No. 10-67 JUL 6 - 2010

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether clearly established First Amendment law prohibits government officials who are speaking at events that are open to the public and paid for by taxpayers from excluding people from the audience on the basis of viewpoint.

LIST OF PARTIES

Petitioners are Leslie Weise and Alex Young.

Respondents are Michael Casper and Jay Bob Klinkerman.

Additional defendants in the case are Steven A. Atkiss, James A. O'Keefe, and John/Jane Does 1-2 in their individual capacities. They were not appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners is a corporation that has issued shares to the public, nor is any a parent corporation, a subsidiary, or affiliate of corporations that have done so.

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The opinion of the United States Court of Appeals for the Tenth Circuit sought to be reviewed (App. at 1a) is published at 593 F.3d 1163. The order denying en banc hearing by a split vote of the active judges (App. at 56a) is unpublished. The district court's opinion (App. at 36a) is unpublished but available at 2008 WL 4838682.

An earlier decision of the district court denying Respondents' motions to dismiss without prejudice is unpublished but available at 2006 WL 3093133. The Tenth Circuit opinion dismissing the appeal from that decision is available at 507 F.3d 1260.

JURISDICTION

The judgment of the Tenth Circuit affirming the district court's decision was entered on January 27, 2010. App. at 1a. That court entered an order denying the petition for rehearing en banc on April 20, 2010. App. at 56a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The First Amendment of the United States Constitution provides that:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

The district court granted Respondents' motions to dismiss. Accordingly, the facts in the Complaint must be taken as true.

On March 21, 2005, President George W. Bush gave a speech on social security at an official government-sponsored and taxpayer-funded event at the Wings Over the Rockies Air and Space Museum in Denver, Colorado. App. at 3a. The event was open to the public. *Id.* at 4a. Government employees at the White House set policies and procedures for members of the public to obtain tickets to attend and delegated ticket distribution to local officials. *Id.* at 3a-4a. Following these policies and procedures, petitioners Leslie Weise and Alex Young secured tickets through their Congressperson. *Id.* at 4a.

On the day of the event, Weise and Young arrived in Weise's vehicle, which had a bumper sticker that read "No More Blood for Oil." *Id.* Although they showed their tickets and were initially admitted to the event, they were ejected by respondents Michael Casper and Jay Bob Klinkerman before the event began. *Id.* The two respondents were acting at the direction of Steven A. Atkiss and James A. O'Keefe, White House Advance Office employees. *Id.* The Advance Office had a policy of excluding those who disagree with the President from the President's public appearances. *Id.* at 3a.

Weise and Young never disrupted the President's event, never intended to cause any

disruption, and never indicated that they would disrupt the event. *Id.* at 5a. According to the Secret Service, they were removed from the event solely based on the perceptions of White House Advance Office employees and volunteers that the bumper sticker on Weise's car expressed disagreement with the President's policies. *Id.* at 4a-5a.

Weise and Young filed suit against Casper and Klinkerman under 28 U.S.C. § 1331, alleging violation of their First and Fourth Amendment rights. In response to their motions to dismiss, the district court held that Casper and Klinkerman were entitled to qualified immunity because they did not violate Weise and Young's constitutional rights, and that in any event any such rights were not clearly established. *Id.* at 53a-55a.[1] On the parties' joint motion, the district court certified that order as a final judgment pursuant to Rule 54(b).[2] *Id.* at 58a.

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[1] The district court initially denied Respondents' motions to dismiss without prejudice because discovery might reveal that, as private volunteers acting under color of federal law, they are not entitled to assert qualified immunity. App. at 5a. While the interlocutory appeal from that decision was pending, Petitioners conducted limited discovery into the identity of other individuals involved and filed a separate suit against Atkins, O'Keefe, and Gregory Jenkins, the former Director of the Advance Office. *Id.* at 5a. The two suits were consolidated after the Tenth Circuit dismissed the appeal. *Id.* The discovery also established that Casper and Klinkerman were entitled to assert qualified immunity, thus resolving that issue. *Id.* at 5a-6a.

[2] Defendants Atkins and O'Keefe, who were represented by the Department of Justice, filed answers instead of moving for

Petitioners appealed the qualified immunity decision to the Tenth Circuit. The majority affirmed, bypassing the question whether Weise and Young's constitutional rights were violated and holding solely that they did not have the clearly established right not to be excluded from a public event on the basis of the government's disagreement with their viewpoint. *Id.* at 6a-16a. Even though the event in this case was sponsored by the government, paid for by tax dollars, and open to the public, the majority held that the First Amendment rule prohibiting government officials from discriminating on the basis of viewpoint was no longer clearly established and implied that this was so because of the combination of this Court's decision in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that private parade organizers could exclude marchers on the basis of viewpoint) and the government speech doctrine, *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009).[3] *See* App. at 15a-

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dismissal. They filed a motion to dismiss after the Tenth Circuit opinion issued; that motion is still pending before the district court. Jenkins filed a motion to be dismissed for lack of personal jurisdiction, which the district court granted. Petitioners did not appeal that decision, but instead filed a separate case in the District of Columbia against Jenkins and Todd Beyer, his successor as the Director of the Advance Office. Those defendants moved to be dismissed or for summary judgment. After the Tenth Circuit issued its opinion in this case, the district court asked for supplemental briefing on its preclusive effect. That decision is still pending before the district court.

[3] This implication is evident from the majority's holding that this case is most similar to *Sistrunk v. City of Strongsville*, 99

16a. The majority also suggested that the speech was unprotected under the First Amendment, that the First Amendment might not apply because the public event took place on private property, and that Petitioners might have prevailed if they had cited retaliation cases rather than exclusion cases. *Id.* at 10a-15a.

Judge Holloway dissented, stating that the district court's reasoning was "severely misguided" and "rel[ied] on precedents that have no bearing on the questions presented in the instant case." *Id.* at 18a. Judge Holloway would have held that Respondents were not entitled to qualified immunity, noting that it "is simply astounding that any member of the executive branch could have believed that our Constitution justified this egregious violation of Plaintiffs' rights." *Id.*

Weise and Young filed a petition for rehearing en banc, and on April 20, 2010, the Tenth Circuit denied the petition by a split vote, with half of the active judges voting to take the case en banc and one judge recused. *Id.* at 58a-59a.

REASON FOR GRANTING THE WRIT

The Tenth Circuit opinion in this case creates a split among the circuits and conflicts with this Court's precedent on a fundamental First

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F.3d 194 (6th Cir. 1996) (holding that a private entity could exclude people from its rally), *cert. denied*, 520 U.S. 1251 (1997). *Sistrunk*, which involved a private speaker and not a government speaker like this case, relied extensively on *Hurley*. 99 F.3d at 198-99.

Amendment issue: Whether clearly established First Amendment law prohibits government officials who are speaking at events that are open to the public and paid for by taxpayers from excluding people from the audience on the basis of viewpoint. The answer to that question has been, until now, an unambiguous "yes." This Court should grant certiorari to resolve this split and reaffirm that "the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010).

I. The Opinion Below Creates a Split Among the Circuits and Conflicts with this Court's Precedent Prohibiting Viewpoint Discrimination.

The Tenth Circuit diverged from the reasoned decisions of other circuits holding that government officers may not exclude individuals from a public event for a viewpoint discriminatory reason. In doing so, it contravened this Court's precedent.

This split is illustrated vividly by *Rowley v. McMillan*, in which the Fourth Circuit affirmed an order enjoining the government from conduct nearly identical to Respondents' in this case. 502 F.2d 1326 (4th Cir. 1974), *aff'g Sparrow v. Goodman*, 361 F. Supp. 566, 585-86 (W.D.N.C. 1973). The plaintiffs in *Rowley*, like Weise and Young, obtained tickets to attend a public event at which the President was scheduled to speak. *Id.* at 1329. Like Weise and Young, they were denied admission or removed before the beginning of the program on the basis of their opposition to the President and his

policies. *Id.* The district court held that such exclusions based on the desire to suppress dissent and unjustified by concern for presidential safety amounted to "wholesale assaults, exclusions, embarrassments, slanders, and deprivations of free speech" in violation of the Constitution. *Sparrow*, 361 F. Supp. at 585-86. The court enjoined the defendants from further discriminating against plaintiffs for their expression of political views. *See id.* at 587-88.

Likewise, all circuits to consider the constitutionality of excluding individuals from publicly accessible spaces and public events—whether city council meetings, public festivals, or along the President's inaugural parade route—have affirmed, in factual circumstances similar to this case, the clearly established law that the First Amendment prohibits such exclusions based on viewpoint. *See, e.g.*, *Wickersham v. City of Columbia*, 481 F.3d 591, 601 (8th Cir. 2007), *cert. denied*, 552 U.S. 950 (2007); *Monteiro v. City of Elizabeth*, 436 F.3d 397, 404 (3d Cir. 2006), *cert. denied sub nom. Perkins-Auguste v. Monteiro*, 549 U.S. 820 (2006); *Gathright v. City of Portland*, 439 F.3d 573, 577 (9th Cir. 2006), *cert. denied*, 549 U.S. 815 (2006); *Parks v. City of Columbus*, 395 F.3d 643, 653 (6th Cir. 2005); *Mahoney v. Babbitt*, 105 F.3d 1452, 1459 (D.C. Cir. 1997); *Musso v. Hourigan*, 836 F.2d 736, 742-43 (2d Cir. 1988); *Glasson v. City of*

Louisville, 518 F.2d 899, 905 (6th Cir. 1975), *cert. denied*, 423 U.S. 930 (1975).[4]

The Tenth Circuit opinion cannot be squared with these circuit decisions, all of which were grounded in the principle underscored repeatedly by this Court: that viewpoint discrimination is a "blatant" violation of the First Amendment, regardless of whether it occurs in a traditional public forum, a limited public forum, or a non-public forum. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995); *see also, e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993); *Boos v. Barry*, 485 U.S. 312, 319 (1988); *Cornelius v. NAACP*, 473 U.S. 788, 811 (1985); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *City of Madison Joint Sch. Dist. No. 8 v. Wisc. Employment Relations Comm'n*, 429 U.S. 167, 175-76 (1976); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Cohen v. California*, 403 U.S. 15, 19 (1971); *Schacht v. United States*, 398 U.S. 58, 63 (1970); *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of New York*, 360 U.S. 684, 688-89 (1959).

The majority below gave three reasons why the application of this fundamental principle to the

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[4] District courts have held the same, in decisions that were not appealed. *See, e.g.*, *Pledge of Resistance v. We the People 200, Inc.*, 665 F. Supp. 414, 416-18 (E.D. Pa. 1987); *Butler v. United States*, 365 F. Supp. 1035 (D. Haw. 1973); *Farber v. Rizzo*, 363 F. Supp. 386, 395 (E.D. Pa. 1973).

facts of this case was not clearly established: the nature of the speech, the nature of the forum, and Petitioners' framing of the legal theory. Each is seriously flawed.

First, the majority suggested that the law was not clearly established given the nature of the speech at issue. The majority distinguished a page of cases holding that viewpoint discrimination is impermissible by asserting that those cases "bear a common feature: speech that is protected for some reason." App. at 13a. If the majority meant to suggest that the "No More Blood for Oil" sticker on Weise's car was not protected by the First Amendment, the decision is simply and clearly wrong. Such political speech is not only protected, but it is "central to the meaning and purpose of the First Amendment." *Citizens United v. FEC*, 130 S. Ct. 876, 892 (2010); App. at 19a, n.1 ("I cannot believe that the majority truly intends this implication.") (Holloway, J., dissenting).

Second, the majority cited the lack of case law holding that the government may not exclude individuals "from an official speech on private property on the basis of their viewpoint." App. at 10a. The majority thus appeared to suggest, contrary to this Court's case law and Petitioners' allegations, that the prohibition on viewpoint discrimination may not apply because the event took place in a non-public forum or because it took place on private property.

For example, the majority distinguished another page of case law prohibiting viewpoint discrimination by holding that those cases are

irrelevant because they involved a "public forum." App. at 14a. But viewpoint discrimination is impermissible even in a non-public forum and thus forum analysis was irrelevant. *See Cornelius*, 473 U.S. at 806; *Perry Educ. Ass'n*, 460 U.S. at 46.

If the Tenth Circuit was not making a formal point about forum analysis, but instead the more simple point that the President's speech took place on private property, the point is nevertheless still fundamentally wrong. Petitioners have alleged that the event was open to the public, and whether the government rented private property and opened it to the public or whether the government used its own property is irrelevant. The relevant focus of the First Amendment analysis is the access sought by the individual, regardless of whether the property at issue is "public property or . . . private property dedicated to public use." *Cornelius*, 473 U.S. at 801; *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 792 (1996) (Kennedy, J., concurring) ("Public fora do not have to be physical gathering places . . . nor are they limited to property owned by the government . . . . Indeed, in the majority of jurisdictions, title to some of the most traditional of public fora, streets and sidewalks, remains in private hands.") (internal citations omitted).

The panel majority ultimately appeared to lose sight of Petitioners' allegations that this was a public event with decisions made by government employees rather than a private event with decisions made by private actors. Thus, the majority erroneously relied on *Sistrunk v. City of*

Strongsville, 99 F.3d 194 (6th Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997), and *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995), which involved non-public events where the decisions to exclude were made by non-governmental officials.[5]

Third, the majority hinted that Petitioners might have prevailed if they had alleged that they were retaliated against because of their viewpoint instead of being excluded because of their viewpoint. App. at 11a n.1; *see also* App. at 12a (speech occurred "elsewhere," *i.e.*, outside in the parking lot). But whether this case is analyzed in retaliation terms or exclusion terms, the outcome is the same. As this Court held in *Perry v. Sindermann*, 408 U.S. 593 (1972), the seminal retaliation case, "[f]or at least a quarter-century, this Court had made clear that . . . [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Id.* at 597; *see also Speiser v. Randall*, 357 U.S. 513, 518-19 (1958). Petitioners stated a retaliation claim under *Perry*, as well as under the Tenth Circuit's elaboration of the theory in *Worrell v. Henry*, 219 F.3d 1197 (10th Cir. 2000), *cert. denied sub nom. Turner v. Worrell*, 533 U.S. 916 (2001). First, Petitioners engaged in political speech which is clearly protected speech. *Supra* at 9. Second, Petitioners unquestionably

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[5] *See Mahoney*, 105 F.3d at 1456 (distinguishing *Hurley* because *Hurley* involved private parties whereas the instant case involved plaintiffs' "desired First Amendment conduct [being] barred directly by the government").

suffered an injury when they were excluded from an event that was open to the public, an injury that would chill a person of ordinary firmness from continuing to engage in that activity. If the general public knew that they could be excluded from public events because of their political views, the danger of chill is self-evident. Finally, the "defendants' actions were motivated by plaintiffs' protected activities." App. at 11a, n.1 (paraphrasing *Worrell*, 219 F.3d at 1212); *see* App. 4a-5a (plaintiffs excluded because of their speech).[6]

Whether this case is analyzed in retaliation terms or exclusion terms, the clearly established law from this Court and other courts prohibits government officials from excluding individuals from public events for a viewpoint discriminatory reason.

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[6] Even if there is any doubt about Petitioners' framing of the case, the court should have considered all relevant applicable law, not just that cited by the parties, in analyzing qualified immunity. *See Elder v. Holloway*, 510 U.S. 510, 516 (1994) ("A court engaging in review of a qualified immunity judgment should therefore use its 'full knowledge of its own [and other relevant] precedents.'" (citing *Davis v. Scherer*, 468 U.S. 183, 192, n. 9 (1984))); *see also Citizens United*, 130 S. Ct. at 893 (citing the First Amendment is sufficient to raise all First Amendment theories).

II. The Opinion Below Represents an Unprecedented Expansion of the Government Speech Doctrine by Merging it with the Court's Decision in *Hurley*.

The Tenth Circuit in effect suggested, in contrast to the law of at least five circuits, that the views of the audience are always attributable to the President even when he is speaking at an event paid for by taxpayers, announced as open to the public, and for which he has delegated authority to others to grant admission tickets. App. at 15a-16a. In other words, even in those circumstances, the President always has the right to pick and choose his audience to make it appear that everyone agrees with him.

In coming to this unsound conclusion, the majority below relied on the doctrine that originated in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), in which this Court held that a private speaker has the right to exclude another speaker with an opposing viewpoint from participating in and thus changing the content of his speech. *Id.* at 576. A state therefore could not force private organizers of a St. Patrick's Day parade to accept a group with a message contrary to its own to march in its parade. *Id.*

Hurley has been applied to other private speakers. Thus, the case that the Tenth Circuit cited involved an event by a private political party. *Sistrunk v. City of Strongville*, 99 F.3d 194 (6th Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997). *Hurley*

has not been applied to government speakers, and even if it were, it does not authorize the speaker to engage in viewpoint-discriminatory exclusion of individuals who seek only to attend a public event but not to participate in the speaker's expression—as at least five circuits have held. *See, e.g.*, *Startzell v. City of Philadelphia*, 533 F.3d 183, 194 (3d Cir. 2008); *Wickersham v. City of Columbia*, 481 F.3d 591, 600 (8th Cir. 2007), *cert. denied*, 552 U.S. 950 (2007); *Gathright v. City of Portland*, 439 F.3d 573, 577 (9th Cir. 2006), *cert. denied*, 549 U.S. 815 (2006); *Parks v. City of Columbus*, 395 F.3d 643, 651 (6th Cir. 2005); *Mahoney v. Babbitt*, 105 F.3d 1452, 1456 (D.C. Cir. 1997).

The reason is simple: for public events like speeches by the President, "[i]t simply makes no sense to suppose that the mere presence in the audience of persons who might have some disagreement with the President on some issues would have any effect on the President's message." App. at 29a (Holloway, J., dissenting); *see also PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74, 87 (1980) (holding that a state may force a shopping center that is open to the public to allow individuals to hand out pamphlets or seek signatures for a petition, as the speech of those individuals will not likely be attributed to the shopping center).

The Tenth Circuit relied on *Sistrunk*, but that decision is consistent with this common-sense observation. It held only that *Hurley* permitted the viewpoint-discriminatory exclusion of individuals from a political rally sponsored by a private entity because at such a rally, the support of the audience

is essential to the message being conveyed to the media. 99 F.3d at 196-200. The same does not hold for the President's public speech.

The Tenth Circuit thus stands alone in granting government speakers an unwarranted and expansive authority to discriminate against individuals attending a public event on the basis of viewpoint. This Court should not allow the limited right of the speaker to control his own message to erode the clearly established principle prohibiting viewpoint discrimination by government officials. *Cf. Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1141 (2009) (Souter, J., concurring in judgment) (warning of the effect of the government speech doctrine on existing doctrine).

III. This Case Presents an Important and Recurring Question About the Right to Dissent.

There are few questions more important to the foundation of this country than whether government officers may discriminate against individuals for the expression of their viewpoint. *See Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is . . . an egregious form of content discrimination"); *Schacht v. United States*, 398 U.S. 58, 63 (1970) (holding that a statutory provision that punishes those speaking out against the Vietnam war "cannot survive in a country which has the First Amendment").

The question presented squarely and cleanly by this case—whether government officers may

exclude individuals from a public event for a viewpoint discriminatory reason—is of recurring importance to those who express disagreement with government officers and their policies. Weise and Young's experience is not unique to the presidency of George W. Bush; it will likely occur again, just as past Presidents (and Vice-Presidents) of both parties have also sought to exclude individuals from publicly accessible spaces and public events on the basis of viewpoint. *See, e.g.*, *Mahoney v. Babbitt*, 105 F.3d 1452 (D.C. Cir. 1997) (President Clinton); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975) (President Nixon); *Rowley v. McMillan*, 502 F.2d 1326 (4th Cir. 1974) (President Nixon); *Pledge of Resistance v. We the People 200, Inc.*, 665 F. Supp. 414 (E.D. Pa. 1987) (Vice-President Bush); *Butler v. United States*, 365 F. Supp. 1035 (D. Haw. 1973) (President Nixon); *Farber v. Rizzo*, 363 F. Supp. 386 (E.D. Pa. 1973) (President Nixon). Moreover, the same question arises in the myriad instances when government officers other than the President discriminate against individuals by excluding them from public events, public meetings, and other publicly available benefits on the basis of viewpoint. *See, e.g.*, *Wickersham v. City of Columbia*, 481 F.3d 591, 601 (8th Cir. 2007), , *cert. denied*, 552 U.S. 950 (2007); *Monteiro v. City of Elizabeth*, 436 F.3d 397, 404 (3d Cir. 2006), *cert. denied sub nom. Perkins-Auguste v. Monteiro*, 549 U.S. 820 (2006); *Gathright v. City of Portland*, 439 F.3d 573, 577 (9th Cir. 2006), *cert. denied*, 549 U.S. 815 (2006); *Parks v. City of Columbus*, 395 F.3d 643, 653 (6th Cir. 2005); *Musso v. Hourigan*, 836 F.2d 736, 742-43 (2d Cir. 1988).

The Tenth Circuit opinion injects uncertainty into the clearly established law that had, until now, prohibited government officers from engaging in viewpoint discrimination in these instances in which officers excluded individuals from public events. This uncertainty will allow government officers in the Tenth Circuit to continue to engage in viewpoint discrimination with impunity. It thus has the potential to "chill political speech, speech that is central to the meaning and purpose of the First Amendment," *Citizens United v. FEC*, 130 S. Ct. 876, 892 (2010). This Court should review the opinion below to allay the chilling effect and dispel any doubt that the prohibition on viewpoint discrimination applies with full force when individuals seek to attend public events sponsored by their government.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

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