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

REPLY BRIEF

MARTHA M. TIERNEY
JERREMY M. RAMP
KELLY, GARNSEY, HUBBELL + LASS LLC
1441 Eighteenth Street, Suite 300
Denver, Colorado 80202
(303) 296-9412

MARK SILVERSTEIN
AMERICAN CIVIL LIBERTIES UNION OF COLORADO
400 Corona Street
Denver, Colorado 80218
(303) 777-5482

CHRISTOPHER A. HANSEN
Counsel of Record
STEVEN R. SHAPIRO
CATHERINE CRUMP
MARIKO HIROSE
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500
chansen@aclu.org

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Blank Page

REPLY BRIEF FOR PETITIONERS

This case arises on a motion to dismiss and thus is limited to the facts in the Complaint. Plaintiffs are two young people who were ejected by Respondents at the direction of White House officials from a speech given by the President. The event was not a political rally or fundraiser; it was an official government event, paid for by taxpayers and open to the public. All decisions about the event, including attendance requirements, were made by White House officials. App. at 3a-4a. Plaintiffs were peacefully sitting in the audience and were ejected solely because they drove to the event in a car bearing a bumper sticker that said "No Blood for Oil." App. at 4a-5a. In other words, they were ejected for having a viewpoint different from that of the President.[1] The Tenth Circuit found that this viewpoint discrimination by the government did

---

[1] Respondents improperly raise facts not in the Complaint in an effort to portray plaintiffs as potentially disruptive. *See e.g.* Casper BIO. at 4. The Complaint specifically asserts that plaintiffs were not and would not be disruptive. (Pet.App. at 5a). Any suggestion by Respondents that people who disagree with the President should be considered disruptive is unfair to Petitioners and unwarranted on this record. *See, e.g., Glasson v. City of Louisville*, 518 F.2d 899, 912 (6th Cir. 1975) ("The record is thus unmistakably clear that appellees intended to permit no criticism of the President that day. A more invidious classification than that between persons who support government officials and their policies and those who are critical of them is difficult to imagine. Appellees drew a line that was not merely invidious but one that also struck at the very heart of the protection afforded all persons by the First and Fourteenth Amendments.").

not represent a clearly established violation of the First Amendment.

1. To a large degree, the Briefs in Opposition serve only to highlight the importance of the issues presented by this case and, for that reason, support a grant of *certiorari*. For example, Respondents assert that the views of every member of the audience at any speech by the President constitute "government speech" and thus anyone who holds a different view can always be excluded from any on his public appearances, no matter where or how that opposing viewpoint is expressed. In this case, Petitioners were barred from attending the President's public speech because of a bumper sticker on their car, which was parked in the parking lot. Under Respondents' theory, however, it would have made no difference if the same message had been expressed on a lawn sign in front of Petitioners' homes. Brief for Respondent Jay Bob Klinkerman in Opposition to Petition for Writ of Certiorari, (Klinkerman BIO) at 12-15; Brief for Respondent Michael Casper in Opposition to Petition for Certiorari (Casper BIO) at 18-19. This represents an astonishing expansion of the government speech doctrine. *See* Petition for a Writ of Certiorari, July 2, 2010 (Pet.) at 13. The Tenth Circuit relied on these arguments to hold that the prohibition against viewpoint discrimination by the government is not clearly established.

Respondents also assert that the Constitution does not apply to an official government event that takes place in a privately-

owned museum even if the event was organized by the government, paid for by the government, and open to the public. According to Respondents, the private venue is dispositive and empowers the government to engage in viewpoint discrimination that strikes at the very heart of the First Amendment. Klinkerman BIO at 18-23; Casper BIO at 19. Again, the Tenth Circuit was persuaded by these arguments. However, that position finds no support in this Court's cases and, if accepted, would represent a dramatic alteration of viewpoint discrimination and public forum doctrines. Pet. at 9-10.

2. Respondents' attempts to distinguish the many Circuit and district court cases cited by Petitioners that directly contradict the Tenth Circuit's decision in this case are unpersuasive. Here too, Respondents' primary argument is that this event took place at a private museum. That may be a difference, but it is not a constitutionally meaningful distinction. When the government decides to hold an event paid for by taxpayers and open to the public, and when the government itself makes all of the decisions about the event, First Amendment rights do not turn on whether the event occurred at a municipal auditorium or a private museum. *See* Pet. at 9-10.[2] Respondents also suggest that petitioners were not harmed as badly as plaintiffs

[2] For example, a school board's authority to bar or silence dissenting community members who wish to speak at an otherwise public meeting does not and should not turn on whether the meeting takes place in a public building or in an Elks Lodge that has been rented for the occasion.

in other cases. Casper BIO at 7. The severity of the harm goes to the measure of damages, not the existence of a First Amendment right. In any event, that is ultimately a determination for the factfinder. Respondents are surely correct that "[t]here is no constitutional right to see the President ...[and] a ticket to attend an event with the President comes with conditions attached..." Casper BIO at 20. But, the precise issue raised by this case is whether that "condition" can include viewpoint discrimination when the event is a public, taxpayer-supported event. Finally, Respondents rely on cases holding that private political parties can determine who may attend their privately sponsored, privately funded, partisan events -- cases irrelevant to this case that involves a publicly sponsored, publicly funded event open to the public. Pet. at 10-11.

3. Respondent Casper briefly raises three additional arguments in an attempt to confuse the posture of this case. None of those arguments have merit. First, Casper argues that the Court should await the decision of the district court in the still pending case in Denver against defendants Atkiss and O'Keefe, who were White House officials, not volunteers. Casper BIO at 11. The Tenth Circuit's decision, however, does not turn on the status of Casper or Klinkerman as volunteers.[3] It thus squarely presents the issue

[3] This case arises in the context of the volunteers because the White House officials, represented by the Department of Justice, answered rather than moving to dismiss on Respondents' theory that qualified immunity attaches because the law was not clearly established.

on which Petitioners seek *certiorari*. Furthermore, because the Tenth Circuit did not rest its decision on Respondents' volunteer status, its reasoning will likely be dispositive in any future proceedings involving Atkiss and O'Keefe. In addition, the district court in D.C. has already asked for briefing on the preclusive effect of the Tenth Circuit's decision in that case. *Weise v. Jenkins*, 07-1157 (CKK), Order, Jan. 5, 2010. As a result, a denial of *certiorari* will accomplish nothing but delaying resolution of a significant constitutional issue that has now divided the circuits -- 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 Court should thus review the Tenth Circuit judgment below rather than allowing it to stand pending another case in which the issue may or may not arise.[4]

Second, in opposing *certiorari,* Casper has asserted for the first time a defense under the Volunteer Protection Act of 1997 (VPA), 42 U.S.C. §§ 14501-14505. Casper BIO at 23. Casper concedes he did not raise this issue in the district court or the court of appeals. *Id.* Even assuming

---

[4] Respondents' further attempt to minimize the significance of the Tenth Circuit ruling by arguing that Petitioners can still obtain declaratory relief in the other pending litigations. Petitioners did not seek declaratory relief against Atkiss and O'Keefe in the Denver case, and there is certainly no guarantee that declaratory relief will be available in the D.C. case.

he may still raise the statutory defense in this Court, it is clearly inapplicable. The statute allows suit where the volunteer's actions were willful. 42 U.S.C. § 14503(a)(3). "In civil actions, the term [willful] is commonly used for an act which is intentional, knowing, or voluntary, as distinguished from accidental." *Momans v. St. John's*, 2000 WL 33976543, *6 (ND Ill. 2000)(interpreting the VPA); *See also* 143 Cong. Rec. S4915-05 (statute only applies to "honest mistake")(Mr. Leahy; Mr. Coverdell). The actions here were unquestionably willful. App. at 4a (Casper was "instructed" to eject the plaintiffs; Mr. Casper "asked them to leave"). The statute also allows suit for violations of a "civil rights law," 42 U.S.C. § 14503 (f)(1)(D), which can fairly be construed to embrace the *Bivens* claims here.[5] Certainly, nothing in the VPA constitutes a clear statement of congressional intent to bar constitutional damage claims, which this Court has required at a minimum. *Webster v. Doe*, 486 U.S. 592, 603, (1988) (requiring clear congressional intent to preclude judicial review of constitutional claims). In *Hui v. Castenada*, 130 S.Ct. 1845 (2010), cited by respondents, the FTCA statute had explicit language that it was the exclusive remedy and also provided that the United States could itself be sued. Neither factor applies to the VPA. *See also Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12, (1986)(if Congress explicitly tried to enact a statutory scheme foreclosing all relief for

[5] *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971).

constitutional violations, that would raise a "[s]erious constitutional question.")

Finally, and even more broadly, Casper argues that there is no *Bivens* remedy, for violation of First Amendment rights. Casper BIO at 24. Again, this is an argument he did not raise below. In making that argument now, he relies exclusively on dicta in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). Even that dicta does not support Casper's assertion,[6] and it is contrary to decisions by this Court and many of the Courts of Appeals. *Hartman v. Moore*, 547 U.S. 250 (2006)(implicitly acknowledging the option of a *Bivens* case for violation of the First Amendment while reversing for other reasons); *Bonaparte v. Beck*, 2010 WL 1049380 (3d Cir. 2010); *National Commodity and Barter Ass'n v. Gibbs,* 886 F.2d 1240 (10th Cir. 1989); *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986); *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977) *cert. denied*. 438 U.S. 916 (1978); *Paton v. LaPrade*, 524 F.2d 862 (2nd Cir. 1975). If this case raises the question of whether *Bivens* provides a remedy for violation of First Amendment rights, the obvious importance of that question reinforces the need for the Petition to be granted.

---

[6] The *Iqbal* Court cited *Bush v. Lucas*, 462 U.S. 367 (1983), which held that a *Bivens* claim would not be available where Congress had established a comprehensive, alternative remedial scheme.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

Christopher A. Hansen
Counsel of Record
Steven R. Shapiro
Catherine Crump
Mariko Hirose
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
chansen@aclu.org

Mark Silverstein
American Civil Liberties Union of Colorado
400 Corona Street
Denver, CO 80218
(303) 777-5482

Martha M. Tierney
Jerremy M. Ramp
Kelly, Garnsey, Hubbell + Lass LLC
1441 Eighteenth Street, Suite 300
Denver, CO 80202
(303) 296-9412