dedicated to open debate or the free exchange of ideas, like public parks or sidewalks. Instead, this was a one-time speech delivered by the President. The Complaint does allege that tickets

for admission were required. The speech, therefore, was not an event that every member of the public could attend. (Complaint ¶ 12). In order to obtain tickets, Petitioners had to provide their driver's licenses and their names and addresses. (Complaint ¶ 13). To gain admission to the speech, there were security checkpoints and the admission of Petitioners was conditional. They were initially stopped by Klinkerman, (Complaint ¶ 19), and then conditionally let in by Casper. (Complaint ¶ 23). Only a few minutes later, Petitioners were asked to leave the "private event" by Casper. (Complaint ¶ 27). These factors, particularly the tickets for admission combined with conditional admission, create a limited private forum for the President's speech on Social Security, *i.e.*, exclusive use of the Museum for the President's expressive activity for a limited time. (Pet. App. at 55a). *See Arkansas Ed. Tel. Comm'n* v. *Forbes*, 523 U.S. 666, 678 (1998) ("Where the property is not a traditional public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all."); *cf. Cornelius*, 473 U.S. at 805-6 (practice of limiting access to *government property* factor in nonpublic forum analysis).

C. The exclusion was reasonable even under a nonpublic forum analysis

Although Klinkerman maintains the government speech doctrine is all the Court need examine, it could be argued that the Museum is somehow a

nonpublic forum.[7] To be a nonpublic forum, the government must own or control the property.[8] While there are no allegations that the government owned or controlled the Museum, the Complaint alleges that the taxpayers paid for the official visit and that it was "open to the public." (Complaint ¶ 10). For purposes of a motion to dismiss, this could be construed as government "control" of the Museum for a limited time. *See Postal Service v. Council of Greenburg Civic Ass'ns,* 453 U.S. 114 (1981) (residential letterboxes owned by private persons but controlled by the Postal Service as an "authorized depository" are nonpublic forum); *but see Denver Area Educ. Telecomm. Consortium, Inc.*, 518 U.S. at 829 (Thomas, J., concurring in the judgment in part and dissenting in part) (the "assertion of government control over private property cannot justify designation of that property as a public forum."). This case is distinguishable because there was very

[7] Petitioners argue that the Court need not engage in a forum analysis based on the notion that viewpoint discrimination is not permissible in any forum. (Pet. App. at 11a-12a n.1). However, *Sistrunk* rejected this argument. 99 F.3d at 198. The analysis is offered in the alternative to demonstrate that no First Amendment violation is present in any event.

[8] While *Cornelius* stated that "a speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns," 473 U.S. at 801, the plurality in *Denver Area Educ. Telecomm. Consortium, Inc.* considered the reference to private property dedicated to public use to be an assumption, 518 U.S. at 749 (plurality opinion), and Justice Thomas considered it to be *dicta*. *Id.* at 827 (Thomas, J., concurring in the judgment in part and dissenting in part).

limited temporal control of the Museum for the obvious need to provide security and protection for the President while giving his speech, as opposed to the kind of long-term control the Postal Service maintains over residential letterboxes. *Postal Service*, 453 U.S. at 123 (letterbox becomes part of nationwide system for receipt and delivery of mail and is afforded federal protection prohibiting damaging or destroying mail deposited therein). Yet, even if the Museum is considered a nonpublic forum for the sake of argument, the government's conduct did not violate the First Amendment.

The government may regulate speech in nonpublic forums if the regulations are point-of-view neutral and satisfy rational review. *E.g.*, *Cornelius*, 473 U.S. at 806. However, complete content neutrality is not required. The government may discriminate based on content and subject matter, such as banning political or public issue advertising while permitting commercial advertising on city-owned buses. *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion). Thus, access can be denied when partisan political speech will disrupt the operation of governmental facilities even though other forms of speech pose no such danger. *Id.* at 302-05; *Greer*, 424 U.S. at 838. Further, the government can discriminate on the basis of the identity of the speaker. *Perry Educ. Ass'n,* 460 U.S. at 49. Finally, the regulation must be rationally related to some conceivably valid government interest.[9]

---

[9] Independent of his rights as a speaker, the President warrants a level of security and protection that is perhaps

Discrimination on the basis of subject matter and the identity of the speaker are permissible in a nonpublic forum. Petitioners allege that they were ejected solely because of the bumper sticker in paragraphs 24 and 32 of the Complaint. It is reasonable to conclude that it was Petitioners' expression on a subject matter different than the President's speech on Social Security – the "No More Blood For Oil" bumper sticker – that led to their ejection. (Complaint ¶¶ 23-25, 32). That is, the exclusion based solely on the bumper sticker is really a subject matter distinction as opposed to viewpoint discrimination because it is off the topic of Social Security, and the President has the right to limit the topic of his speech. *E.g.*, *Arkansas Ed. Tel. Comm'n*, 523 U.S. at 683 (exclusion of candidate from debate based on his lack of objective support reasonable and viewpoint neutral). Even in government meetings open to the public, the government generally can confine the discussion to a specified subject matter. *City of Madison,* 429 U.S. at 175 n.8.

---

greater than almost any speaker in any forum, public or private. Providing protection for the President is a valid governmental interest. *E.g.*, *Watts v. United States*, 394 U.S. 705, 707 (1969) ("The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence."). The Secret Service's authority to protect the president is codified at 18 U.S.C. § 3056.

To the extent Petitioners allege viewpoint discrimination in paragraphs 1, 8, 24, and 25 of the Complaint, this is a legal conclusion couched as a factual allegation that the Court need not accept as true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In any event, the so-called "viewpoint-based reasons" are reasonable and should be upheld. *Wells*, 257 F.3d at 1143. It is undisputed that the President's speech was on Social Security and that Petitioners' bumper sticker read: "No More Blood For Oil." In a nonpublic forum, a speaker may be excluded if he wishes to address a topic not encompassed within the purpose of the forum. *Cornelius*, 473 U.S. at 806. This is based on the common sense notion that even "protected speech is not equally permissible in all places and at all times," and under a forum analysis it is appropriate to give proper regard to the "disruption that might be caused by the speaker's activities." *Id.* at 799-800; *Cohen v. California*, 403 U.S. 15, 19 (1971) (First Amendment has "never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses.").

Petitioners claim that they had no intention of disrupting the President's speech and claim that they gave no indication of doing so. (Complaint ¶¶ 18, 31). Yet it is clear that, because of the bumper sticker, Casper warned Weise that "she had been 'ID'd'" and that she should not try any "funny stuff." (Complaint ¶¶ 23-25, 32). Petitioners further admit that Young intended to speak at the President's

speech if possible. (Complaint ¶ 18).[10] These facts show that Casper's warning to Weise and eventual ejection of Petitioners was based upon the identity of the "speaker," *i.e.*, Petitioners, due the different subject matter expressed via their bumper sticker. (Complaint ¶¶ 23-25, 32); *see Perry Educ. Ass'n,* 460 U.S. at 49. The "avoidance of controversy" is a valid ground for restricting speech and denying access to a nonpublic forum. *Cornelius*, 473 U.S. at 811. "The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." *Id.*

While Petitioners allege a claim for viewpoint discrimination, the question on a motion to dismiss based on qualified immunity is not merely whether the Complaint states a claim for relief, but whether Petitioners can clearly establish a constitutional

---

[10] To the extent this raises the issue of the threshold of disruption necessary to be constitutionally removed from an event, the point is again demonstrated that the law is not clearly established because this would seem to present yet another question of first impression. *See Startzell*, 533 F.3d at 198-99 ("The right of free speech does not encompass the right to cause disruption" and line is crossed "when protestors move from distributing literature and wearing signs to disruption of the permitted activities . . . ."); *see also Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., concurring) (example usually given as to "line between ideas and overt acts[]" is "the case of one who falsely shouts fire in a crowded theatre."); *cf. Terminiello v. City of Chicago*, 337 U.S. 1 (1949) (police may not use "heckler's veto" to restrict speaker causing disruptions among audience). The threshold of disruption or controversy is lower in a nonpublic forum. *Cornelius,* 473 U.S. at 811.

violation. *Pearson*, 129 S. Ct. at 816; *Bell Atlantic Corp.*, 550 U.S. at 555. Yet in nonpublic forum cases, the line between view-point-neutrality and permissible subject matter and identity of the speaker discrimination is not always clear. For example, in *Cornelius*, this Court remanded the case for further consideration of whether exclusion of political advocacy groups from participation in the federally created Combined Federal Campaign was point-of-view neutral or biased against groups critical of administration policy. 473 U.S. at 821-23. Because the bumper sticker was off the topic of Social Security, the exclusion was based on subject matter, and Petitioners' allegation of viewpoint discrimination thus "seems to ignore the ancient wisdom that calling a thing by a name does not make it so." *City of Madison*, 429 U.S. at 174.

Put differently, the claim of viewpoint – as opposed to subject matter – discrimination is not clearly established. This is not to say that a claim of viewpoint discrimination can never be clearly established, but it is to say that for purposes of a motion to dismiss on qualified immunity grounds, the allegations of viewpoint discrimination must be well pled such that the "unlawfulness [is] apparent." *Anderson*, 483 U.S. at 640. Otherwise, any motion to dismiss on qualified immunity could be defeated by legal conclusions couched as allegations, which would be contrary to the purpose of allowing qualified immunity to be asserted at the pleading stage. *E.g.*, *Mitchell*, 472 U.S. at 526 ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading

qualified immunity is entitled to dismissal before the commencement of discovery.").

D. The exclusion did not infringe on Petitioners' First Amendment rights

In conclusion, this was a single speech, it was not a forum. The purpose of the President's speech was to advocate his ideas and policies regarding Social Security. Given that the Museum has a finite capacity and is not a government owned property or program capable of accommodating a large number of public speakers, denial of access to the President's speech, like the exclusion from the Combined Federal Campaign, was reasonable. *Cornelius,* 473 U.S. at 808 (reasonable does not mean "the most reasonable or the only reasonable limitation."); *Postal Service*, 453 U.S. at 129 (exclusion from letterboxes upheld as reasonable). Under the government speech doctrine or the nonpublic forum doctrine, the government action had no adverse effect, or only a "*de minimis*" adverse effect, on Petitioners' free speech rights. *Branzburg v. Hayes*, 408 U.S. 665, 734 (1972) (Stewart, J., dissenting). The Free Speech Clause does not apply to government speech, and there is no constitutional violation even under a forum analysis as the exclusion was reasonable and no different than any other regulation of simultaneous speech. This lack of infringement obviates the need to run the gauntlet of First Amendment scrutiny, as Petitioners have the burden of proof on this "threshold inquiry." *Id.* (Stewart, J., dissenting) (describing the Court's "implicit[]" methodology). As such, Petitioners have

alleged no constitutional violation.

IV. ANY ALLEGED CONSTITUTIONAL RIGHT WAS NOT CLEARLY ESTABLISHED

Even if one were to assume that Klinkerman's alleged conduct violated a constitutional right – which it did not – Petitioners cannot carry their burden of showing that such a constitutional right was clearly established. *Sistrunk* held that the President of the United States has the right to deny a person entry into a Presidential speech based upon signage displayed by that person. 99 F.3d at 200. *Wells* held that a governmental entity has the right to control its own speech. 257 F.3d at 1153. Qualified immunity defendants "are entitled to rely on existing lower court cases without facing personal liability for their actions," even if their own Federal Circuit had not yet ruled on the doctrine at issue. *Pearson*, 129 S. Ct. at 823. Based on *Sistrunk* and *Wells*, Klinkerman could reasonably have believed that he acted lawfully in following the orders of the White House. Thus, Klinkerman, a volunteer, should not be forced "to endure additional burdens of suit – such as the costs of litigating constitutional questions and delays attributable to resolving them – when the suit otherwise could be disposed of more readily." *Pearson*, 129 S. Ct. at 818 (internal quotation marks and citation omitted).

Petitioners argue that "individuals have a right to be free from discrimination based on viewpoint." (Pet. App. at 9a). Ignoring this Court's instruction that the focus of qualified immunity analysis must

be on the contours of the specific right at issue "in a more particularized" sense, *Anderson*, 483 U.S. at 640, Petitioners once again cite generic and abstract principles. (Pet. App. at 9a-10a). Petitioners do not cite any 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 even a limited nonpublic forum, excludes persons because of a bumper sticker that was off the topic of the President's speech. (Pet. App. at 10a). Instead, they cite First Amendment cases on topics ranging from motion picture licenses to school board meetings and labor picketing.[11] Petitioners rely on cases focusing

[11] *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (university student activity fund is a limited public forum); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (school property open to public for various uses is a limited public forum); *Boos v. Barry*, 485 U.S. 312 (1988) (regulation of demonstrations near foreign embassies held to violate First Amendment as to display restrictions but not as to restrictions on congregation); *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788 (1985) (Combined Federal Campaign not a limited public forum); *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (city ordinance prohibiting the posting of signs on public property constitutional); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (school mail facilities not a limited public forum); *City of Madison Joint Sch. Dist. No. 8 v. Wisc. Employment Relations Comm'n*, 429 U.S. 167 (1976) (school board meeting open to public); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (labor picketing prohibited near school buildings); *Cohen v. California*, 403 U.S. 15 (1971) (conviction for disturbing the peace by offensive conduct for "unseemly expletive" in courthouse corridor); *Schacht v. United States*, 398 U.S. 58 (1970) (theatrical production discrediting the military); *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York*, 360 U.S. 684 (1959)

on government regulation of private speech in public forums, not government presentation of its own speech in a limited private forum, which is the core issue here. Yet even if one concedes, *arguendo,* the general principle contained in those factually distinct cases, it is still not "clearly established" that Klinkerman's actions were improper. *Pearson*, 129 S. Ct. at 823.

Even if there is a constitutional right that Klinkerman violated, numerous cases cloud the contours of that right, especially *Sistrunk* and *Wells.* The state of the law is such that Klinkerman could reasonably have believed the President had the right to control the message of his own speech. The Sixth Circuit in an analogous case affirmed as constitutional the exclusion of a ticket holder from a Presidential speech because of contrarian signage she displayed. *Wells* affirmed the principle that a speaker's right to autonomy applies to government speech. In sum, applicable case law supports the actions of Klinkerman. Therefore, it cannot be said that he "knowingly violate[d] the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Assuming, *arguendo*, that Klinkerman did violate a constitutional right, such right was not clearly established, and he is entitled to qualified immunity.

(distributor denied license for movie with "immoral" theme of adultery).

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the Petition. Therefore, Klinkerman respectfully requests that the Petition be denied.

Respectfully submitted,

BRETT R. LILLY
Counsel of Record
BRETT R. LILLY, LLC
6730 West 29th Avenue
Wheat Ridge, CO 80214
(303) 233-0973
BrettLilly@comcast.net

JOHN S. ZAKHEM
ZAKHEM LAW, LLC
700 17th Street, Ste. 2000
Denver, CO 80202
(303) 228-1200
Counsel for Respondent
Jay Bob Klinkerman

August 11, 2010