No. 13-115

In the Supreme Court of the United States

TIM WOOD AND ROB SAVAGE, PETITIONERS

v.

MICHAEL MOSS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Respondents provide no sound basis for subjecting petitioners, two Secret Service agents on the President's protective detail, to the burdens of litigation and to potential personal liability for damages (including punitive damages) under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in the circumstances of this case. Disavowing at least one of the two bases for the Ninth Circuit's decision, respondents now acknowledge that, in order to state a claim for a violation of clearly established law, they must sufficiently allege that petitioners moved them "specifically *because* of their viewpoint, and *without* a valid security reason." Resp. Br. 40; see *id.* at 12, 41-42. Respondents cannot meet that burden.

Under the facts alleged in the complaint, petitioners issued a facially viewpoint-neutral order to clear

"all persons" from a street adjacent to an alley leading to the open-air patio where the President was dining. Pet. App. 177a. Respondents do not meaningfully dispute that, while on that street, members of their group (and anyone who had mixed in with their group) were within explosive range of the President. See Pet. Br. 44; Resp. Br. 24. Respondents cannot dispute that simply moving them to the next block (Fourth Street), as petitioners originally directed, would have left their group *closer* to the President than the pro-Bush demonstrators to the west of the Inn. Pet. Br. 4-5 & Diagram A. And respondents no longer dispute that, once they were shifted to the next block, petitioners were entitled to move them a block farther (to Fifth Street) in order to avoid giving them a direct line of sight to the wooden fence behind which the President was dining. See Pet. Br. 7; *id.* at 7 (Diagram B); Resp. Br. 22.

Nothing in the complaint plausibly alleges that petitioners lacked a "valid security reason," Resp. Br. 40, to clear the street. Even the Ninth Circuit, in finding an earlier version of respondents' complaint insufficient, recognized that simply moving respondents to the next block—which is all that respondents now contend to have been unconstitutional—"is not a plausible allegation of disparate treatment" as compared to the treatment of either the pro-Bush demonstrators or the diners and guests at the Inn. 572 F.3d at 971. And respondents' reliance on the alleged actions of *other* Secret Service agents at other times and places to support an inference that these *particular* petitioners had an invidious speech-suppressive motive cannot be squared with this Court's rejection of vicarious

Bivens liability in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009).

In short, even if respondents' allegations are "consistent with" unlawful conduct, *Iqbal*, 556 U.S. at 681, those allegations fail to refute the "obvious alternative explanation," *id.* at 682 (citation omitted), for petitioners' actions here, namely, that they sought to establish an effective security perimeter to protect the President during his unscheduled, last-minute stop for dinner on an outdoor restaurant patio. The Court should reverse and end the prolonged litigation to which petitioners have been subjected.

A. Secret Service Crowd-Control Measures Supported By A Legitimate Presidential-Security Rationale Do Not Violate Clearly Established First Amendment Rights

In order to survive a motion to dismiss, a plaintiff in a *Bivens* suit must "plead factual matter that, if taken as true, states a claim that [the defendant officials] deprived him of his clearly established constitutional rights." *Iqbal*, 556 U.S. at 666. Defining respondents' "clearly established constitutional rights" is thus critical to determining the sufficiency of their complaint. See *id.* at 675 ("[W]e begin by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity."). Although respondents' brief at points takes an overly broad view of clearly established law, respondents ultimately recognize that, in order to overcome petitioners' qualified-immunity defense, their complaint must sufficiently allege that petitioners moved them "specifically *because* of their viewpoint, and *without* a valid security reason." Resp. Br. 40; see *ibid.* (describing

that as "[t]he issue in this case"); see also *id.* at 12 (same); *id.* at 41-42 (similar). So long as petitioners *did* have "a valid security reason" for moving respondents, they did not violate any clearly established First Amendment right.

1. This Court has "emphasized" that the qualified-immunity inquiry requires a "'particularized'" analysis of whether the "'contours of the right'" asserted by the plaintiff were "'sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right.'" *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)). Accordingly, as the opening brief details (at 22-25), the Court has consistently framed the right at issue for purposes of qualified immunity not "as a broad general proposition," but instead in relation to the "specific context of the case." *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (quoting *Saucier*, 533 U.S. at 201).

The court of appeals here deviated significantly from that approach. In its view, Secret Service agents violate clearly established First Amendment rights simply by "explicitly treat[ing] pro- and anti-Bush demonstrators differently," regardless of the agents' reasons for doing so. Pet. App. 35a. The court accordingly held—separate and apart from any allegations that petitioners acted with a viewpoint-discriminatory motive, *id.* at 38a-43a—that a contention that respondents "were moved to a location where they had less opportunity than the pro-Bush demonstrators to communicate their message to the President and those around him" would in itself "support a plausible claim of viewpoint discrimination." *Id.* at 38a. The court then proceeded to deny petitioners

qualified immunity on the ground that "[i]t is 'beyond debate' that, particularly in a public forum, government officials may not disadvantage speakers based on their viewpoint." *Id.* at 45a; see *id.* at 49a.

As the opening brief explains (at 25-37), the court of appeals erred in concluding that the existence of a general right to be free from "viewpoint discrimination in a public forum," Pet. App. 49a, clearly established the more specific right of respondents in this case to stand within a particular distance of the President. Respondents do not meaningfully argue otherwise. They instead steer clear of the court of appeals' theory by emphasizing that their own theory of the case is that petitioners moved them "for purely political reasons." Resp. Br. 15. There is accordingly no dispute that the court of appeals erred when it suggested that petitioners could be subject to liability merely based on allegations that groups with differing viewpoints were placed at different distances from the President.

2. Although respondents do not repeat that particular error, portions of their brief nevertheless contain the same "familiar qualified immunity errors," Pet. App. 22a (O'Scannlain, J., dissenting from the denial of rehearing en banc), that infected the Ninth Circuit's analysis. Like the court of appeals, respondents appear to believe (Br. 32-37) that decisions of this Court describing general viewpoint-neutrality principles in other contexts necessarily compel a particular legal rule in the distinct context of crowd control during a last-minute, unscheduled stop by the President.[1]

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[1] Amicus NAACP Legal Defense and Educational Fund's discussion of viewpoint-discrimination law (Br. 25-34) overlooks the qualified-immunity context of this case entirely.

Respondents' one-size-fits-all approach to viewpoint discrimination cannot be reconciled with this Court's decision in *Reichle* v. *Howards*, 132 S. Ct. 2088 (2012). The plaintiff in that case claimed that two Secret Service agents had engaged in a form of viewpoint discrimination by arresting him "in retaliation for criticizing the Vice President." *Id.* at 2092. The Court concluded that, even assuming the agents had in fact arrested the plaintiff in retaliation for his viewpoint, the agents were entitled to qualified immunity. *Id.* at 2093-2097. Emphasizing the need to define the constitutional right at issue in a "particularized" and "specific" way, the Court reasoned that it "has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause; nor was such a right otherwise clearly established at the time of [the plaintiff's] arrest." *Id.* at 2093-2094 (internal quotation marks and citation omitted). Respondents correctly point out (Br. 34-35) that the plaintiff in *Reichle* touched the Vice President, while respondents here did not touch the President. But the relevant point for purposes of qualified immunity is the level of specificity at which the Court defined the viewpoint-discrimination right at issue. Just as "the general right to be free from retaliation for one's speech" was not specific enough in *Reichle*, 132 S. Ct. at 2094, so too the general "principle of viewpoint neutrality" (Resp. Br. 33) is not specific enough here. See *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2084 (2011) ("The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established.").

This Court has previously considered as part of the "circumstances" relevant to whether a constitutional right was clearly established "the duty to protect the safety and security of the Vice President of the United States from persons unknown in number." *Saucier*, 533 U.S. at 209. No sound reason exists for disregarding that same duty (as applied to the President rather than the Vice President) here. An agent in petitioners' position could reasonably have believed that it was lawful to move respondents to the next block, so long as he had a legitimate security rationale for doing so. That is true even if respondents' viewpoint also factored into the decisionmaking process. As the opening brief explains (at 32-36), consideration of viewpoint is not invariably unlawful. A police officer who "bear[s] animus toward the content of a suspect's speech," for example, is nevertheless entitled to "arrest [a] suspect because his speech * * * suggests a potential threat." *Reichle*, 132 S. Ct. at 2095. Particularly given that backdrop, a Secret Service agent could reasonably conclude that he may take speech into account in assessing how close someone should be to the President; that any animus he might have toward the speech would not necessarily preclude him from taking legitimate security precautions; and that even if his motives are mixed, the First Amendment does not categorically foreclose him from acting to advance the Nation's "overwhelming" interest "in protecting the safety of its Chief Executive," *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam). See *Reichle*, 132 S. Ct. at 2097 (Ginsburg, J., concurring in the judgment) (recognizing that Secret Service agents are "duty bound to take the content of" speech

"into account in determining" whether someone poses "an immediate threat" to a protectee's security).

Respondents attack a straw man when they suggest (Br. 33) that petitioners seek a "Secret Service exception to the First Amendment." The point is not that the First Amendment is wholly inapplicable to the Secret Service, but that application of the First Amendment is context-specific, see, *e.g.*, *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1220 (2011), and the qualified-immunity inquiry even more so, see, *e.g.*, *Brosseau*, 543 U.S. at 198. Respondents cannot identify any case (let alone any precedent of the Ninth Circuit or this Court) that would have given petitioners sufficient notice that their actions in this case, if undertaken at least in part to further a legitimate security interest, would amount to unconstitutional viewpoint discrimination. See Pet. Br. 25-28 (discussing cases cited at Resp. Br. 33-37); see also *Sherrill* v. *Knight*, 569 F.2d 124, 126 (D.C. Cir. 1977) (challenge not to crowd control, but to procedures and standards for issuing White House press passes) (cited at Resp. Br. 34). Petitioners accordingly should not face potential personal liability, and the burdens of litigation, unless respondents can sufficiently plead that petitioners were acting solely with a viewpoint-discriminatory motive and lacked any legitimate security justification for their actions.[2] See *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (recognizing that the protections of qualified immunity are "nowhere more important than when the specter of Presidential assassination is raised").

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[2] That is true whether the claim is denominated as a claim of viewpoint discrimination, "content discrimination," or "discrimination against expression." See Resp. Br. 30 n.6.

B. Respondents' Complaint Does Not Plausibly Allege That Petitioners Lacked A Valid Security Rationale For Moving Respondents

To prevail, respondents must allege that petitioners moved respondents "specifically *because* of their viewpoint, and *without* a valid security reason." Resp. Br. 40. As this Court's recent decisions interpreting Federal Rule of Civil Procedure 8(a)(2) make clear, respondents have failed to do so.

In *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), this Court concluded that a complaint whose allegations were "consistent with an unlawful agreement * * * nevertheless * * * did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful * * * behavior." *Iqbal*, 556 U.S. at 680 (describing *Twombly*). In *Iqbal*, the Court found claims of racial and religious discrimination by high-ranking government officials to be implausible, even "[t]ak[ing] as true" allegations that one official "direct[ed]" the "arrest[] and det[ention of] thousands of Arab Muslim men . . . as part of [the] investigation of the events of September 11" and that both officials "approved" a "policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI." *Id.* at 681 (citation omitted); see *id.* at 669. The Court explained that "[a]s between" the "purposeful, invidious discrimination [the plaintiff] asks us to infer" and the "'obvious alternative explanation'" of a "nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts," the

former was "not a plausible conclusion." *Id.* at 682 (quoting *Twombly*, 550 U.S. at 567).

As the opening brief explains (at 38-52), the approach set forth in *Iqbal* and *Twombly* requires dismissal of respondents' complaint. Like the complaint in *Iqbal*, the complaint here provides allegations merely "consistent with" a theory that government officials acted with a discriminatory purpose. 556 U.S. at 681. "But given more likely explanations, they do not plausibly establish this purpose." *Ibid.* In particular, petitioners' proffered security rationale for moving respondents (to get them out of weapons range of the President) is an "obvious alternative explanation" for petitioners' actions. *Id.* at 682 (citation omitted). In light of that "obvious alternative explanation," respondents' allegations, whether taken individually or taken together, do not support a "plausible conclusion," *ibid.*, that petitioners were entirely "*without* a valid security reason" to act as they did, Resp Br. 40.[3]

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[3] *Iqbal* rejected a contention, essentially identical to an argument respondents make here (Br. 26), that the pleading standard it applied was inconsistent with Federal Rule of Civil Procedure 9(b). 556 U.S. at 686-687. This case does not require the Court to address precisely how much "more likely," *id.* at 680, 681, an alternative explanation must be to render a plaintiff's theory implausible. Although some amici attempt to minimize *Iqbal*'s reference to "more likely" alternative explanations, they acknowledge that a complaint should be dismissed when there is an "obvious" alternative to the theory of liability advanced by the plaintiff. See Pub. Justice Amicus Br. 17; NAACP Amicus Br. 11. Here, it is obvious from the face of the complaint that petitioners had a legitimate security rationale for moving respondents, and the complaint thus fails to plead facts sufficient to divest petitioners of their qualified immunity. The heightened showing that qualified immunity requires in this context, in combination with the obvious existence of a security rationale on the facts as alleged, differentiates this case

Comparison to the pro-Bush demonstrators. For the reasons explained in the opening brief (at 30-31, 44-45), respondents' contention that they were "treated differently than the similarly situated pro-Bush demonstrators," Resp. Br. 20 (emphasis omitted), is misconceived. As the President's motorcade proceeded to the Inn, the two groups had equal access to the President from opposite sides of Third Street, and they were able to demonstrate as they saw fit. Pet. App. 175a. Once the motorcade passed and the President entered the outdoor patio for dinner, however, the two groups were not "similarly situated." Respondents were on the street directly in front of both the Inn and an alley leading to the patio where the President was dining. *Id.* at 212a. The pro-Bush demonstrators were on the next block over, shielded from the President's location by a large building (the U.S. Hotel). *Ibid.* Petitioners thus had legitimate reasons to be substantially more concerned about the potential threat posed by respondents' group.

Respondents continue to assert (Br. 23) that they were not "in handgun or explosive range of the President" when they were on the street in front of the Inn. But as the opening brief observed (at 44-45), that conclusory assertion is belied by the diagram in respondents' own complaint, which shows that members of respondents' group (and anyone who might have infiltrated that group) were close enough to throw an explosive that could have harmed the President. Respondents' brief does not meaningfully deny or refute that observation, but instead simply asserts that any focus on respondents' weapons-range proximity to the

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from the mine run of civil-rights cases with which the amici are concerned. See NAACP Amicus Br. 12-21.

President "misses the point." Resp. Br. 24. Respondents' weapons-range proximity to the President, however, corroborates petitioners' stated reason for moving them, namely, that petitioners "did not want anyone within handgun or explosive range of the President," Pet. App. 177a.[4]

Respondents emphasize that they were "moved to a location more than twice as far from the Inn" as the location of the pro-Bush demonstrators. Resp. Br. 20; see, *e.g.*, *id.* at 22. But as respondents themselves recognize (*id.* at 22), their ultimate location is not the proper focus of the inquiry. The complaint alleges that respondents' group was initially moved only to the next block (Fourth Street). Pet. App. 177a. According to the map attached to the complaint (*id.* at 212a, Pet. Br. 4 (Diagram A)), that location was still nearer to the President than the position of the pro-Bush demonstrators. As the opening brief explains (at 5-7 & Diagram B, 44-45), respondents' new location itself provided a line of sight to the patio fence. Respondents were "subsequently" moved a block farther back (to Fifth Street). Pet. App. 177a. Respondents do not contest the necessity of that second move. See Resp. Br. 22. They instead characterize the issue as a

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[4] Respondents suggest in passing (Br. 21-22) that if removing everyone from weapons-range proximity were petitioners' actual rationale, petitioners could simply have cleared "the sidewalk outside the mouth of th[e] alley." But blocking off part of the sidewalk with no natural boundaries would have required diverting additional resources; taking that approach would have been less secure because members of respondents' group would still have been only "a few steps" from where they could potentially cause serious harm, *id.* at 21; and such after-the-fact micromanagement of Secret Service agents' on-the-spot security precautions should not provide a basis for subjecting those agents to *Bivens* liability.

"red herring" and emphasize that their theory of the case is that petitioners acted unconstitutionally when petitioners *initially* moved them over to the next block. Respondents thus appear to recognize that, if petitioners were entitled to clear the street adjacent to the Inn and the alley, they were not required to position respondents an equivalent distance from the Inn as the pro-Bush demonstrators.

The initial move—which left respondents *closer* to the President than were the pro-Bush demonstrators—does not plausibly establish that petitioners lacked a valid security rationale and acted solely with the intent to mute respondents' speech. As the court of appeals recognized in rejecting respondents' earlier complaint, alleging that petitioners moved respondents "to a location situated a comparable distance from the Inn as the other demonstrators, thereby establishing a consistent perimeter around the President" is "not a plausible allegation of disparate treatment." 572 F.3d at 971. The court explained that "[i]f [petitioners'] motive in moving [respondents] away from the Inn was—contrary to the explanation they provided to state and local police—suppression of [respondents'] anti-Bush message, then presumably, they would have ensured that demonstrators were moved to an area where the President could not hear their demonstration, or at least to an area farther from the Inn th[a]n the position that the pro-Bush demonstrators occupied." *Ibid.* Respondents have never alleged that the President, who was dining on an outdoor patio, could not hear their demonstration from the next block (or even that he could not hear it from their final location on Fifth Street), see Pet. Br. 31 n.4, and an inference that the President could not hear a group of

200 to 300 people only half a block away would be unreasonable.

Respondents briefly hypothesize (Br. 24-25) that petitioners should have been *more* concerned about the pro-Bush demonstrators than about their group, on the theory that "someone intent on doing harm would * * * more likely conceal himself or herself among a group of the President's supporters." Although an assailant might conceivably adopt that strategy, the Secret Service protects the President not only from sophisticated assassins (who could be anywhere) but also from people who might lash out at him, particularly if urged to do so by a group of like-minded people. See Pet. Br. 34 & n.5 (discussing attacks by protesters). Petitioners thus had an entirely valid security reason for clearing the street adjacent to the alley and the Inn in order to ensure that *both* groups of demonstrators were out of weapons range.

The timing of petitioners' order. The allegation that the President sat down to dinner 15 minutes before petitioners directed the police to clear the street, Pet. App. 177a, does not support an inference that petitioners lacked a valid security rationale for that directive. The substantially more likely explanation for the timing of petitioners' order is that petitioners—who had limited time to secure the area—did not initially have the opportunity to fully assess the security risk of having respondents' group on the street adjacent to the alley. Respondents acknowledge (Br. 30) that petitioners had only a limited amount of time (roughly 20 minutes) within which to make security arrangements after the President changed his plans and decided to dine outdoors at the Inn. Petitioners could not realistically develop a perfect security plan

in that short a period. Rather, they would naturally seek to improve the plan as the situation developed or as further optimizations became apparent. Indeed, respondents do not even allege that petitioners knew the President would dine on the patio (as opposed to inside the Inn, where he would have been more shielded from respondents' group) until the President actually arrived and sat down. Pet. App. 175a.[5] In any event, regardless of the timing, moving a group that was within weapons range of the President to a distance that was still *closer* to the President than another group of demonstrators cannot plausibly suggest a purely discriminatory motive.

Treatment of the diners and guests at the Inn. Even the Ninth Circuit recognized, in rejecting respondents' earlier complaint, that the "allegation that the diners and guests inside the Inn were allowed to remain in close proximity to the President without security screening does not push their viewpoint discrimination claim into the realm of the plausible." 572 F.3d at 971. The court declined to reconsider the issue in the second appeal and noted law-of-the-case concerns about whether the mandate from the first appeal would permit such reconsideration. See Pet. Br. 47 & n.6; Pet. App. 43a n.5. Respondents do not address those law-of-the-case concerns. But even assuming the issue is fairly presented, for the reasons explained in the opening brief (at 47-48), the diners

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[5] Respondents' attempt to paint the picture that petitioners moved them only when their chants became audible is additionally undermined by their failure specifically to allege that they only started chanting 15 minutes or so after the President arrived. It is implausible that respondents, who had gathered specifically to protest the President, stood quietly by for that length of time.

and guests at the Inn were not similarly situated to respondents, and any differential treatment of them does not create an inference of discriminatory motive.

Respondents' contention (Br. 28) that the diners and guests at the Inn "posed a greater risk of assaulting the President" erroneously assumes that *anyone* closer to the President is a greater threat than someone farther away. That is not so. Because the President's visit to the Inn was unknown even to the Secret Service until just before it occurred, the diners and guests at the Inn could not have had any expectation that they would see the President that evening or any opportunity to premeditate a plan to cause him harm. The diners and guests thus presented a risk to the extent that one of them might have been carrying a weapon for unrelated reasons and decided on the spur of the moment to try to use it on the President, or decided spontaneously to use a utensil or other nearby object as a weapon.[6] See *id.* at 29. The Secret Service could mitigate that risk by keeping close watch on the relatively small number of people in the Inn (see Pet. App. 177a) and controlling ingress and egress so as to keep the situation stable.

Under the circumstances, respondents' group presented a different, and potentially greater, risk. The group was larger in number (see Pet. App. 169a) and was crowded together in a manner that could have

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[6] Such an ad hoc attack would have been so unlikely actually to harm the President that it is doubtful anyone would have tried it. See *Rubin* v. *United States*, 525 U.S. 990, 993 (1998) (Breyer, J., dissenting) (observing that "the Secret Service seeks to surround a President with an all-encompassing zone of protection, such that agents, once alerted, can form a human shield within seconds") (internal quotation marks and citation omitted).

made it difficult to spot individual threatening movements, such as someone drawing a gun (see Pet. Br. 4 (Diagram A)). The original members of the group had self-identified as critical of the President, had ventured out that evening (and had chosen their route) precisely because the President would be nearby, and had ample opportunity to arm themselves with their proximity to the President in mind. And the Secret Service could not necessarily prevent additional people, who had heard about the President's location and arrived with the specific purpose of attempting to harm him, from joining the crowd.

Respondents' reliance on the allegations about the diners and guests at the Inn is also flawed on a more fundamental level. At bottom, the inference respondents would draw from those allegations is that petitioners simply did not care about risks to the President's physical safety, and thus must have moved respondents for reasons unrelated to any such risks. See Resp. Br. 29. That inference requires a conclusion that petitioners deliberately failed to carry out the Secret Service's most critical mission, see 18 U.S.C. 3056(a)(1), or, at the very least, were massively incompetent. Cf. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (recognizing a "presumption of regularity" for certain government actions) (citation omitted). Particularly as compared to the "obvious alternative explanation," *Iqbal*, 556 U.S. at 682 (citation omitted), that petitioners legitimately viewed respondents' group as more of a threat, the inference is not plausible.

The Secret Service's alleged unwritten policy of viewpoint discrimination. The complaint expressly recognizes that the Secret Service has "written guide-

lines, directives, instructions and rules which purport to prohibit Secret Service agents from discriminating between anti-government and pro-government demonstrators, between demonstrators and others engaged in expressive assembly, and between demonstrators and members of the public not engaged in expressive assembly." Pet. App. 184a. Respondents, however, would treat those written policies as fraudulent; infer that the Secret Service's *actual* policy was to actively suppress disfavored speech; and would then further infer that petitioners were engaging in viewpoint discrimination in the particular circumstances of this case. Nothing in the complaint makes that chain of reasoning plausible.

For the reasons explained in the opening brief (at 48-49), the Presidential Advance Manual, which was not prepared by or for the Secret Service, does not suggest that petitioners here engaged in viewpoint discrimination. Respondents rely (Br. 5) on a passage advising members of the President's advance team, at certain ticketed presidential events, to "work with the Secret Service and have them ask the local police department to designate a protest area where demonstrators can be placed; preferably not in view of the event site or motorcade route." Pet. App. 219a; see *id.* at 215a (section on "Crowd Raising and Ticket Distribution"). That statement is most naturally understood to reflect that the Secret Service is the primary liaison to local police during presidential visits. Particularly when viewed in light of the surrounding context, it cannot plausibly be taken to suggest that the Secret Service disregards its written policies and engages in systematic viewpoint discrimination. Among other things, the manual elsewhere expressly instructs that

demonstrators who "appear likely to cause only a political disruption" are "the Advance person's responsibility" and that the Secret Service should be notified only if "the demonstrators appear to be a security threat." *Id.* at 220a. That express recognition that the Secret Service deals only with security threats reinforces both the Secret Service's own written policies and the obvious security-based explanation for petitioners' actions here.

The opening brief also explains (at 49) why the complaint's largely conclusory allegations of viewpoint discrimination by *other* Secret Service agents in *other* situations at *other* times—even if true, and even if found to be instances of unlawful discrimination—do not support an inference of viewpoint discrimination by petitioners in this particular case. Respondents' brief acknowledges (Br. 25-26) differences between those alleged incidents and this one, but contends that the other incidents would provide evidence of a "Secret Service policy" of viewpoint discrimination, which would in turn suggest that petitioners were "acting in accordance" with that policy in the circumstances of this case. That argument is foreclosed by *Iqbal*, which rejected an analogous theory of inferential animus.

The Court in *Iqbal* recognized that, in a *Bivens* suit alleging unconstitutional discrimination, individual government officials "cannot be held liable" in their personal capacities "unless *they themselves* acted on account of a constitutionally protected characteristic." 556 U.S. at 683 (emphasis added); see *id.* at 677. The Court accordingly found claims of discriminatory motive by high-ranking government officials implausible notwithstanding that the plaintiff "allege[d] that various *other* defendants," who were the officials' subordi-

nates, might have acted "for impermissible reasons." *Id.* at 682-683. The Court acknowledged that certain allegations in the complaint, "if true, and if condoned [by the officials], could be the basis for some inference of wrongful intent on [the officials'] part." *Id.* at 683. But the complaint nevertheless "d[id] not suffice to state a claim," because it failed to "plausibly suggest [the officials' own] discriminatory state of mind." *Ibid.*

Respondents' theory in this case would go even further than the theory rejected in *Iqbal*. It would resuscitate the theory rejected in *Iqbal* by relying on the actions of certain field-level operatives (a handful of Secret Service agents) to create an inference of discrimination at the highest levels of the agency (an unwritten agency-wide policy favoring viewpoint discrimination). It would then take the additional step of inferring that different field-level operatives (petitioners) acted in accordance with that policy and themselves harbored unconstitutional motives. The Court should not effectively authorize vicarious *Bivens* liability by allowing plaintiffs to impugn the motives of every single officer in an agency based on the alleged wrongful intent of a few. And it especially should not do so in the critical and sensitive context of Secret Service agents protecting the physical safety of the President.

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For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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