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

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Petitioners are Secret Service agents who, while protecting President George W. Bush, are alleged to have required that a group of 200 to 300 anti-Bush demonstrators be moved away from an alley next to an outdoor patio where the President was making a last-minute, unscheduled stop to dine. After they were moved, the anti-Bush demonstrators were less than one block farther from the alley than a group of pro-Bush demonstrators (who had not been adjacent to the alley at the outset). They were also two blocks farther from the route that the President's motorcade subsequently took when he left the restaurant. The court of appeals held that petitioners are not entitled to qualified immunity from a claim under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), of viewpoint discrimination in violation of the First Amendment. The questions presented are as follows:

1. Whether the court of appeals erred in denying qualified immunity to Secret Service agents protecting the President by evaluating the claim of viewpoint discrimination at a high level of generality and concluding that pro- and anti-Bush demonstrators needed to be positioned an equal distance from the President while he was dining on the outdoor patio and then while he was traveling by motorcade.

2. Whether respondents have adequately pleaded viewpoint discrimination in violation of the First Amendment when no factual allegations support their claim of discriminatory motive and there was an obvious security-based rationale for moving the nearby anti-Bush group and not the farther-away pro-Bush group.

PARTIES TO THE PROCEEDING

Defendants-appellants in the court of appeals were petitioner Tim Wood, United States Secret Service agent, in his official and individual capacities; petitioner Rob Savage, United States Secret Service agent, in his official and individual capacities; Ron Ruecker, Superintendent of the Oregon State Police, in his official and individual capacities; Eric Rodriquez, former Captain of the Southwest Regional Headquarters of the Oregon State Police, in his official and individual capacities; Tim F. McClain, Superintendent of the Oregon State Police, in his official and individual capacities; and Randie Martz, Superintendent of the Oregon State Police, in his official and individual capacities.

Plaintiffs-appellees in the court of appeals were Michael Moss, Lesley Adams, Beth Wilcox, Richard Royer, Lee Frances Torelle, Mischelle Elkovich, Anna Vine (formerly known as Anna Boyd), and the Jackson County Pacific Green Party.

Several other individuals and entities were defendants in the district court but did not file notices of appeal and were neither appellants nor appellees in the court of appeals. See Pet. App. 1a-3a.

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OPINIONS BELOW

The opinion of the court of appeals, as modified upon denial of rehearing en banc (Pet. App. 1a-59a), is reported at 711 F.3d 941. The order of the district court and the report and recommendation of the magistrate judge (Pet. App. 60a-157a) are reported at 750 F. Supp. 2d 1197. The opinion of the court of appeals following an earlier appeal is reported at 572 F.3d 962. The previously appealed order of the district court and the report and recommendation of the magistrate judge are available at 2007 WL 2915608.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2012. A petition for rehearing was denied on February 26, 2013 (Pet. App. 8a). On May 16, 2013, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including

June 27, 2013. On June 20, 2013, Justice Kennedy further extended the time to July 26, 2013, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law * * * abridging the freedom of speech."

STATEMENT

1. The complaint in this case seeks to hold agents of the United States Secret Service personally liable for damages (including punitive damages) under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for the manner in which they established a security perimeter around the President during a last-minute, unscheduled stop for dinner. Pet. App. 205a-206a; see *id.* at 172a-180a, 198a-201a. As this Court has recognized, "[t]he Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive," *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam), and federal law entrusts that responsibility to the Secret Service. The Secret Service is charged by statute with the physical security of not only the President, but also the Vice President, the families of the President and Vice President, and a number of other designated persons. 18 U.S.C. 3056(a). The President and Vice President are required by law to accept Secret Service protection. *Ibid.*

According to the allegations of the complaint, which are taken as true for present purposes, petitioners were two Secret Service agents "assigned to

provide security for" President George W. Bush on the evening of October 14, 2004. Pet. App. 165a. President Bush was scheduled to spend the evening at a cottage in Jacksonville, Oregon. *Id.* at 172a. Respondents are members of a group of 200 to 300 anti-Bush demonstrators who, after making advance arrangements with the local police, assembled about two blocks away from the cottage. *Id.* at 172a-174a.[1] A "similarly sized group of pro-Bush demonstrators" assembled across the street. *Id.* at 174a, 212a.

After the two groups had assembled, the President decided to make a last-minute, unscheduled stop to dine on an outdoor patio at the Jacksonville Inn. Pet. App. 175a. The Inn was located on California Street, on the same block where respondents were standing. *Id.* at 212a. After the demonstrators learned of the latebreaking change in plans, they clustered heavily on the side of California Street that included the Inn. *Id.* at 175a. The positions of the demonstrators at that point are illustrated in Diagram A (*infra*, and in the appendix to this brief), reproduced from the complaint.

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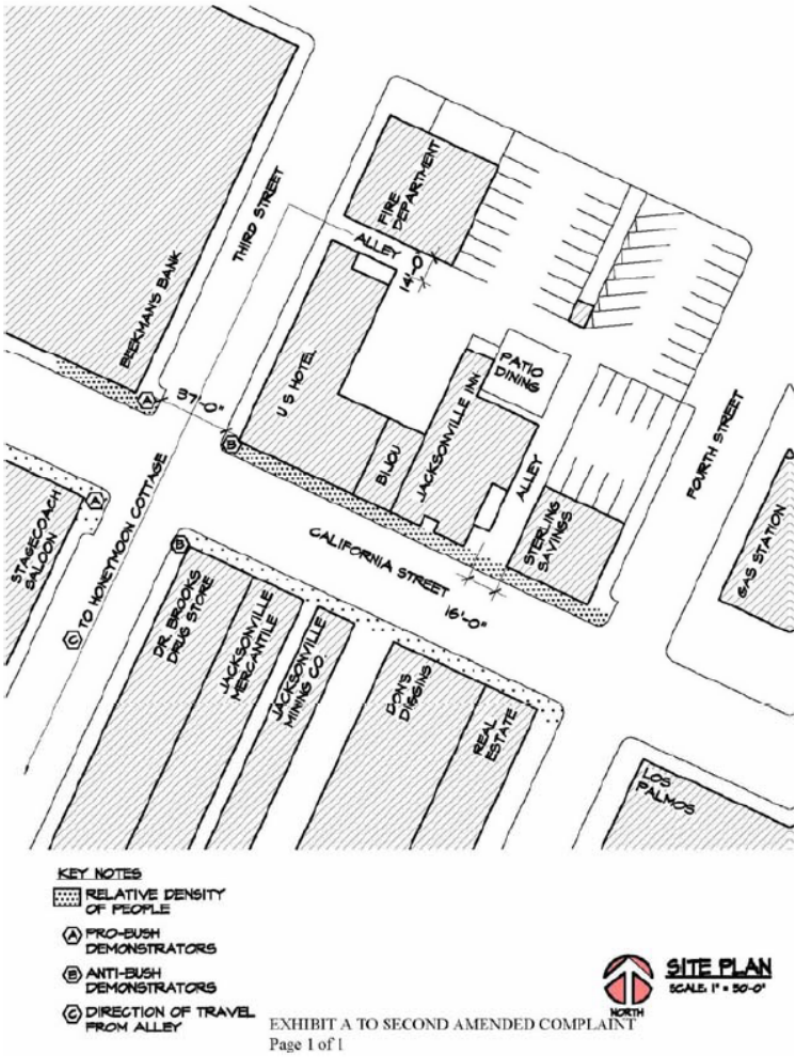
[1] Respondents in this Court include the anti-Bush demonstrators, the Jackson County Pacific Green Party, and state police officers. See Sup. Ct. R. 12.6; Pet. App. 1a-3a (caption identifying parties to the proceeding in the court of appeals). Because the court of appeals instructed the district court to dismiss the claim appealed by the state police officers (Pet. App. 58a), and because the Jackson County Pacific Green Party did not join the *Bivens* claim against petitioners (*id.* at 198a-199a), this petition uses the term "respondents" to refer to the seven individual anti-Bush demonstrators who were plaintiffs-appellees in the court of appeals. See p. II, *supra*.

DIAGRAM A



Source: Pet. App. 212a

Although the diagram shows that the anti-Bush demonstrators were at that time closer to the patio

area than were the pro-Bush demonstrators, the complaint alleges that, when the President arrived at the Inn, the assembled groups of anti- and pro-Bush demonstrators "had equal access" to the President because both groups were on California Street but on opposite sides of Third Street. Pet. App. 174a-175a. The Secret Service directed state and local police to secure the alley leading from California Street to the patio on which the President would be dining. *Id.* at 175a-176a. The police also cleared Third Street north of the intersection between Third and California Streets and began to prevent people from crossing Third Street. *Id.* at 176a. At this point, while the pro-Bush demonstrators were effectively cordoned off about half a block away, members of respondents' group remained on the sidewalk directly in front of an alley leading past the patio on which the President was dining. *Ibid.*; *id.* at 212a.

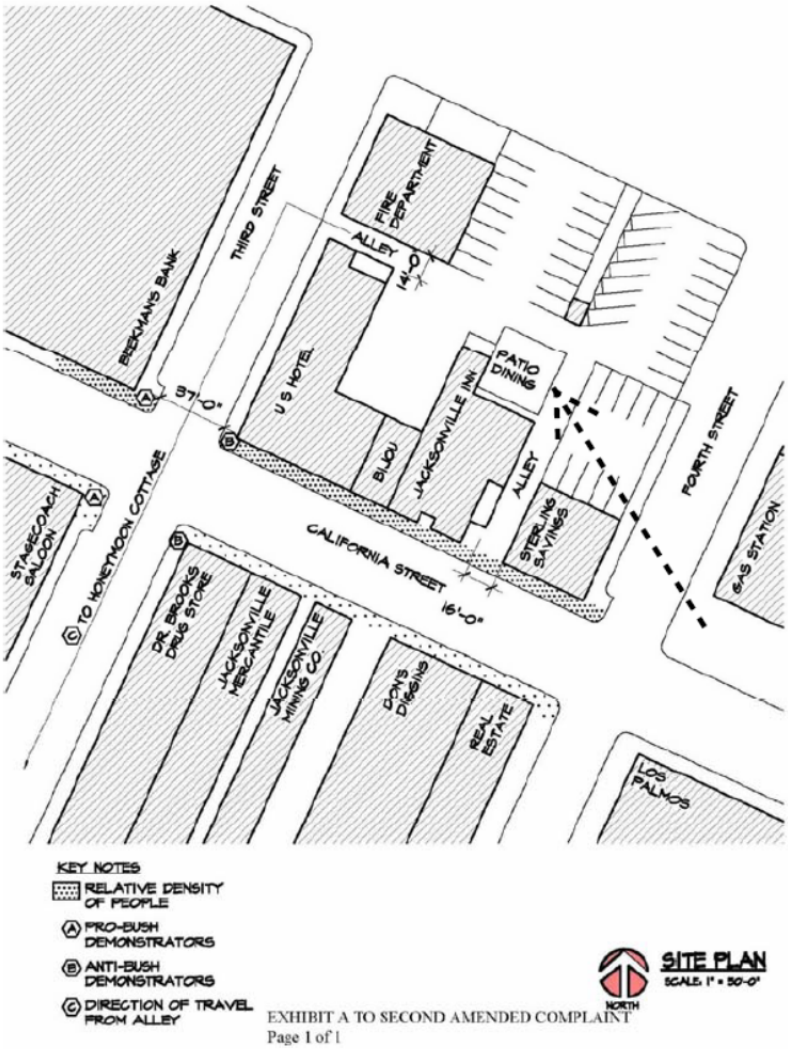
Shortly after the President arrived at the patio, petitioners directed state and local police to "clear California Street of all persons between Third and Fourth Streets." Pet. App. 177a. That was the block immediately adjacent to the alley leading past the patio, and it was also the block on which the anti-Bush demonstrators were standing. *Ibid.*; *id.* at 212a. Petitioners' order did not distinguish among demonstrators based on the viewpoint being expressed, but instead instructed that all the people in that area be "move[d] * * * to the east side of Fourth Street and subsequently to the east side of Fifth Street." *Id.* at 177a.

The map attached to the complaint (Diagram A) shows that, if the anti-Bush demonstrators had been moved only to the east side of Fourth Street, they would have remained slightly closer to the President

than the pro-Bush demonstrators. Pet. App. 212a (illustrating that patio was closer to Fourth Street than to Third Street). However, as illustrated on Diagram B (*infra*, and in the appendix to this brief), while the pro-Bush demonstrators had a large building (the U.S. Hotel) between them and the President, the anti-Bush demonstrators, while on the east side of Fourth Street, would have had their line of sight to the President blocked only by the patio's six-foot-high wooden fence. See *id.* at 176a (alleging the existence of the fence). At their final location on the east side of Fifth Street, the anti-Bush demonstrators were less than a block farther from the patio than the pro-Bush demonstrators. *Id.* at 212a. Respondents allege, in a portion of the complaint not at issue here, that state and local police officers "us[ed] clubs, pepper spray bullets, and forceful shoving" to move them. *Id.* at 180a.

Respondents allege that, according to the police, petitioners "told [the police] that the reason for the Secret Service's request" to move the people on the block directly adjacent to the California Street alley "was that they did not want anyone within handgun or explosive range of the President." Pet. App. 177a. Respondents claim that any such security rationale "was false * * * because there was no significant security difference between the two groups of demonstrators." *Id.* at 177a-178a. In respondents' view, if that security rationale had been the agents' actual reason for moving the anti-Bush demonstrators, petitioners would "have requested or directed that the pro-Bush demonstrators * * * be moved further to the west so that they would not be in range of the

DIAGRAM B



Source: Pet. App. 212a (arrow added)

President as [his motorcade] travelled from the Inn to" the cottage where he would spend the night, and

would also "have requested or directed that all persons dining, staying at, or visiting the Inn who had not been screened * * * be removed from the Inn." *Id.* at 178a; see *id.* at 95a. Respondents allege that petitioners' actual motivation in moving them was to suppress their speech. *Id.* at 183a-185a.

The complaint recognizes that the Secret Service has "promulgated written guidelines, directives, instructions and rules" that prohibit discrimination against demonstrators on the basis of their viewpoint. Pet. App. 184a. Respondents allege, however, that those documents "do not represent the actual policy and practice of the Secret Service." *Ibid.* Respondents further allege that the Secret Service has a history of "discriminating against First Amendment expression," *id.* at 181a (capitalization modified), and that "[t]he White House under President George W. Bush * * * sought to prevent or minimize the President's exposure to dissent or opposition during his public appearances and travels," *id.* at 182a-183a. In support of that allegation, respondents invoke portions of a manual for the White House Advance Team (which is not part of the Secret Service) and published reports of "numerous other occasions" on which the Secret Service purportedly sought to shield President Bush from "anti-government expressive activity." *Id.* at 189a-194a, 213a-217a; see *id.* at 42a, 99a. They allege that petitioners' actions "on October 14, 2004, were an implementation of this actual policy and practice" of viewpoint discrimination in violation of the First Amendment. *Id.* at 185a-186a. Respondents do not allege, however, that petitioners themselves were involved in any of the prior incidents.

2. In 2006, respondents filed a first amended complaint against petitioners, the director of the Secret Service, and various state and local officials, seeking compensatory and punitive damages, as well as declaratory and injunctive relief, for alleged violations of state law and respondents' First, Fourth, Fifth, and Fourteenth Amendment rights. Pet. App. 65a-66a.[2] The district court dismissed most of those claims. *Id.* at 67a-68a. The district court declined, however, to dismiss the First Amendment *Bivens* claim against petitioners and rejected petitioners' defense of qualified immunity. *Ibid.*

Petitioners filed an interlocutory appeal, and the court of appeals reversed, concluding that "[t]he factual content contained within the complaint does not allow us to reasonably infer that [petitioners] ordered the relocation of [respondents'] demonstration because of its anti-Bush message." 572 F.3d at 972. The court of appeals did, however, grant respondents leave to replead, because their initial complaint had been filed before two decisions of this Court—*Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009)—that had clarified the applicable pleading standards.

In 2009, respondents filed a second amended complaint, which included the same claims as the first but with some added factual allegations. Pet. App. 30a, 64a, 67a. Petitioners (and other defendants) filed

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[2] Respondents' claims included a claim under the Administrative Procedure Act, 5 U.S.C. 702, seeking to prohibit the Secret Service from, *inter alia*, "[b]arring or forcing anti-government demonstrators from areas where pro-government demonstrators are allowed to be present." 06-cv-03045 Docket entry No. 34 ¶¶ 3, 79 (D. Or. Oct. 5, 2006).

motions to dismiss on qualified-immunity and other grounds. *Id.* at 71a. The district court, adopting the report and recommendation of the magistrate judge, granted the motions to dismiss in part and denied them in part. *Id.* at 60a-62a. With respect to respondents' First Amendment *Bivens* claim against petitioners, the court found that the second amended complaint met "the stricter pleading standards imposed by" *Twombly* and *Iqbal*. *Id.* at 61a; see *id.* at 89a-114a. The court also concluded that petitioners "have not shown, at least at this stage of the litigation, that they are entitled to qualified immunity." *Id.* at 61a; see *id.* at 114a-121a.

3. Petitioners filed another interlocutory appeal. Pet. App. 30a-31a. As in the first appeal, the court of appeals recognized that government officials should receive qualified immunity from a constitutional-tort suit unless (1) the plaintiffs have alleged facts that "make out a violation of a constitutional right," and (2) "the right at issue was clearly established at the time of [the] defendant's alleged misconduct." *Id.* at 31a-32a (brackets in original) (quoting *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009)); see 572 F.3d at 967-968. This time, however, the court of appeals concluded that respondents' First Amendment claim against petitioners could proceed. Pet. App. 31a-50a, 58a.

a. The court of appeals reasoned that "[a] restriction on speech is viewpoint-based if (1) on its face, it distinguishes between types of speech or speakers based on the viewpoint expressed; or (2) though neutral on its face, the regulation is motivated by the desire to suppress a particular viewpoint." Pet. App. 35a. The court held that respondents' complaint was

sufficient to proceed on both of those theories of unlawful viewpoint discrimination. *Id.* at 35a-43a.

First, the court of appeals concluded that the complaint adequately alleged facial discrimination against respondents for their political views. Pet. App. 36a-38a. The court reasoned that, after the anti-Bush demonstrators were moved, they were "more than a block farther from where the President was dining than [were] the pro-Bush demonstrators, and, one can infer, were therefore less able to communicate effectively with the President, media, or anyone else inside or near the Inn." *Id.* at 37a. The court also found it "critical[]" that, as a result of the move, "the anti-Bush protestors were two blocks away from the [post-dinner] motorcade route, while the pro-Bush demonstrators remained along it." *Ibid.* The court dismissed petitioners' contention that the "armored limousine" that would carry the President in that motorcade "had far greater security than the open-air patio where the President dined," stating that this contention "rests on facts outside of the complaint" and that "a viewpoint-neutral rationale cannot transform a facially discriminatory policy * * * into a valid one." *Id.* at 37a-38a.

Second, the court of appeals concluded that the complaint "would be adequate to establish a First Amendment violation even if there had been no pro-Bush demonstrators and therefore no differential treatment," because it adequately alleged that petitioners "acted with an impermissible motive of shielding the President from those expressing disapproval of him or his policies." Pet. App. 38a-39a. The court reasoned that respondents had "plead[ed] facts that make plausible their claim that they were moved be-

cause of their viewpoint—that the security rationale, if indeed offered by the agents at all, was pretextual." *Id.* at 39a. The court's reasoning was based on respondents' "asser[tion]" that, because they had been separated from the outdoor patio by a six-foot-high fence, and from the alley by police officers in riot gear, "they posed no threat to the President, and there was thus no reason for them to be moved from their initial location." *Id.* at 40a. The court also reasoned that, while it had found respondents' allegation of the Secret Service's "'officially authorized pattern and practice' of shielding the President from dissent" to be impermissibly "conclusory" when it had reviewed the first amended complaint, the second amended complaint "elaborates in much more detail" on that allegation. *Id.* at 41a. The additional detail came in the form of 12 allegedly "similar instances of viewpoint discrimination against protestors expressing negative views of the President" involving different agents at different times and locations, as well as excerpts from a Presidential Advance Manual that "direct[] the President's advance team to 'work with the Secret Service * * * to designate a protest area * * * , preferably not in view of the event site or motorcade route.'" *Id.* at 41a-42a (emphasis omitted).

b. The court of appeals additionally held that petitioners are not entitled to qualified immunity, rejecting petitioners' argument that the First Amendment right respondents "claim was infringed" was not "clearly established in the specific context at issue here." Pet. App. 44a; see *id.* at 43a-47a. Relying primarily on decisions of this Court addressing claims of viewpoint discrimination in other contexts, the court

of appeals reasoned that taking respondents' "allegation of discriminatory motive as true, it is clear that no reasonable agent would think that it was permissible under the First Amendment to direct the police to move protestors farther from the President because of the critical viewpoint they sought to express." *Id.* at 45a. The court reiterated that the anti-Bush group was "moved over a block farther from the Inn than the pro-Bush demonstrators," and that "based on the facts alleged, there are relevant ways" in which the two groups' "distances [from the President while he was dining] were not comparable." *Id.* at 44a. The court also found it "quite relevant" that "the pro-Bush demonstrators were permitted to remain along the President's motorcade route, while the anti-Bush protestors were kept away." *Ibid.*

c. In response to a dissent from denial of rehearing en banc (discussed below), the court of appeals amended its opinion to further explain its decision. Pet. App. 4a-8a, 47a-50a. The court stated that, in order for petitioners to prevail, "any explanation for the agents' differential treatment of the pro- and anti-Bush demonstrators would have to be so obviously applicable as to render the assertion of unconstitutional viewpoint discrimination implausible." *Id.* at 47a. The court believed, however, that "there is simply *no* apparent explanation for why the Secret Service agents permitted only the pro-Bush demonstrators, and not the anti-Bush protestors, to remain along the President's after-dinner motorcade route." *Ibid.* The court rejected the suggestion that the reason "the pro-Bush demonstrators were not moved" was because "they were ostensibly further than [respondents' group] from the patio where President Bush was

dining." *Ibid.* In the court's view, that explanation was "non-responsive" to the fact that the anti-Bush group was moved "a considerable distance, to a location" that was "not comparable to the place where the pro-Bush group was allowed to remain." *Id.* at 48a (citation and internal quotation marks omitted).

4. Petitioners sought rehearing en banc, which the court of appeals denied. Pet. App. 8a. In an opinion joined by seven other judges, Judge O'Scannlain dissented. *Id.* at 8a-23a. In the dissenters' view, the court of appeals' opinion was "a textbook case-study of judicial second-guessing of the on-the-spot judgment that Secret Service agents assigned to protect the President have made about security needs." *Id.* at 8a (internal quotation marks and citation omitted). The opinion also "commit[ted] many familiar qualified immunity errors" by, *inter alia*, "afford[ing] unwarranted deference to legal conclusions in [respondents'] complaint" and "defin[ing] the right at issue too broadly." *Id.* at 22a; see *id.* at 12a-18a.

The dissenting judges reasoned that, "[b]y using [respondents'] allegations about [petitioners'] discriminatory motive as a starting point, * * * the panel turns *Iqbal* on its head." Pet. App. 12a. The dissenters also concluded that two legal propositions were not established with sufficient clarity for respondents to defeat petitioners' claim of qualified immunity. *Id.* at 18a. First, the dissenters found that moving respondents "to a location one block farther from the President than [the pro-Bush demonstrators] when creating a Presidential security perimeter" did not violate any clearly established First Amendment right because "before this decision, no law appeared to require Secret Service agents to ensure that groups of

differing viewpoints were positioned in locations exactly equidistant from the President at all times." *Ibid.*; see *id.* at 19a. Second, the dissenters stated that it "seems absurd" to construe the First Amendment as requiring Secret Service agents "to return a group of demonstrators to their original location before the President could leave in his motorcade." *Id.* at 20a.

The dissenting judges additionally reasoned that the court of appeals' decision "renders the protections of qualified immunity toothless"; "hamstrings Secret Service agents, who must now choose between ensuring the safety of the President and subjecting themselves to First Amendment liability"; and imposes on Secret Service agents a "newly created duty to act like concert ushers—ensuring with tape-measure accuracy that everyone who wants to demonstrate near the President has an equally good view of the show." Pet. App. 8a, 22a-23a. Recognizing that the Ninth Circuit's "track record in deciding qualified immunity cases is far from exemplary," the dissenters expressed "concern[]" that, "with this decision, * * * our storied losing streak will continue." *Id.* at 22a & n.3 (citing four qualified-immunity cases in which this Court has reversed the Ninth Circuit).

SUMMARY OF ARGUMENT

The court of appeals erred in denying petitioners qualified immunity from respondents' allegations that they engaged in viewpoint discrimination while establishing a security perimeter around the President during a last-minute, unscheduled stop for dinner. As the eight judges who dissented from the denial of rehearing en banc recognized, the court of appeals' decision reflects "many familiar qualified immunity

errors." Pet. App. 22a. The decision flouts this Court's repeated exhortations that, for purposes of determining whether a defendant violated a clearly established constitutional right, the court must consider the specific context of the alleged violation rather than describing the constitutional right at an abstract or general level. And it effectively disregards this Court's decision in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), by permitting discovery, and potentially a trial with the risk of punitive damages, in the absence of sufficient allegations of discriminatory intent. Most troubling of all, it commits these errors notwithstanding this Court's recognition that principles of qualified immunity are "nowhere more important than when the specter of Presidential assassination is raised." *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (per curiam).

A. Under the doctrine of qualified immunity, if the law at the time of the events at issue "did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation." *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (per curiam). The Court has "emphasize[d] that" the qualified-immunity determination "'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Ibid.* (quoting *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001)). The court of appeals ignored that principle when it denied qualified immunity to petitioners based on the broad general proposition that viewpoint discrimination is unlawful. The question the court of appeals should have asked was whether petitioners had adequate notice that their particular actions in establishing a security perimeter around the

President would violate the First Amendment. Had the inquiry been properly framed, petitioners' entitlement to qualified immunity would have been clear.

In a multitude of circumstances, legitimate crowd-control measures may have the practical effect of placing different speakers expressing different views at different distances from the President or other high-level officials whom Secret Service agents have a duty to protect. Nothing in this Court's decisions even suggests, much less clearly establishes, that such disparate impact standing alone violates the First Amendment. Respondents err in suggesting that the only options available to petitioners were (1) to take the security risk of leaving respondents in their initial position; (2) to move the pro-Bush demonstrators farther away, even though their location raised no security concerns, in order to equalize the groups' distances; or (3) to preclude the President from dining at the Inn altogether.

Moreover, even assuming *arguendo* that petitioners' actions took some account of respondents' speech, nothing in this Court's decisions clearly establishes that a Secret Service agent must categorically disregard someone's words in deciding how close that person may get to the President. As Justice Ginsburg noted two Terms ago, officials engaged in a "protective function" will "rightly take into account words spoken to, or in the proximity of, the person whose safety is their charge" when "determining whether" the speaker "pose[s] an immediate threat" to the protectee. *Reichle* v. *Howards*, 132 S. Ct. 2088, 2097 (2012) (Ginsburg, J., concurring in the judgment).

B. Respondents attempt to bring at least one aspect of their claim within clearly-established law by

alleging that petitioners did not move respondents to protect the President, but instead with the sole and specific purpose of suppressing respondents' speech. Their allegations of unlawful animus, however, are insufficient to survive a motion to dismiss.

As this Court made clear in *Iqbal*, when the defendant's discriminatory intent is a necessary element of a constitutional claim, the plaintiff cannot defeat a motion to dismiss simply by alleging in conclusory terms that the defendant acted with the requisite unlawful motive. Rather, the plaintiff must allege specific facts that, taken as true, raise a sound inference of unconstitutional motivation. Respondents did not satisfy that requirement here. The court of appeals found respondents' factual allegations sufficient only by effectively requiring petitioners to negate the *possibility* of invidious intent. This Court has made clear, however, that even when unconstitutional motive is a *conceivable* explanation for the facts alleged in a plaintiff's complaint, a motion to dismiss should be granted if a *more likely* innocent explanation for the alleged facts exists.

On the facts as alleged, it is considerably more likely that petitioners' actions following the President's last-minute change of plans were motivated by their stated security rationale—moving everyone out of handgun or explosive range—than by a desire to suppress speech. In their original location, respondents were separated from the President by only an 80-foot alley and a wooden fence. Someone in the group of 200 to 300 demonstrators, or someone with illicit designs using the demonstrators as cover, could easily have thrown an explosive device within range of the President. In the alternate location to which respond-

ents originally were moved, they apparently had a direct line of sight to the fence behind which the President was sitting, creating the possibility of bullet-fire (or explosives) that would endanger the President. The other groups at the scene were not similarly situated. The pro-Bush demonstrators were separated from the President by buildings, and thus could not have reached him with bullets or explosives. And the other diners at the Inn had never expected to be near the President that evening, and thus presented a much lesser threat than respondents' group, whose proximity to the President was the result of considerable advance planning.

Respondents cannot "nudge [their] claims of invidious discrimination across the line from conceivable to plausible," *Iqbal*, 556 U.S. at 680 (internal quotation marks and citation omitted), by excerpting a manual for the White House Advance Team or by alleging viewpoint discrimination by other Secret Service agents at other times and other places. The manual excerpts address ticketed events, not unscheduled stops; the manual is directed to political employees of the White House, not the Secret Service; and the complaint recognizes that the Secret Service itself has explicit written policies prohibiting viewpoint discrimination. And respondents' conclusory allegations of viewpoint discrimination by *different* agents in *different* circumstances cannot support a plausible inference of viewpoint discrimination by *these* agents in *these* circumstances.

The potential consequences of the decision below are substantial. Secret Service agents frequently operate in politically-charged environments as they seek to protect the President, the Vice-President, and

their families, along with other political figures. Under the Ninth Circuit's decision, those agents may now be individually liable for damages, including punitive damages, whenever their duties require them to control a crowd of demonstrators. That decision must be overturned in order to reinforce that the safety of the principals, not the threat of personal liability, should animate the decisions of those charged with protecting our Nation's leaders.

ARGUMENT

RESPONDENTS' ALLEGATIONS THAT PETITIONERS PROTECTED THE PRESIDENT IN A VIEWPOINT-DISCRIMINATORY MANNER FAIL TO STATE A VALID *BIVENS* CLAIM

This Court has never expressly endorsed a judicially-created cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against federal officials in their individual capacities for alleged violations of the First Amendment. See *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 n.4 (2012); *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009). Assuming such a cause of action exists, however, the doctrine of qualified immunity "shields officials from suit" so long as their conduct "did not violate clearly established * * * constitutional rights of which a reasonable person would have known." *Ortiz* v. *Jordan*, 131 S. Ct. 884, 888 (2011) (brackets omitted) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). "The qualified immunity standard," the Court has explained, "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law,'" in order that "'officials should not err always on the side of caution' because they fear being sued."

Hunter v. *Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Malley* v. *Briggs*, 475 U.S. 335, 343 (1986), and *Davis* v. *Scherer*, 468 U.S. 183, 196 (1984)). "Our national experience has taught that this principle is nowhere more important than when the specter of Presidential assassination is raised." *Ibid.*

Notwithstanding the express and obvious security rationale for moving respondents' group farther away from the President, the court of appeals mistakenly denied petitioners the protection that the qualified-immunity doctrine is designed to provide. Its decision cannot be squared with this Court's precedents. First, the court of appeals disregarded this Court's repeated admonitions against "defin[ing] clearly established law at a high level of generality." *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2084 (2011). It did not identify a single decision interpreting the First Amendment to require that, in a crowd-control situation, all groups of demonstrators be equidistant from an official receiving law-enforcement protection. Instead, it erroneously presumed that a reasonable Secret Service agent would infer that specific rule from the more generalized proposition disfavoring viewpoint discrimination. Second, the court of appeals effectively disregarded this Court's decision in *Ashcroft* v. *Iqbal*, *supra*, in concluding that respondents had adequately pleaded discriminatory intent, when petitioners' alleged actions were "more likely explained by" legitimate security concerns, 556 U.S. at 680, than a desire to suppress speech. See *id.* at 673 (observing that "the sufficiency of * * * [the] pleadings is both inextricably intertwined with, and directly implicated by, the qualified-immunity de-

fense") (internal quotation marks and citations omitted). Those errors require reversal.

A. Respondents Had No Clearly Established Constitutional Right To Remain Within A Particular Distance Of The President

The court of appeals denied petitioners the defense of 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." Pet. App. 45a (quoting *al-Kidd*, 131 S. Ct. at 2083). That general proposition does not clearly establish the more specific proposition that "moving one group to a location one block farther from the President than another when creating a Presidential security perimeter constituted a violation of that group's First Amendment rights." *Id.* at 18a (O'Scannlain, J., dissenting from the denial of rehearing en banc). Indeed, no precedent from this Court, the Ninth Circuit, or any other circuit "require[d] Secret Service agents to ensure that groups of differing viewpoints were positioned in locations exactly equidistant from the President at all times." *Id.* at 19a (O'Scannlain, J., dissenting from the denial of rehearing en banc).

1. For the past 25 years, this Court has "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality" in conducting qualified-immunity analysis. *al-Kidd*, 131 S. Ct. at 2084 (internal citation omitted); see *Brosseau* v. *Haugen*, 543 U.S. 194, 199, 201 (2004) (per curiam) (summarily reversing for evaluating qualified immunity "at a high level of generality"); *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001) (reversing because "whether the right was clearly established

must be considered on a more specific level than recognized by the Court of Appeals"); see also *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999) (explaining that "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established"); *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987) (explaining that evaluating a claim at an abstract level of generality would transform "a guarantee of immunity into a rule of pleading").

The inquiry into whether an official's actions violated clearly established law "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau*, 543 U.S. at 198 (quoting *Saucier*, 533 U.S. at 201). To do otherwise, this Court has explained, would allow plaintiffs "to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Anderson*, 483 U.S. at 639. "Such an approach," the Court continued, "would destroy 'the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties,' by making it impossible for officials 'reasonably to anticipate when their conduct may give rise to liability for damages.'" *Ibid.* (quoting *Davis*, 468 U.S. at 195 (brackets omitted)).

This Court has accordingly refused to permit rights framed at the level of generality of the right described by the court of appeals here—the right to be free from "viewpoint discrimination in a public forum," Pet. App. 49a—to provide the basis for divesting an official of qualified immunity. In *Anderson* v. *Creighton*,

supra, the Court framed the relevant inquiry not in terms of "the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances," but instead in terms of whether it was clearly established that "the circumstances with which [the officer in that case] was confronted did not constitute probable cause and exigent circumstances." 483 U.S. at 640-641. In *Wilson* v. *Layne*, *supra*, the Court framed the relevant inquiry not in terms of "the protections of the Fourth Amendment" generally, but instead in terms of whether "a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed." 526 U.S. at 615. In *Saucier* v. *Katz*, *supra*, the Court framed the relevant inquiry not in terms of "the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness," but instead in terms of whether a "reasonable officer in petitioner's position could have believed that hurrying respondent away from the scene, where the Vice President was speaking and respondent had just approached the fence designed to separate the public from the speakers, was within the bounds of appropriate police responses." 533 U.S. at 201-202, 209. And in *Brosseau* v. *Haugen*, *supra*, the Court framed the relevant inquiry not in terms of the general Fourth Amendment right against the use of excessive force, but instead in terms of whether it was clearly established that an officer cannot "shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the

immediate area are at risk from that flight." 543 U.S. at 200.

The principle that the right must be defined with specificity applies equally to constitutional torts alleging the violation of First Amendment rights. In *Reichle* v. *Howards*, *supra*, this Court concluded that two Secret Service agents should receive qualified immunity "from a suit for allegedly arresting a suspect in retaliation for his political speech, when the agents had probable cause to arrest the suspect for committing a federal crime." 132 S. Ct. at 2091; see *id.* at 2097. The Court emphasized that "the right allegedly violated must be established, not as a broad general proposition, but in a particularized sense so that the contours of the right are clear to a reasonable official." *Id.* at 2094 (internal quotation marks and citation omitted). The Court thus framed the relevant inquiry not in terms of the "general right to be free from retaliation for one's speech," but instead in terms of "the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause." *Ibid.*; see *id.* at 2094 n.5 ("[W]e do not define clearly established law at such a 'high level of generality.'") (quoting *al-Kidd*, 131 S. Ct. at 2084).

2. As the Tenth Circuit has correctly recognized, "merely stating that the government cannot engage in viewpoint discrimination is just about as general as stating that the government cannot engage in unreasonable searches and seizures—an approach that is too general for the qualified immunity analysis." *Weise* v. *Casper*, 593 F.3d 1163, 1168 n.1, cert. denied, 131 S. Ct. 7 (2010). Yet the court of appeals in this case took that very approach. Pet. App. 45a-46a. It thereby sidestepped the necessary inquiry into

whether any "controlling authority" or "robust consensus of cases of persuasive authority," *al-Kidd*, 131 S. Ct. at 2084 (internal quotation marks and citation omitted), would have made "clear to a reasonable officer" in petitioners' position "that his conduct was unlawful in the situation he confronted," *Saucier*, 533 U.S. at 202. That inquiry would have required a decision in petitioners' favor.

Respondents contend that petitioners violated clearly established law by directing that respondents' group be moved from an initial location closer to the President than the pro-Bush demonstrators to a location slightly less than a block farther from the President than the pro-Bush demonstrators. Br. in Opp. 26. Until the court of appeals issued the decision below, however, no decision of this Court, or of the Ninth Circuit, had required such precise calibration by Secret Service agents. See Pet. App. 19a (O'Scannlain, J., dissenting from the denial of rehearing en banc) (noting the absence of decisions that "appeared to require Secret Service agents to ensure that groups of differing viewpoints were positioned in locations exactly equidistant from the President at all times").

The only case that the court of appeals identified as "closely on point," Pet. App. 46a, was the D.C. Circuit's decision in *Mahoney* v. *Babbitt*, 105 F.3d 1452 (1997). It is far from clear that a single out-of-circuit decision could ever be sufficient to clearly establish the law in the Ninth Circuit on this subject. See *Reichle*, 132 S. Ct. at 2094 (reserving the question whether the Tenth Circuit's *own* authority could clearly establish the law in the circumstances of that case). In any event, *Mahoney* is not a close analogue to this

case. In *Mahoney*, counsel for the National Park Service advised that any member of a certain group attempting to protest President Clinton's late-term abortion policies along the Inaugural Parade route "would be subject to arrest and fine." 105 F.3d at 1456. The government conceded in litigation that its policy was viewpoint-discriminatory and that if the group members "were to carry signs offering congratulations or best wishes to the President," they "would not be subject to arrest." *Ibid.* The D.C. Circuit found such deliberate viewpoint discrimination not to be justified under the First Amendment. *Id.* at 1456-1460. It had no occasion, however, to address the distinct circumstances of this case, which involve snap decisions by Secret Service agents about how, without the benefit of advance security work, to deal with two groups of demonstrators who were near an outdoor area where the President was dining.

Respondents' own efforts to identify clearly established law on this subject—which have focused, for the most part, on out-of-circuit decisions—are similarly unavailing. Some of the circuit decisions they have cited (Br. in Opp. 15-16) have involved categorical bans on certain forms of expressive activity in a particular area. See *Lederman* v. *United States*, 291 F.3d 36, 39 (D.C. Cir. 2002) (ban on demonstrations on certain sidewalks near the Capitol building); *Pursley* v. *City of Fayetteville*, 820 F.2d 951, 952 (8th Cir. 1987) (ban on all pickets and demonstrations in front of residences or dwelling places). Other decisions (Br. in Opp. 19, 21) involved entirely excluding one viewpoint from an otherwise-open forum. See *Metro Display Adver., Inc.* v. *City of Victorville*, 143 F.3d 1191, 1193-1194 (9th Cir. 1998) (attempt to ban pro-union

displays in bus shelters); see also *Sparrow* v. *Goodman*, 361 F. Supp. 566, 583-584 (W.D.N.C. 1973) (exclusion of various likely protesters from event in the Charlotte Coliseum), aff'd *sub nom. Rowley* v. *McMillan*, 502 F.2d 1326 (4th Cir. 1974). But respondents identify no cases finding a First Amendment violation when stated security considerations merely caused two groups with different views to end up at marginally different distances from a public official (let alone the President), especially when the groups were not even similarly situated at the outset.[3]

3. Both the court of appeals (Pet. App. 45a) and respondents (Br. in Opp. 24-26) rely heavily on the proposition that denial of qualified immunity does not

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[3] Respondents cite (Br. in Opp. 22) one case that involved the arrest of a protester who tried to carry a sign in close proximity to a presidential speech, outside the designated "pro" and "anti" demonstration zones that had been established in advance. See *Johnson* v. *Bax*, 63 F.3d 154, 156 (2d Cir. 1995). The court there, however, did not conclude that the plaintiff had a viable First Amendment claim, but instead ruled only that the district court had erroneously treated the complaint as not even having alleged a First Amendment claim. *Id.* at 157-159. Respondents also cite (Br. in Opp. 21-22) a handful of district-court decisions, but district-court decisions cannot clearly establish the law. See *al-Kidd*, 131 S. Ct. at 2084 (explaining that "[e]ven a district judge's *ipse dixit* of a holding is not 'controlling authority' in any jurisdiction, much less in the entire United States") (citation omitted). In any event, those decisions are inapposite, because they involve attempts to ban persons of a particular view entirely from an event. *Pledge of Resistance* v. *We the People 200, Inc.*, 665 F. Supp. 414, 415-417 (E.D. Pa. 1987) (attempt to ban peaceful demonstration activities by anti-war protesters and civil-rights groups in areas of bicentennial festivities in Philadelphia); *Butler* v. *United States*, 365 F. Supp. 1035, 1037-1038 (D. Haw. 1973) (removal or exclusion of protesters from Air Force base during event to greet President Nixon and Japanese Premier).

"require a case directly on point," so long as "existing precedent * * * placed the statutory or constitutional question beyond debate." *al-Kidd*, 131 S. Ct. at 2083. Of course, "in an obvious case," general "standards can 'clearly establish' the answer, even without a body of relevant case law." *Brosseau*, 543 U.S. at 199 (citing, *inter alia*, *Hope* v. *Pelzer*, 536 U.S. 730, 738 (2002)). But it is "far from * * * obvious," *ibid.*, that creating a security perimeter that places supporters and protesters different distances from the President violates the First Amendment.

The general rule against "viewpoint discrimination" would have been of no help in determining whether the relatively trivial disparate impact alleged in this case, standing alone, violated the First Amendment. Among other things, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). The possibility that Secret Service agents' crowd-control measures will often have disparate impacts on the location of different individuals who are expressing different viewpoints does not in itself raise First Amendment concerns. See *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."). In light of the different geographical and topographical features of the various places that the President might visit—sometimes, as in this case, without advance warning—it would be impossible for the Secret Service to "ensur[e] with tape-measure accuracy that

everyone who wants to demonstrate near the President has an equally good view of the show." Pet. App. 8a (O'Scannlain, J., dissenting from the denial of rehearing en banc). That is especially true where, as here, the two groups did not have "an equally good view of the show" at the start.

Reasonable agents could readily have believed that it was permissible to move the anti-Bush group across Fifth Street without moving the pro-Bush group. The two groups posed different security concerns at the outset because the anti-Bush group was initially located significantly closer to, and at a site less screened from, the patio than was the pro-Bush group. Respondents' map makes clear that, even after the anti-Bush group was moved across Fourth Street, it was still closer to, and less screened from, the patio. See Diagram B, *supra*. At that point, the decision to move the anti-Bush group another block across Fifth Street did result in its being slightly farther from the President than the pro-Bush group.[4] A reasonable officer

[4] The court of appeals described the anti-Bush group as being separated from the President "by more than a full square block[] and two roadways," and it characterized that distance as "more than a block farther * * * than the pro-Bush demonstrators." Pet. App. 37a, 48a. That calculation is belied by respondents' own map, which reveals that the pro-Bush group was itself separated from the alley leading to the patio by most of one block and one roadway. Diagram A, *supra*. Because that distance was *longer* than the distance from the alley to the east side of Fourth Street, the addition of precisely one more block (*i.e.*, the distance from the east side of Fourth Street to the east side of Fifth Street) necessarily resulted in a difference of less than one block between the two groups' distances from the alley. Since the pro-Bush group was itself nearly a block from the alley, the less-than-one-block difference casts serious doubt on the court of appeals' willingness to "infer" that the anti-Bush group was materially "less able" than

could have thought, however, that the enhanced ability of law-enforcement officers on the scene to engage in crowd control by using a cross-street as the line of demarcation outweighed any desire to calibrate distances more precisely.

The court of appeals attached "critical[]" significance to the fact that moving the anti-Bush demonstrators away from the alley next to the outdoor patio while the President was dining later resulted in their being two blocks farther than the pro-Bush group from the post-dinner motorcade route. See Pet. App. 37a; see *id.* at 37a-38a, 44a, 47a, 48a. But respondents' complaint does not allege that the anti-Bush group had any reasonable opportunity to move back to their original position between the time when the President left dinner and the time when his motorcade traveled down Third Street; it does not allege that the motorcade should have been required to wait for the demonstrators to move; and respondents have expressly disavowed any argument that petitioners were required to move them back to their original location once the President had finished his dinner, see Br. in Opp. 26.

Respondents' arguments only highlight the absence of relevant precedent. During oral argument in the court of appeals, respondents' counsel stated that, when petitioners arrived at the patio restaurant and

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the pro-Bush group "to communicate effectively with the President" while he was dining. *Id.* at 37a. So, too, does the failure of the second amended complaint to remedy a pleading deficiency that the court of appeals had previously identified in the first amended complaint: respondents did not allege they had been "moved to an area where the President could not hear their demonstration." 572 F.3d at 971.

discovered 200 to 300 people crowding the block immediately adjacent to the Inn, they should simply have "prevailed upon the President not to dine at the Inn" at all, or, in order to have "a basis to move the anti-Bush protestors a block east," "they should have moved the pro-Bush demonstrators a block west." Oral Argument at 42:22-43:36, *Moss* v. *United States Secret Serv.*, 675 F.3d 1213 (No. 10-36152), http://www.ca9.uscourts.gov/media/view.php?pk_id=0000008129. Nothing in this Court's viewpoint-discrimination jurisprudence, however, remotely establishes the proposition that respondents' desire to remain in their initial location trumps the President's freedom of movement. Nor does anything in the Court's decisions compel Secret Service agents to inquire into the political views of various groups and take additional steps to interfere with even more speech than security concerns would require in an attempt to keep opposing groups at roughly equal distances from the President. Indeed, had petitioners moved the pro-Bush group farther from the President simply because the location of the anti-Bush group presented security concerns, they might well have been sued for doing so. See, *e.g.*, *Frisby* v. *Schultz*, 487 U.S. 474, 485 (1988) (noting that a time, place, or manner regulation of speech should "target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy") (citation omitted).

4. Even assuming *arguendo* that petitioners' decision to relocate respondents' group had some connection to the group's anti-Bush message (but see Part B, *infra*), the general principle against "viewpoint discrimination" would still fail to clearly establish the unconstitutionality of petitioners' actions. Distinc-

tions based on the views expressed in someone's speech are not invariably unlawful. For example, the Court has recognized that a police officer's decision whether to arrest a suspect may be informed by "wholly legitimate consideration" of the suspect's speech. *Reichle*, 132 S. Ct. at 2096. Similarly, the Court has held that the federal government may, consistent with the First Amendment, adopt a policy under which it prosecutes only vocal objectors to its military-draft laws. *Wayte* v. *United States*, 470 U.S. 598, 610-614 (1985). And the Court has explained that, when a defendant's "beliefs and associations"—as indicated by his speech—are relevant to his criminal conduct, a judge may take account of them in selecting the appropriate sentence. *Wisconsin* v. *Mitchell*, 508 U.S. 476, 486, 489-490 (1993).

In all of these situations, the views expressed are, or at least may be, germane to judgments, including predictive judgments, that the governmental official is required to make. See *Reichle*, 132 S. Ct. at 2095 (explaining that an "officer may decide to arrest the suspect because his speech * * * suggests a potential threat"); *Wayte*, 470 U.S. at 612-613 (explaining that protest letters written to the Selective Service "provided strong, perhaps conclusive evidence of the nonregistrant's intent not to comply—one of the elements of the offense"); *Mitchell*, 508 U.S. at 487-488 (explaining that "bias-inspired conduct * * * is thought to inflict greater individual and societal harm," because, *inter alia*, "bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest"). Similar logic applies in protecting the President.

As Justice Ginsburg explained in her concurring opinion in *Reichle*, Secret Service agents "rightly take into account words spoken to, or in the proximity of, the person whose safety is their charge." 132 S. Ct. at 2097 (Ginsburg, J., concurring in the judgment). No clearly established First Amendment principle requires Secret Service agents to disregard the commonsense proposition that someone who appears displeased (or even angry) with the President may be more likely to lash out in the heat of the moment and try to harm him than someone who appears pleased with the President. See *ibid.* (stating that the Secret Service agent defendants in *Reichle* were "duty bound to take the content of [the plaintiff's] statements into account in determining whether he posed an immediate threat to the Vice President's physical security"); cf. *Hunter*, 502 U.S. at 229-230 (Stevens, J., dissenting) ("Those who guard the life of the President properly rely on the slightest bits of evidence—nothing more than hunches or suspicion—in taking precautions to avoid the ever-present danger of assassination.") (internal quotation marks and citation omitted). Protesters have, for example, thrown objects at high-ranking officials or politicians on a number of occasions.[5]

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[5] See, *e.g.*, Juli Weiner, *Books, Eggs, and Shoes: All Things That Have Been Thrown at U.S. Presidents*, Vanity Fair (Oct. 11, 2010), http://www.vanityfair.com/online/daily/2010/10/books-eggs-and-shoes-all-things-that-have-been-thrown-at-us-presidents; Alex Stevenson, *Eggs, Flour and Green Slime: Britain's Ten Yuckiest Political Protests*, politics.co.uk. (Aug. 14, 2013), http://www.politics.co.uk/comment-analysis/2013/08/14/eggs-flour-and-green-slime-britain-s-ten-yuckiest-political (eggs, prophylactic filled with purple flour, green slime, and custard pie thrown at British politicians); Michael Janofsky, *First Inauguration Since 9/11 Spurs*

A reasonable officer in petitioners' position could legitimately conclude, in the absence of any contrary authority from this Court or the Ninth Circuit, that the Nation's "valid, even * * * overwhelming, interest in protecting the safety of its Chief Executive," *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam), justifies taking speech into account in assessing how close a particular person or group should be able to get to the President. See also *Rubin* v. *United States*, 525 U.S. 990, 990-991 (1998) (Breyer, J., dissenting from denial of certiorari) ("The physical security of the President of the United States has a special legal role to play in our constitutional system."). Nothing in this Court's jurisprudence would inform an agent that, for example, he must allow the President to shake hands with an invective-spewing detractor whenever the President has shaken hands with a supporter. And nothing would put the agent on

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Tightest Security, N.Y. Times (Dec. 13, 2004), http://select.nytimes.com/gst/abstract.html?res=F5071FFD34550C708DDDAB0994DC404482&fta=y&incamp=archive:article_related (eggs and debris thrown at President Bush's motorcade); Hollie Clemence, *Eggs and Shoe Thrown at Iran President on Return Home*, The Times (Sept. 29, 2013), http://www.thetimes.co.uk/tto/news/world/middleeast/article3881931.ece; Ibrahim Barzak, *Protesters Throw Eggs, Shoe at French Official Visiting Gaza*, Wash. Times (Jan. 21, 2011), http://www.washingtontimes.com/news/2011/jan/21/protesters-throw-eggs-shoe-french-official-visitin/; Kirit Radia, *Communist Protesters Throw Red Paint on Clinton's Motorcade*, abcNews (Nov. 16, 2011), http://abcnews.go.com/blogs/politics/2011/11/communist-protesters-throw-red-paint-on-clintons-motorcade/#undefined; Suzi Parker, *Hillary Clinton in Egypt, Pelted with Tomatoes and Taunts of 'Monica!'*, WPPolitics (July 16, 2012), http://www.washingtonpost.com/blogs/she-the-people/post/hillary-clinton-in-egypt-pelted-with-tomatoes-and-taunts-of-monica/2012/07/16/gJQA8E7HpW_blog.html.

notice that moving a group of anti-Bush demonstrators farther away from the President, assertedly for safety reasons, would necessarily be unconstitutional.

5. This case does not require the Court directly to decide whether or to what degree the First Amendment constrains Secret Service agents when they establish a protective perimeter around the President during an unscheduled stop. Rather, it is sufficient, for purposes of the qualified-immunity analysis here, for the Court simply to conclude that the answer would not have been obvious to a reasonable official in petitioners' position. See *Camreta* v. *Greene*, 131 S. Ct. 2020, 2031 (2011) (suggesting that this approach is most consistent with well-established principles of constitutional avoidance); *Pearson* v. *Callahan*, 555 U.S. 223, 236-242 (2009). Under the objective circumstances that petitioners faced, and given the comparatively small differences in the relative distances between the pro- and anti-Bush groups and the President, there is no sound reason to conclude that moving respondents, in itself, violated any clearly established constitutional right.

That "eight Court of Appeals judges agreed with [petitioners'] judgment in a case of first impression" strongly reinforces that petitioners should not be grouped with the "plainly incompetent or those who knowingly violate the law," to whom qualified immunity is denied. *al-Kidd*, 131 S. Ct. at 2085 (citation omitted). This Court has recognized that "it is unfair to subject police to money damages for picking the losing side of [a legal] controversy" on which "judges * * * disagree." *Wilson*, 526 U.S. at 618. Imposing such liability on members of the President's protective detail would go beyond mere unfairness. It

would send the message that Secret Service agents should elevate the most plaintiff-friendly interpretation of the First Amendment above their trained judgment about how best to safeguard the President. That message would undermine the qualified-immunity doctrine's goal of "encouraging the vigorous exercise of official authority," *Harlow*, 457 U.S. at 807 (citation omitted), in the very context in which this Court has recognized such encouragement to be the most critical. See *Hunter*, 502 U.S. at 229 (recognizing that the qualified-immunity doctrine's "accommodation for reasonable error" is "nowhere more important than when the specter of Presidential assassination is raised").

During a typical year, the President alone makes hundreds of stops or appearances in public areas around the country. Impromptu or unscheduled visits, like the 2004 visit to the restaurant patio in Jacksonville, are not uncommon. Such stops often require agents to make quick, on-the-spot decisions to safeguard the President in the presence of large groups of people. Cf. *Scheuer* v. *Rhodes*, 416 U.S. 232, 246-247 (1974) (qualified immunity protects officials who need to "act swiftly and firmly" when faced with "an atmosphere of confusion, ambiguity, and swiftly moving events"). In making such decisions, Secret Service agents face the difficult task of quickly assessing the potential security implications of multifaceted and rapidly evolving factual circumstances. They should not be distracted from those security-related assessments by the threat of personal liability if they fail to ensure comparable proximity to the President or other high-level officials of diverse groups who seek to express competing views.

B. Respondents Did Not Adequately Plead That Petitioners Acted With A Viewpoint-Discriminatory Motive

For the reasons stated above, respondents could not establish a violation of a clearly established constitutional right simply by proving that they were placed farther from the President than a competing group of demonstrators, or even simply by proving that petitioners considered their speech in deciding how far they needed to be from the President. Respondents have attempted to circumvent that qualified-immunity bar by including in their complaint allegations that petitioners moved them solely to suppress a disfavored viewpoint, and not for any security-related reason. In *Ashcroft* v. *Iqbal*, *supra*, this Court held that a complaint alleging discrimination in violation of the First and Fifth Amendments must plead the defendant's discriminatory purpose or intent in factual, nonconclusory terms. 556 U.S. at 676-677, 680-681. The complaint in this case fails to satisfy that standard.

1. The plaintiff in *Iqbal* alleged that certain high-ranking federal officials had "adopted an unconstitutional policy that subjected [him] to harsh conditions of confinement on account of his race, religion, or national origin." 556 U.S. at 666. The Court explained that, in order to avoid dismissal, a complaint alleging purposeful discrimination by a federal official "must plead sufficient factual matter" to show that the official took "a course of action 'because of,' not merely 'in spite of,' the action's adverse effects upon an identifiable group." *Id.* at 677 (brackets and some internal quotation marks omitted) (quoting *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979)). The

Court further explained, drawing on its decision in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007), that Federal Rule of Civil Procedure 8(a)(2) requires that such a complaint do more than "plead facts that are 'merely consistent with' a defendant's liability." 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Rather, it must "'state a claim to relief that is plausible on its face'" by "plead[ing] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ibid.* (quoting *Twombly*, 550 U.S. at 570). The Court emphasized that "where the well-pleaded facts do not permit the court to infer more than the mere *possibility* of misconduct, the complaint * * * has not 'show[n] * * * that the pleader is entitled to relief.'" *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)) (emphasis added; brackets added by Court).

The Court found that the particular complaint in *Iqbal* did not satisfy Rule 8(a)(2)'s requirements. 556 U.S. at 687. The Court "beg[an]" its "analysis by identifying the allegations in the complaint that [were] not entitled to the assumption of truth" because they were "conclusory" assertions that "amount[ed] to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim." *Id.* at 680-681 (citation omitted); see *id.* at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). The Court accordingly disregarded allegations that, for example, one petitioner had been the "'principal architect'" of a policy subjecting the plaintiff to harsher conditions of confinement based on race or religion, and that the other petitioner was "'instrumental' in

adopting and executing" that policy. *Id.* at 680-681 (citation omitted).

The Court "next consider[ed]" the actual "factual allegations in [the] complaint to determine if they plausibly suggest[ed] an entitlement to relief." *Iqbal*, 556 U.S. at 681. The Court found those allegations—namely, that one petitioner had directed the arrest and detention of "thousands of Arab Muslim men" and that both petitioners had "approved" a "policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were cleared by the FBI"—insufficient to support an intentional-discrimination claim. *Id.* at 681-683 (internal quotation marks and citation omitted). Although those allegations were "*consistent* with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin," they failed to "plausibly establish this purpose," because "more likely explanations" existed. *Id.* at 681 (emphasis added).

2. The complaint in this case alleges that petitioners ordered "all persons" (a viewpoint-neutral category) to be moved from the block adjacent to the outdoor patio for the stated purpose of getting them beyond "handgun or explosive range of the President" (a viewpoint-neutral justification). Pet. App. 177a. Respondents nevertheless assert that petitioners "had no valid security reason to request or order the eviction of [respondents] from the north and south sidewalks of California Street between Third and Fourth Streets," *id.* at 186a, and that petitioners were instead motivated by a desire to discriminate against respondents on account of their expressive activity, *id.* at 183a-185a. In allowing respondents to proceed with

their claim, the court of appeals failed to adhere to the approach set forth in *Iqbal*.

As the court of appeals recognized in rejecting respondents' first amended complaint, a "bald allegation of impermissible motive on [petitioners'] part," or an unsupported "allegation of systematic viewpoint discrimination at the highest levels of the Secret Service," would be "just the sort of conclusory allegation that the *Iqbal* Court deemed inadequate" to sustain a complaint of this sort. 572 F.3d at 970. The rule that such conclusory allegations are insufficient, however, would be of little value in protecting petitioners against unsupported claims if respondents could simply amend their complaint to plead specific facts that, while "consistent with" an inference of unlawful conduct, are "more likely explained by[] lawful * * * behavior." *Iqbal*, 556 U.S. at 680. Rather, to create an inference of unlawful motivation sufficient to defeat a motion to dismiss, respondents must plead specific facts that, taken as true, refute any "obvious alternative explanation" for the defendant's conduct. *Id.* at 682 (citation omitted). In *Iqbal*, the obvious alternative explanation for the plaintiff's detention was that "the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.* at 683. And in *Twombly*, which rejected a complaint alleging an antitrust violation, the obvious alternative explanation to anti-competitive conspiracy was that the defendant companies were simply former government-sanctioned monopolists engaging in parallel but independent conduct, "sitting

tight, expecting their neighbors to do the same thing." 550 U.S. at 568; see *id.* at 548.

Here, in contrast, the court of appeals gave no meaningful weight to the commonsense inference that petitioners, two Secret Service agents charged by statute with protecting the President (see 18 U.S.C. 3056(a)(1)), considered it important to move everyone between Third and Fourth Streets away from the restaurant patio (out of handgun or explosive range) in order to protect the President. Rather, the court stated that, "[a]s this case arises on a motion to dismiss, any explanation for the agents' differential treatment of the pro- and anti-Bush demonstrators would have to be *so obviously applicable* as to render the assertion of unconstitutional viewpoint discrimination implausible." Pet. App. 47a (emphasis added). The practical effect of the court's approach is to preclude dismissal of a *Bivens* complaint whenever an innocent explanation for the defendant's conduct is not obviously the correct one—*i.e.*, whenever an inference of unlawful motivation is "consistent with" the facts alleged in the complaint. But see *Iqbal*, 556 U.S. at 680-682.

In both *Iqbal* and *Twombly*, this Court recognized that a good deal more than that is needed to bring a plaintiff's factual allegations "across the line from conceivable to plausible." *Iqbal*, 556 U.S. at 680 (quoting *Twombly*, 550 U.S. at 570). In particular, when a plaintiff's factual allegations are susceptible to "more likely [innocent] explanations," those allegations "do not plausibly establish [an invidious] purpose." *Id.* at 681. By requiring a defendant to negate any realistic possibility that he acted with an unconstitutional motive, the court of appeals' test all but precludes dis-

missal of a complaint in a case in which the plaintiff alleges an improper motive.

3. Under the standards set forth in *Iqbal*, respondents' complaint fails to state a claim of intentional viewpoint discrimination. Although petitioners' directive to move respondents' group was "consistent with" intentional viewpoint discrimination, the far "more likely explanation[]" for petitioners' actions, *Iqbal*, 556 U.S. at 681, was the security rationale that petitioners actually gave at the time. In concluding otherwise, the court of appeals focused on three sets of allegations that, in the court's view, plausibly showed petitioners' security rationale to be pretextual. Pet. App. 39a-43a. None of those allegations, either separately or in combination, creates a plausible inference of pretext, let alone a plausible inference that petitioners' actions were motivated by a desire to suppress respondents' speech.

First, the court of appeals believed that the complaint alleged sufficient facts from which to infer that respondents "posed no threat to the President" that would require moving them. Pet. App. 39a-40a. The court interpreted the complaint to allege that respondents were not, in fact, in explosive or handgun range at either their original location (between Third and Fourth Streets) or their initial new location (on the east side of Fourth Street); that the alley connecting California Street to the patio where the President was dining was guarded by officers in riot gear; that the terrain included various buildings and a six-foot fence around the patio; and that none of the demonstrators had "attempted to surmount these obstacles to get access to the President." *Id.* at 40a. None of

that plausibly implies that petitioners' security rationale for moving respondents' group was pretextual.

To the extent the complaint alleges that respondents' group was out of handgun or explosive range of the President, respondents' own map refutes those allegations. According to that map, when respondents' group was at its initial location, only about 80 feet of alley separated them from the patio where the President was dining. See Pet. App. 212a. That distance—shorter than the 90-foot distance from home plate to first base on a baseball diamond—was not so great as to eliminate all possibility of danger to the President. Respondents cannot salvage their complaint by making the incredible allegation that it would have been impossible for someone to throw a grenade, or other type of explosive, far enough that its blast radius would endanger the President. Dan Eggen & Michael A. Fletcher, *FBI: Grenade Was a Threat to Bush*, Wash. Post (May 19, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/05/18/AR2005051800470.html (discussing a live grenade with a 65-foot blast radius thrown at President Bush in Tbilisi in 2005 and noting that it could have injured him from 100 feet away had it detonated); see, *e.g.*, 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1363, at 120-121 (3d ed. 2004) ("The district court will not accept as true pleading allegations that are contradicted by facts that can be judicially noticed or by other allegations or exhibits attached to or incorporated in the pleading.") (footnotes omitted); *id.* at 120-121 nn.39-40 (citing cases). Nor can they claim that they were out of handgun or explosive range at the location to which they were initially moved, on the east side of Fourth

Street. As previously discussed, the location at the corner of Fourth and California Streets appears from respondents' map to have had a direct line of sight to the patio. See Diagram B, *supra*.

The presence of police officers in riot gear (who could not have stopped an explosive thrown over their heads) and a wooden fence around the patio (which would not likely have stopped a bullet or an explosive) did not render petitioners' additional security precautions unnecessary. Nor does it suggest pretext that petitioners decided to widen the security perimeter even in the absence of an attempt to breach or circumvent the existing one. No matter how polite respondents' group might have appeared, petitioners had no assurance that it would stay that way. Petitioners also had no assurance that an assailant was not using the group for cover.

If "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation," *Ryburn* v. *Huff*, 132 S. Ct. 987, 991-992 (2012) (per curiam), they should be even more so about subjecting Secret Service agents to prolonged litigation based on post hoc judicial assessments about whether the President was sufficiently secure. Cf. *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (declining to read certain First Amendment precedents to "assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained"). That Secret Service agents are being proactive, rather than reactive, in addressing potential

threats to the President cannot be a basis for inferring that their security concerns are pretextual.

Second, the court of appeals focused on petitioners' allegations that, if security concerns had been "the true reason" for moving the anti-Bush demonstrators from their initial location, petitioners would also have required that the pro-Bush group be moved away from the President's post-dinner motorcade route. Pet. App. 178a; see *id.* at 40a-41a. But the security concerns arising from the presence of a large group of people near the open-air patio where the President was dining were plainly different from those associated with permitting a group (like the pro-Bush demonstrators) to remain along Third Street while the President's *motorcade* traveled by. To the extent that a contrary inference might ever be plausible, the complaint alleges no facts to support one. It does not, for example, allege that the President lacked his usual armored limousine, which would have provided considerable protection from any sort of attack. See, *e.g.*, Scott Lindlaw, *In an Election Season, Bush Brings Presidential Pomp*, Laredo Morning Times (Oct. 25, 2004), http://airwolf.lmtonline.com/news/archive/102504/pagea11.pdf ("Bush is driven through cities in an armored, black limou sine with flags flying from the front of the car."); Elisabeth Bumiller, *Inside the Presidency*, National Geographic (Jan. 2009), http://ngm.nationalgeographic.com/2009/01/president/bumiller-text/1 (explaining that cargo planes transport the President's armored limousine from stop to stop); John Pearley Huffman, *The Secret Seven: The Top Presidential Limousines of All Time*, Popular Mechanics (Jan. 20, 2009), http://www.popularmechanics.com/cars/news/vintage-speed/4300349 ("Besides five-inch thick armored doors and bulletproof glass so thick it

blocks out parts of the light spectrum, Bush's DeVille was rumored to feature a self-contained passenger compartment with its own secure air supply, run flat inner cores inside the tires, and a big 454 cubic inch truck engine so the 14,000-or-so pound monster could push through any obstacles.").

Respondents have also alleged (Br. in Opp. 15-17) that, had petitioners truly been interested in the President's safety when they moved respondents, they would "have requested or directed that all persons dining, staying at, or visiting the Inn who had not been screened * * * be removed from the Inn." Pet. App. 178a. Because of serious law-of-the-case concerns stemming from its rejection of similar allegations in the first amended complaint, the court of appeals expressly refrained from relying on these allegations in addressing the sufficiency of respondents' second amended complaint. *Id.* at 43a n.5.[6] But those allegations would not bolster the complaint in any event. The other diners and guests to whom respondents refer were at the Inn before it was known that the President would dine there. Because they

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[6] In its decision finding the first amended complaint insufficient, the court of appeals concluded that "[t]he differential treatment of diners and guests in the Inn, who did not engage in expressive activity of any kind and were not located in the public areas outside of the Inn * * * offers little if any support for * * * an inference" that petitioners were acting with a speech-suppressive motive. 572 F.3d at 971. Notwithstanding circuit law limiting the scope of the remand to issues left open by the circuit court, see *United States* v. *Thrasher*, 483 F.3d 977, 981-982 (9th Cir. 2007), cert. denied, 553 U.S. 1007 (2008), the district court nevertheless "view[ed]" those allegations "somewhat differently than the Ninth Circuit" had and relied on them as supporting the sufficiency of respondents' complaint, Pet. App. 110a.

thus would have had no opportunity to plan to harm the President, those individuals were differently situated from the crowd outside, which had gathered in specific anticipation of being near the President. Petitioners' treatment of the diners thus provides no basis to conclude that the security-based rationale was pretextual or inconsistently applied.

Third, the court of appeals focused on excerpts from a Presidential Advance Manual that were included with the complaint, along with allegations of a widespread Secret Service practice of viewpoint discrimination, as support for an inference of pretext. Pet. App. 41a-42a; see *id.* at 189a-194a, 213a-217a. But the Presidential Advance Manual was, as the court of appeals recognized, "designed to guide the President's political advance team, not the Secret Service." *Id.* at 42a. Furthermore, as Judge O'Scannlain noted, the manual "clearly refers to ticketed presidential events, from which demonstrators can be excluded without violating the First Amendment." *Id.* at 14a (O'Scannlain, J., dissenting from the denial of rehearing en banc); see, *e.g.*, *id.* at 215a-217a (discussing ticket distribution and collection). Indeed, the manual specifically distinguishes between the Secret Service's responsibility for demonstrators who "appear to be a security threat" and the advance team's responsibility for handling demonstrators who "appear likely to cause only a political disruption." *Id.* at 220a. As the complaint acknowledges, the Secret Service has "written guidelines, directives, instructions and rules" that, on their face, "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." *Id.* at 184a. The advance-manual excerpts do not plausibly support an inference that the Secret Service's stated policies are a sham.

Neither do the portions of respondents' pleadings discussing other incidents in which Secret Service agents allegedly engaged in viewpoint discrimination. As the dissenters below noted, those alleged incidents did not involve "the same agents or the same circumstances" as this case and "do not show a pattern pervasive enough to establish an unspoken policy of discrimination, especially in light of the explicit Secret Service policy prohibiting such conduct." Pet. App. 13a-14a (O'Scannlain, J., dissenting from the denial of rehearing en banc). None of the other incidents is alleged to have involved petitioners, and most of respondents' capsule descriptions appear to refer to circumstances involving pre-arranged protest zones associated with events where the President was expected to speak, or to protesters who might have disrupted such events, rather than to spur-of-the-moment decisions precipitated by unscheduled stops and multiple groups of differently situated people. See *id.* at 190a-194a. Moreover, it is highly likely that security concerns would provide an "obvious alternative explanation," *Iqbal*, 556 U.S. at 682 (citation omitted), for the Secret Service's actions in most or all of these other alleged incidents. Respondents cannot save their complaint from insufficiency under *Iqbal* simply by concatenating a series of mini-complaints that are themselves insufficient.

4. The context of this case warrants particularly careful adherence to the pleading standards set forth

in *Iqbal* and *Twombly*. This Court has recognized the concern that, "[b]ecause an official's state of mind is easy to allege and hard to disprove, insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials." *Crawford-El* v. *Britton*, 523 U.S. 574, 584-585 (1998) (internal quotation marks and citation omitted). The Court accordingly suggested, even before *Iqbal* and *Twombly*, that trial courts can weed out insubstantial motive-based cases by "insist[ing] that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment." *Id.* at 598 (citation omitted). That approach, which *Iqbal* and *Twombly* now expressly require, is especially important in cases involving First Amendment claims against Secret Service agents.

Secret Service agents frequently operate in politically charged environments. They protect not only the President and Vice President and their families, 18 U.S.C. 3056(a)(1), but also other political figures such as foreign heads of state (and, potentially, other foreign dignitaries), 18 U.S.C. 3056(a)(5)-(6), as well as presidential and vice-presidential candidates, 18 U.S.C. 3056(a)(7). They also sometimes provide security at "special events of national significance," 18 U.S.C. 3056(e)(1), which can include political activities like major-party presidential nominating conventions. Agents' security decisions will thus often involve expressive activity. If the complaint in this case—which second-guesses the Secret Service agents' stated rationale for establishing a particular security perime-

ter through reliance on disparate-impact allegations, a memorandum to non-Secret-Service personnel, and conclusory allegations of viewpoint discrimination at other times and places—is sufficient to state a claim, then Secret Service agents would have every reason to anticipate a lawsuit whenever their duties require them to control a crowd of demonstrators. As this Court has recognized, however, those who protect the President "should not err always on the side of caution because they fear being sued." *Hunter*, 502 U.S. at 229 (internal quotation marks and citation omitted).

The court of appeals sought to downplay the practical impact of its decision by suggesting that petitioners could yet prevail by refuting respondents' allegations of unlawful motive "[a]fter discovery or trial." Pet. App. 46a. This Court has repeatedly explained, however, that "[t]he basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" *Iqbal*, 556 U.S. at 685 (quoting *Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)). "Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government." *Ibid.* Here, in a case that has made two trips to the court of appeals, the Secret Service and two of its agents have already borne the burdens of litigation for more than seven years since respondents filed their initial complaint. See 06-cv-03045 Docket entry No. 1 (D. Or. July 6, 2006). Discovery in this case—which could involve inquiry not only into the Secret Service's methods and practices as they

pertain to the relocation of respondents, but also as they pertain to the dozen other instances of viewpoint discrimination that respondents summarily allege—has the potential to be particularly burdensome and disruptive. Wider exposure of the Secret Service's methods and practices could also impede its ability to ensure the safety of its protectees.

Respondents have suggested (Br. in Opp. 11) that, in petitioners' view, "no plaintiff asserting a claim for viewpoint discrimination could survive a motion to dismiss unless the plaintiff could allege that the defendant announced his or her intention to discriminate." That is incorrect. Here, for instance, respondents' entitlement to relief might have been plausible if local law-enforcement officers had said that the Secret Service agents invoked a discriminatory reason for moving the anti-Bush group (rather than the viewpoint-neutral justification they gave); or if the pro-Bush group had then been allowed to move into the nearer location that the anti-Bush group had vacated; or, perhaps, if the other incidents had involved the same agents and were similar in nature to the events here (as opposed to being primarily at ticketed events). Respondents, however, have made no such specific allegations. Accordingly, under well-established pleading standards, their complaint is insufficient.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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DIAGRAM A

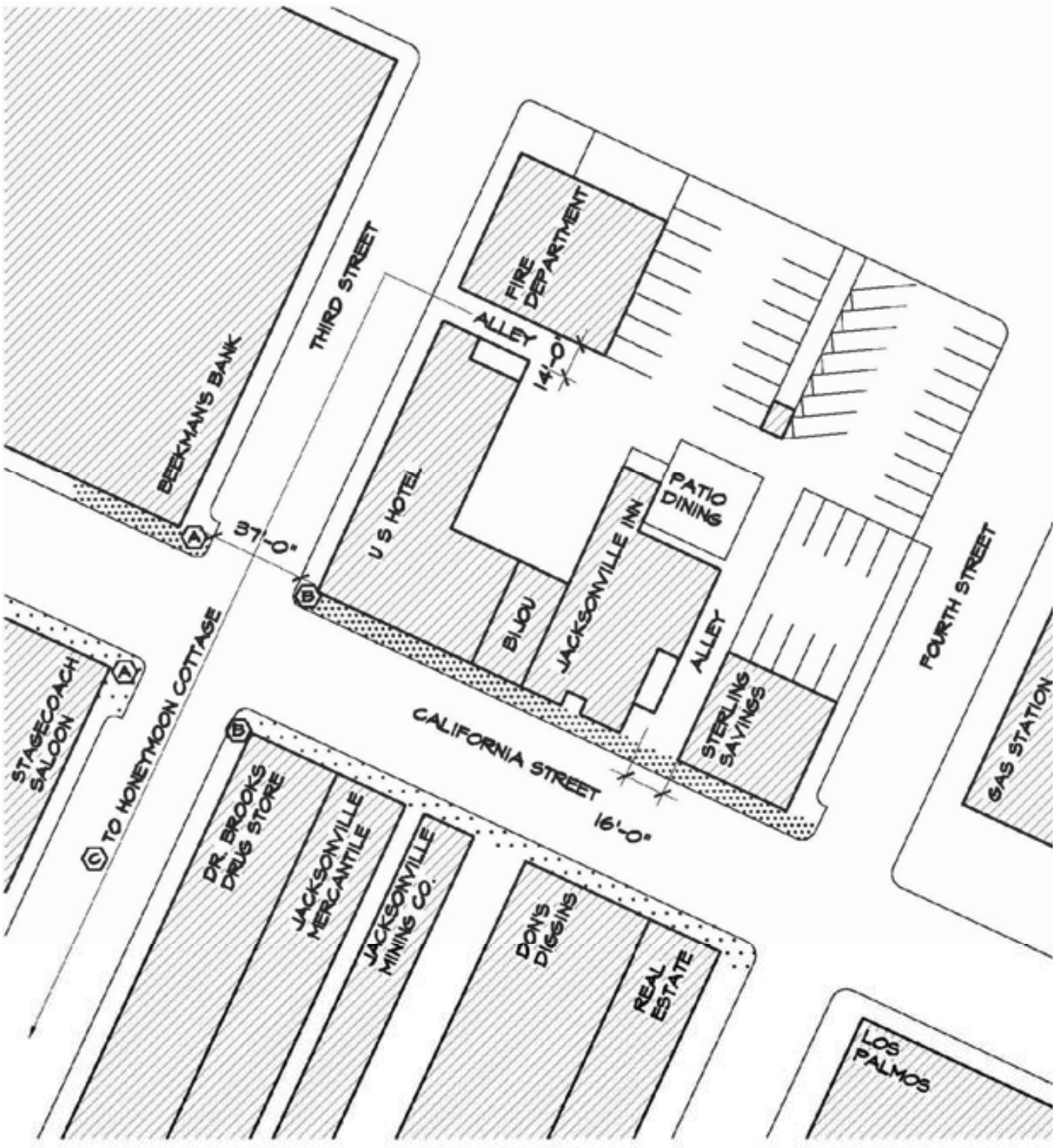

EXHIBIT A TO SECOND AMENDED COMPLAINT
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Source: Pet. App. 212a

DIAGRAM B

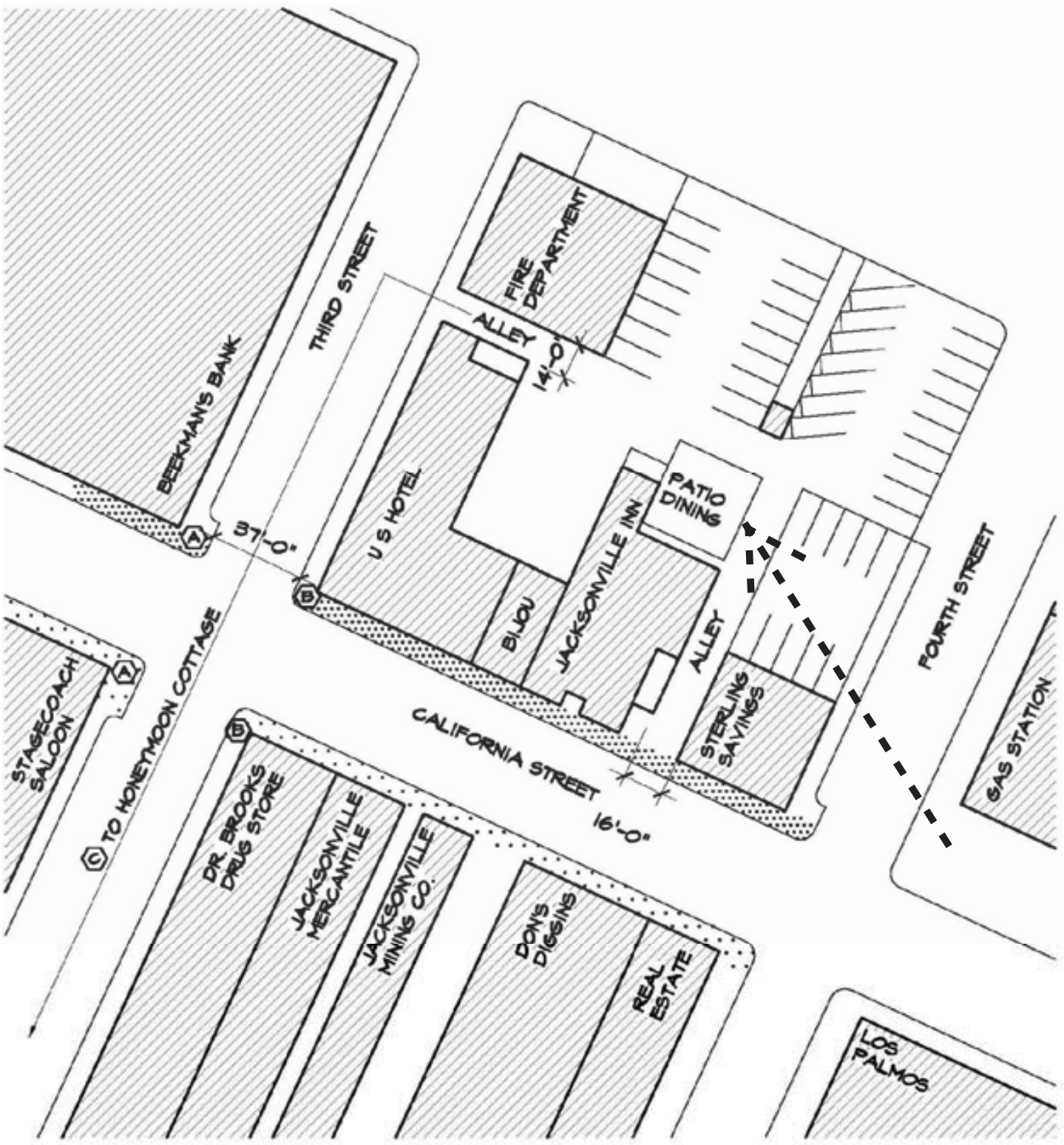

EXHIBIT A TO SECOND AMENDED COMPLAINT
Page 1 of 1

Source: Pet. App. 212a (arrow added)