No. 11-1402

In the Supreme Court of the United States

MICHAEL MARCAVAGE, PETITIONER

v.

RANGER ALAN SAPERSTEIN, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether park rangers who removed a protestor from a sidewalk just outside of the Liberty Bell were entitled to qualified immunity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 666 F.3d 856. The memorandum opinion of the district court (Pet. App. C1-C18) is reported at 777 F. Supp. 2d 858.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2012. A petition for rehearing was denied on March 5, 2012 (Pet. App. G1-G2). The petition for a writ of certiorari was filed on May 17, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial before a magistrate judge in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of the misdemeanor charges of noncompliance with permit re-

quirements, in violation of 36 C.F.R. 1.6(g)(2), and interference with an agency function, in violation of 36 C.F.R. 2.32(a), for declining to move a permitless protest he was conducting on the sidewalk in front of the Liberty Bell Center to another nearby sidewalk. Pet. App. F1-F13. The district court affirmed (*id.* at E1-E27), but the court of appeals reversed both convictions (*id.* at D1-D49). Petitioner sued respondents and other parties, alleging that they violated his First Amendment right to free speech. The district court dismissed petitioner's complaint after concluding that respondents were entitled to qualified immunity. *Id.* at B1, C1-C18. The court of appeals affirmed. *Id.* at A1-A13.

1. On October 6, 2007, petitioner, "using a bullhorn, led an anti-abortion rally of about twenty people carrying graphic signs" on a sidewalk in front of the Liberty Bell Center at Independence National Historical Park in Philadelphia. Pet. App. C3. The bullhorn "could be heard inside the Liberty Bell Center, approximately 30 feet away, during Park Service programming, and interfered with Ranger instructions outside of the Liberty Bell Center." *Id.* at F3. Also on the sidewalk that day were tourists and participants in a breast cancer walk. *Id.* at C3, F5-F6.

Independence National Historical Park regulations in effect at the time of petitioner's demonstration required a permit for demonstrations. Pet. App. D3. In 2007, the year of petitioner's demonstration, the Park issued 175 permits for demonstrations that collectively involved more than 100,000 people. See *ibid.* Petitioner, however, did not apply for a permit before beginning his demonstration. *Id.* at D4. In addition, the regulations in effect at that time did not designate the Sixth Street sidewalk where petitioner was demonstrating as one of the

areas open to the public for First Amendment activity. *Id.* at A2. The Park "ha[d] determined that [the] sidewalk[] [could not] accommodate demonstrations, and that the use of [it] for demonstrations would be unsafe and inconsistent with Park programming." *Id.* at F3-F4.

At approximately 11:45 a.m. on the day of petitioner's demonstration, respondent Park Service Ranger Alan Saperstein approached petitioner and informed him that he could not demonstrate on the Sixth Street sidewalk because it was a restricted area under park regulations. Pet. App. A2. Although petitioner had not applied for a written permit, Saperstein issued him an oral permit to continue his demonstration on Market Street on the opposite side of the Liberty Bell Center, a location that was designated an open area for First Amendment activity under the regulations. *Id.* at A3. Petitioner could have used his bullhorn there "without restriction," and "he would have had greater access to the public than the Liberty Bell site he chose." *Id.* at F5.

Respondent Park Service Ranger Ian Crane, Saperstein's supervisor, later spoke with petitioner by phone and also encouraged him to move to that area of the park. Pet. App. A3. At approximately 2:05 p.m., after petitioner had refused repeated requests to move, Saperstein and other rangers escorted him off the Sixth Street sidewalk while Saperstein held petitioner's hands behind his back. *Ibid.*; see *id.* at D4-D5. Saperstein then issued petitioner a citation pursuant to 36 C.F.R. 1.6(g)(2) for violating the terms of a permit. *Id.* at A3. Later, petitioner received a citation through the mail for interfering with agency functions in violation of 36 C.F.R. 2.32. *Ibid.*

2. a. Petitioner was tried for these misdemeanors and convicted by a United States Magistrate Judge. See Pet. App. F10-F11.

The magistrate judge rejected petitioner's defense that the citations violated his First Amendment right to free speech. Pet. App. F8. The magistrate judge found "no credible evidence that [petitioner] was asked to move his protest due to the content of his message." *Id.* at F6. Instead, the magistrate judge found that "[t]he evidence established that [petitioner's] activities interfered with public movement and interpretive programming, affected the atmosphere of peace and tranquility in a historic zone, obstructed the sidewalk, interfered with operation of a public use facility, and impeded public movement and emergency access to the Liberty Bell site." *Ibid.*

Based on the characteristics of the Sixth Street sidewalk, the magistrate judge determined that the sidewalk was a nonpublic forum. Pet. App. F7. The magistrate judge found that "the Government had opened the 6th Street sidewalk area to the public for the limited purpose of queuing up to see the Liberty Bell, and not for the purpose of staging demonstrations by members of the general public." *Ibid.* He also concluded that the Park's "determination that the sidewalks at issue cannot accommodate demonstrations, and that use of them for demonstrations would be unsafe and inconsistent with Park programming," was "reasonable." *Ibid.* Applying the reasonableness test for speech restrictions in nonpublic forums, the magistrate judge concluded that petitioner's arrest "was 'reasonable and not an effort to suppress expression merely because public officials oppose[d] the speaker's view.'" *Id.* at F8 (quoting *United*

States v. *Goldin*, 311 F.3d 191, 197 (3d Cir. 2002) (alteration in original)).

Alternatively, the magistrate judge held that even if the Sixth Street sidewalk was a public forum, the arrest was a permissible time, place, and manner restriction because it was content-neutral, was narrowly tailored, and served the significant interest of maintaining order and safety at the entrance to the Liberty Bell Center. Pet. App. F8-F9. Because the Park had provided a "reasonable alternative venue to stage protests on the Government's property near the Liberty Bell Center," the magistrate judge rejected petitioners' "argument that the 6th Street regulation was an absolute ban on expressive activity." *Id.* at F9.

The magistrate judge sentenced petitioner to 12 months of probation. Pet. App. F11.

b. Petitioner appealed his conviction to the district court, which affirmed. Pet. App. E1-E27.

After reviewing the Sixth Street sidewalk's characteristics, the district court affirmed the magistrate judge's determination that it was a nonpublic forum. See Pet. App. E13-E18. The district court noted that "this eleven-foot-wide sidewalk was separated from the street by a 'fence,' composed of bollards and chains" and that the "area, traditionally and regularly used as a waiting area for visitors standing in line to enter the Liberty Bell Center, was patrolled by guards and Park Rangers." *Id.* at E18. The court also observed that the sidewalk in question "was not an open location where people could relax and enjoy the company of their friends, but rather, it was a relatively narrow, often highly congested area with the specific and limited purpose of providing access to and from the Liberty Bell Center." *Ibid.*

The district court also affirmed the magistrate judge's conclusion that the restriction on petitioner's speech in the nonpublic forum was both reasonable and content-neutral. See Pet. App. E18-E25. In the alternative, the district court agreed with the magistrate judge that even if the Sixth Street sidewalk was a public forum, the restriction was a permissible time, place, and manner restriction. *Id.* at E25-E26.

c. On appeal, the Third Circuit vacated petitioner's convictions. See Pet. App. D1-D49.

The court of appeals found that there was insufficient evidence to sustain petitioner's conviction for violating the terms of a permit. Pet. App. D7-D8. In particular, the court held that the "verbal permit" granted to petitioner was invalid under the regulations, which required permits to be in writing, and that petitioner could not properly be convicted of violating an invalid permit. *Id.* at D8.

While the court found sufficient evidence to sustain petitioner's conviction for interfering with agency functions, Pet. App. D9, it vacated that conviction on the ground that it violated the First Amendment, *id.* at D10-D49. The court determined that petitioner raised a "classic as-applied [First Amendment] challenge" to his conviction, which "for all intents and purposes" was "entirely dependent on the facts of this case." *Id.* at D12.

Unlike the magistrate judge and district court, the court of appeals concluded that the sidewalk where petitioner was demonstrating was a public forum. Pet. App. D15-D20. The court noted that "whether a particular sidewalk is a public or a nonpublic forum is highly fact-specific and no one factor is dispositive" and that a "court must consider the forum's physical traits as well as its past uses and purposes." *Id.* at D15. The court

was of the view that the distinctive pavement and presence of bollards separating the stretch of sidewalk from the street were insufficient to distinguish it from the sidewalks to which it connected. *Id.* at D16-D17. The court also concluded that the sidewalk's "historical uses" and "purposes likewise connote its status as a traditional public forum." *Id.* at D18-D19.

Given the court of appeals' conclusion that the sidewalk was a traditional public forum, it observed that restrictions on speech there could be upheld as reasonable regulations of time, place, and manner of speech only if they were content-neutral. Pet. App. D23. The restriction in this case did not satisfy that test, the court held, because it concluded that the rangers' actions were content-based and that the lower courts had clearly erred in concluding otherwise. *Id.* at D25-D39; cf. *id.* at D25 n.11 (rejecting petitioner's "intimat[ion]" that rangers engaged in viewpoint discrimination). The court also concluded that the rangers' actions could not satisfy strict scrutiny. *Id.* at D39-D48.

In closing, the court of appeals stressed that respondents "treated [petitioner] and his group with courtesy and respect and comported themselves with no small amount of restraint and patience." Pet. App. D49. The court also stated that it was "not insensitive to the rangers' laudable efforts to ensure the smooth operation of a national park located in the middle of a major metropolis—assuredly no easy undertaking, especially on a busy Saturday when hordes of pedestrians are idling about, hustling by, or seeking entry to historic landmarks." *Ibid.* Nonetheless, the court concluded that the First Amendment requires a "nuanced approach designed to strike the right balance between competing

interests" and that "[o]n this record, [it was] persuaded that the scale tips in [petitioner's] favor." *Ibid.*

3. While his criminal appeal was pending, petitioner brought this suit against the National Park Service, the Department of the Interior, and respondent Park Service Rangers Saperstein and Crane, alleging, among other things, that his arrest violated the First Amendment. See Pet. App. A2, A4. He sought compensatory and punitive damages as well as declaratory and injunctive relief. *Id.* at A4.

a. The district court granted respondents' motion to dismiss petitioner's complaint. Pet. App. B1; see Pet. App. C1-C18. The district court first observed that this Court had not extended the implied damages remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to First Amendment claims and had been "reluctant to extend *Bivens* liability to any new context or new category of defendants." *Id.* at C6-C7 (internal quotation marks omitted). But the court noted that the Third Circuit had held that "violations of the First Amendment are actionable under *Bivens*." *Id.* at C7.

The district court next noted that the parties did not dispute (and the court of appeals had held) that petitioner's First Amendment rights were violated. Pet. App. C9. But the district court held that respondents were entitled to qualified immunity because, under these circumstances, petitioner's "claim under the First Amendment was not clearly established at the time of his arrest." *Id.* at C14.

In reaching this conclusion, the district court stated that whether the First Amendment was violated will often depend on the type of forum in which the speech takes place, Pet. App. C10, and that "[t]he question of

whether a particular sidewalk is a public or nonpublic forum is highly fact-specific and no one factor is dispositive," *id.* at C11 (quoting Pet. App. D15) (alteration in original). Although the court of appeals in the misdemeanor case had ultimately concluded that the Sixth Street sidewalk was a traditional public forum, the district court emphasized that the magistrate judge and the district court judge in that prior case had each concluded otherwise. *Id.* at C11. Because the various judges to address the issue themselves disagreed about the proper characterization of the Sixth Street sidewalk, the district court determined that respondents could not be subjected to damages "for 'picking the losing side of the controversy' regarding the status of the forum." *Id.* at C13 (quoting *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999)).

Moreover, the district court noted that the park regulations in effect at the time of petitioner's arrest required demonstrators to obtain a permit and designated the Sixth Street sidewalk as closed to the public for First Amendment activity. Pet. App. C12. "Park Rangers such as [respondents] Saperstein and Crane should not be asked to choose between enforcing park regulations and being subjected to suit for money damages." *Ibid.*[1]

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[1] The district court also dismissed petitioner's Fourth Amendment and Equal Protection claims against respondents Saperstein and Crane, Pet. App. C14-C18, and found that sovereign immunity protected the National Park Service and the Department of the Interior from suit for damages, *id.* at C6. The court dismissed as moot petitioner's claims for injunctive relief because the National Park Service had issued new regulations both relieving groups of under 25 people from the obligation to obtain a permit and designating the Sixth Street sidewalk as a "public area open for First Amendment activity." *Id.* at C18. The court of appeals affirmed these holdings, *id.* at A7-A12, and petitioner does not ask this Court to revisit them.

b. The court of appeals affirmed. Pet. App. A1-A13. Like the district court, the court of appeals found that "the fact that two judges found no First Amendment violation indicates that [petitioner's] constitutional right to demonstrate on the Sixth Street sidewalk was not clearly established." *Id.* at A6. Noting the fact-specific nature of First Amendment forum analysis, the court found that respondents were reasonable in believing that their actions comported with the Constitution. *Ibid.* The court noted that petitioner's "First Amendment rights were already vindicated when [it] vacated his previous conviction" and stated that respondents should not be subject to damages "for making a reasonable mistake." *Id.* at A7.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The decision rests on the factbound determination that respondents were reasonable in concluding that the Sixth Street sidewalk was a nonpublic forum. Further review is not warranted.

1. As the court of appeals recognized, "[t]he question whether a particular sidewalk is a public or a nonpublic forum is highly fact-specific and no one factor is dispositive." Pet. App. A6 (quoting Pet. App. D15) (alteration in original). In reversing petitioner's misdemeanor conviction, the court of appeals found his "classic as-applied challenge" meritorious, while noting that "for all intents and purposes" that challenge was "entirely dependent on the facts of this case" and that petitioner "nowhere even obliquely suggests that the constitutionality of the regulation at issue should be assessed against a broader backdrop." *Id.* at D12.

In later finding that respondents were entitled to qualified immunity, the courts below made a second, derivative factbound determination, namely whether respondents' assessment of the status of the Sixth Street sidewalk as a non-public forum was reasonable. Pet. App. A6-A7. These findings turned entirely on case-specific details, such as the kind of pavement used on the sidewalk in question, *id.* at D16, the presence of fencing along its side, *id.* at C11, D16-D17, E17-E18, the identity of individuals using it, *id.* at C11, D18, F5-F6, and the significance of a "Compendium" issued by the Superintendent of Independence National Historical Park governing permit requirements, *id.* at C12, E17, F4.

As petitioner acknowledges (Pet. 12 n.7), the lower courts' factbound determinations do not conflict with the conclusion of any other court of appeals. The courts merely applied the correct legal standard to the facts before them, and those case-specific resolutions do not merit this Court's review.

2. Petitioners seek recovery against respondents under *Bivens* for an asserted violation of his First Amendment rights. But while this "Court has recognized an implied cause of action for damages against federal officials for Fourth Amendment violations," it has "never held that *Bivens* extends to First Amendment claims." *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 n.4 (2012). Here, even assuming *Bivens* extends to First Amendment claims, the court of appeals concluded that respondents were entitled to qualified immunity. That conclusion was corrected and does not warrant review.

a. The defense of qualified immunity shields government officials from liability for civil damages "insofar as their conduct does not violate clearly established

statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). The two-prong qualified immunity inquiry asks whether the official's conduct violated a constitutional right, and, if so, whether the right was "clearly established" at the time of the alleged violation. *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001), overruled on other grounds, *Pearson* v. *Callahan*, 555 U.S. 223 (2009). For a government official to be stripped of qualified immunity, preexisting law must place the unconstitutionality of his conduct "beyond debate." *Ashcroft* v. *Al-Kidd*, 131 S. Ct. 2074, 2083 (2011). Qualified immunity thus protects officials from suit unless they are "plainly incompetent or * * * knowingly violate the law." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986).

Whether the restrictions that respondents placed on petitioner's speech violated the First Amendment depended in material part on whether the Sixth Street sidewalk was a traditional public forum or a nonpublic forum. Compare Pet. App. D13-D21 with *id.* at E13-E18 and *id.* at F7-F8. Contrary to petitioner's assertion, see Pet. 8-9, it is "incorrect * * * that every public sidewalk is a public forum." *United States* v. *Kokinda*, 497 U.S. 720, 728 (1990) (plurality opinion); see *Greer* v. *Spock*, 424 U.S. 828, 838 (1976) (sidewalk within a military base open to the public was not a traditional public forum); Pet. App. D15 ("[N]ot all public sidewalks constitute public fora for First Amendment purposes."). Rather, "the location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum." *Kokinda*, 497 U.S. at 728-729. This inquiry "is highly fact-specific and no one factor is dispositive." Pet. App. D15. Every circuit fol-

lows this fact-specific approach to public forum analysis.[2]

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[2] See *Initiative & Referendum Inst.* v. *U.S.P.S.*, 685 F.3d 1066, 1071 (D.C. Cir. 2012) (noting that "it is not enough to know that the regulated property is a sidewalk" and concluding that "the location, purpose, and history of interior postal sidewalks combine to show that they are not public forums"); *Del Gallo* v. *Parent*, 557 F.3d 58, 70 (1st Cir.) (to determine a location's forum "[w]e examine both the characteristics of the property and its history and purpose"), cert. denied, 130 S. Ct. 740 (2009); *Make the Road by Walking, Inc.* v. *Turner*, 378 F.3d 133, 146 (2d Cir. 2004) (evaluating the physical characteristics and purpose of welfare waiting rooms in determining that they are nonpublic forums); *McTernan* v. *City of York, Pa.*, 577 F.3d 521, 527-528 (3d Cir. 2009) (evaluating a ramp's characteristics and purpose to conclude that it was a nonpublic forum); *Warren* v. *Fairfax Cnty.*, 196 F.3d 186, 189 (4th Cir. 1999) (en banc) (grassy mall outside municipal building was a public forum in light of its "physical characteristics" and "objective use and purposes"); *Hays Cnty. Guardian* v. *Supple*, 969 F.2d 111, 116-117 (5th Cir. 1992) (evaluating state university's physical characteristics and traditional purposes in finding that it was not a traditional public forum), cert. denied, 506 U.S. 1087 (1993); *United Church of Christ* v. *Gateway Econ. Dev. Corp.*, 383 F.3d 449, 452-453 (6th Cir. 2004) (noting that whether a sidewalk is a public forum "hinges on a case-by-case inquiry in which no single factor is dispositive" and finding that a sidewalk encircling a sports area was a traditional public forum because it was "fully integrated into the downtown and indistinguishable from its adjoining publicly owned sidewalk both physically and in its intended use"); *Chicago Acorn* v. *Metropolitan Pier Exposition Auth.*, 150 F.3d 695, 702-703 (7th Cir. 1998) (evaluating purpose and physical characteristics of Chicago pier in determining that it was not a traditional public forum); *Families Achieving Independence & Respect* v. *Nebraska Dep't of Soc. Servs.*, 111 F.3d 1408, 1419-1420 (8th Cir. 1997) (concluding that lobby of welfare office is not a traditional public forum by evaluating its purpose and layout); *Venetian Casino Resort, L.L.C.* v. *Local Joint Exec. Bd.*, 257 F.3d 937, 943 (9th Cir. 2001) (replacement sidewalk constructed on casino property but "seamlessly connected to public sidewalks on either end and intended for general public use" was a traditional public forum), cert. denied, 535 U.S.

b. The physical characteristics of the Sixth Street sidewalk (along with other factors discussed below) distinguished it from nearby sidewalks, making respondents' conclusion that the area was a nonpublic forum reasonable. The Sixth Street sidewalk was partially constructed from Belgian block and was lined with "numerous metal bollards, approximately four feet high, many of which were joined together by metal chains" that acted as a "fence" to separate the sidewalk from the street. Pet. App. E17-E18; see *Int'l Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 680 (1992) (noting that "separation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction"). The sidewalk was "patrolled by guards and Park Rangers." Pet. App. E18. And, unlike the prototypical public sidewalk that this Court held to be a traditional public forum in *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981), the Sixth Street sidewalk was not "continually open," "often uncongested," and "a place where people [could] enjoy the open air or the company of friends and neighbors in a relaxed environment." Instead, it was "relatively narrow" and "often highly congested." Pet. App. E18.

The purposes of the Sixth Street sidewalk further distinguished it from a typical public sidewalk. While most public sidewalks are thoroughfares, the Sixth

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905 (2002); *Brown* v. *Palmer*, 944 F.2d 732, 736 (10th Cir. 1991) (en banc) (looking to purpose and characteristics of military base to conclude that it was not a traditional public forum during open house); *Uptown Pawn & Jewelry, Inc.* v. *City of Hollywood*, 337 F.3d 1275, 1278 (11th Cir. 2003) (noting that courts look to factors including "the nature of the property" and "its compatibility with expressive activity" in concluding that municipal bus benches are not traditional public forums).

Street sidewalk was "traditionally and regularly used as a waiting area for visitors standing in line to enter the Liberty Bell Center." Pet. App. E18. On the day of petitioner's demonstration, the Liberty Bell Center was accessible to visitors only via the Sixth Street sidewalk. *Id.* at E17. This Court has held that a sidewalk's use as an entrance or exit to a nonpublic area may distinguish it from other public sidewalks for purposes of the First Amendment. See *Kokinda*, 497 U.S. at 727-728.

The distinct physical characteristics and purpose of the Sixth Street sidewalk were not ultimately sufficient to persuade the court of appeals that the area was a nonpublic forum, see Pet. App. D13-D31, but they amply support the reasonableness of the respondents view that it was. The status of the Sixth Street sidewalk as a traditional public forum was far from a matter "beyond debate." *Al-Kidd*, 131 S. Ct. at 2083.

Qualified immunity is particularly appropriate because governing regulations supported respondents' actions. Park regulations identified the Sixth Street sidewalk as a restricted area that was not open to the public for First Amendment activity. Pet. App. F3. They further required a permit for demonstrations at the Park, which petitioner failed to obtain. *Ibid.* By requiring petitioner to move to Market Street, respondents were carrying out their duties as set forth in governing park regulations. In the absence of a clear indication that these regulations were unlawful, respondents "should not be asked to choose between enforcing park regulations and being subjected to suit for money damages." *Id.* at C12; see also *Wilson*, 526 U.S. at 617 (Because "the state of the law * * * was at best undeveloped, * * * it was not unreasonable for law enforcement officers to look and rely on their formal * * * policies.").

c. The fact that both the magistrate judge and the district court judge in the misdemeanor case found no First Amendment violation confirms that respondents are entitled to qualified immunity. Contrary to petitioner's suggestion, see Pet. 18-19, this Court has maintained that a disagreement among lower courts over a constitutional question may entitle defendants to qualified immunity. "If judges * * * disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson*, 526 U.S. at 618; see *Reichle*, 132 S. Ct. at 2096 (same).

Two federal judges disagreed with the court of appeals that petitioner's First Amendment rights were violated. Although the Third Circuit panel ultimately held that a constitutional violation occurred, it acknowledged that respondents' real-time decision on how to handle petitioner's demonstration was no "easy undertaking" and concluded only that the "scale tips in [petitioner's] favor." Pet. App. D49. The fact that two federal judges tipped the scale the other way and concluded that respondents' conduct was not unlawful demonstrates that their actions were at least reasonable.[3]

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[3] While respondents had ample reason to conclude that the Sixth Street sidewalk was a nonpublic forum, no clearly established law prohibited them from removing petitioner even if the sidewalk *was* a traditional public forum. Both the magistrate judge and district court in the misdemeanor case found in the alternative that there was no First Amendment violation even if the Sixth Street sidewalk was a public forum. See Pet. App. F8-F9; *id.* at E25-E26. Those holdings demonstrate that respondents' actions were reasonable for this independent reason.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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