No. 13-115

IN THE

Supreme Court of the United States

TIM WOOD AND ROB SAVAGE,
Petitioners,

v.

MICHAEL MOSS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/ COUNTY MANAGEMENT ASSOCIATION, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND NATIONAL SHERIFFS' ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE [1]

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and Federal agencies, and regularly submits amicus briefs to this Court in cases, like this one, that raise issues of vital state concern.

The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the amici and their counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. *See* Rule 37.

educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearing-house for legal information and cooperation on municipal legal matters.

The National Sheriffs' Association is a 26 U.S.C. § 501(c)(4) non-profit formed in 1940, which promotes the fair and efficient administration of criminal justice throughout the United States; and, in particular, in advancing and protecting the Office of Sheriffs throughout the United States. The Association has over 21,000 members and is the advocate for over 3,000 sheriffs located through-out the United States. The National Sheriffs' Association promotes the public interest goals and policies of law enforcement in the nation, and it participates in judicial processes where the vital interests of law enforcement and its members are being affected.

The amici represent the interests of state and local law enforcement, including some, like the Secret Service, who act as bodyguards, *e.g.*, state troopers

who protect governors, or city police who protect mayors and other officials. State and local law enforcement entities also keep the peace and protect public order and safety during political protests and similar situations. Thus, the state and local law enforcement officers represented by amici frequently encounter situations similar to the one at issue in this case. State and local governments also face backlash and lawsuits for viewpoint discrimination over law enforcement decisions that were not undertaken with any discriminatory intent, but only to protect individuals and maintain public safety.

SUMMARY OF THE ARGUMENT

A Google Maps Street View tour confirms an obvious alternative explanation for moving the protesters. The relatively new rule of *Twombly*/*Iqbal* requires courts to consider the underlying situation from the defendant's perspective, to determine if there is an "obvious alternative explanation" for the defendant's conduct that justifies qualified immunity. Here, the Court can and should view the protest from the perspective of the Petitioner Secret Service Agents by taking a tour of the area using Google Maps Street View. By considering the geographic and architectural features revealed by Google Maps, the Court can readily appreciate that the Secret Service Agents had sound security-based reasons for moving the anti-Bush protesters on the corner of Fourth and California Streets further away from the President.

Content of speech may be considered here. Because this case involves the protection of the President during an outdoor and unscreened political protest, this is a rare situation where a qualified

immunity analysis can properly take into consideration the content of the protesters' speech. The Secret Service Agents were entitled to consider how a threat to the President was more likely to emerge from the group of Bush protesters than from the group of supporters—another justification for moving the protesters further away from the President than the corner of Fourth and California Streets.

The proper level of generality must take into consideration the Agents' security concerns. Defining the constitutional right at too high a level of generality is a common qualified immunity problem. Here, determining the proper level of generality/specificity requires taking account of the overriding security concerns that necessarily drove the Secret Service Agents' decisions.

ARGUMENT

I. Rather than limit itself to the two-dimensional map in the record, this Court should use Google Maps Street View to examine the actual geographic and architectural facts on the ground, as encountered by the Secret Service Agents, in evaluating the protesters' viewpoint discrimination claim.

For the Ninth Circuit majority, the anti-Bush protesters were unconstitutionally "disadvantaged" when they were moved farther away from the President than the pro-Bush supporters, because the greater distance between the demonstrators and the President made it more difficult for the demonstrators to communicate their message to the President. App. 37a (inferring that because the protesters were moved one block "farther from where

the President was dining" than the Bush supporters, the protesters must have been "less able to communicate effectively with the President, media, or anyone else inside or near the Inn").

The Ninth Circuit opinions and the briefing by the parties contain many verbal descriptions of the three relevant blocks along California Street. The record and the Ninth Circuit opinion also contain a simple two-dimensional map prepared by the Respondent protesters. App. 59a. The protesters offered this map to help establish the relative distances. The map puts the events onto a set of Cartesian coordinates so the Court can measure relative distances between the two groups and the President.

The Court can and should do much more than view the record map to determine relative distances. It should examine the three blocks of downtown Jacksonville at issue via Google Maps Street View, to get a much more detailed sense of the geographic and architectural facts on the ground, as confronted by the Petitioner Secret Service Agents.

This Court has recognized the value of making reference to available objective facts in qualified immunity cases where the Court must evaluate the conduct of government actors based on claimants' allegations. In *Scott v. Harris*, 550 U.S. 372 (2007), this Court considered a qualified immunity defense that hinged upon two radically different interpretations of a car chase. The claimant was fleeing police when he was forced off the road by a police car, and became paralyzed as a result. He sued the police, claiming that they unlawfully used lethal force to apprehend him. *Id*. at 375-76. So, the reasonableness of the police officers' actions depended heavily on the circumstances of the car chase. The claimant

described his driving as careful and nonthreatening, whereas the police officers described a dangerous high-speed chase. *Id.* at 378-80.

The Court deemed it appropriate to inform its determination of reasonableness by viewing an indisputably accurate videotape of the car chase. *Id*. The videotape confirmed that the police officers' version of the chase was factually accurate—"Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury." *Id*. at 380. Thus informed, the Court had no difficulty determining that the police did not violate the claimant's Fourth Amendment rights by hitting his bumper with a police cruiser. *Id*. at 380-86.

So far, neither side has approached this qualified immunity case through lens of *Scott v. Harris*. Nor did the Ninth Circuit. But this Court's approach to qualified immunity in *Scott v. Harris* can be usefully applied here by carefully considering the facts from the perspective of the Secret Service Agents, as aided by the objective details provided by the street-level photographs available from Google Maps Street View.

Federal courts have long deemed it appropriate to take judicial notice of geographical facts as observed through resources like Google Maps. *See* Fed. R. Evid. 201(b); *Boyce Motor Lines v. United States*, 342 U.S. 337, 344 (1952) (Jackson, J., dissenting) ("We may, of course, take judicial notice of geography."); *United States v. Perea-Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012) (taking notice of a Google map and satellite image as a "source whose accuracy cannot reasonably be questioned"); *Citizens for Peace in Space v. City of*

Colorado Springs, 477 F.3d 1212, 1218 n.2 (10th Cir. 2007) (taking judicial notice of online distance calculations); *Rindfleisch v. Gentiva Health Sys., Inc.*, 752 F. Supp. 2d 246, 259 n.13 (E.D.N.Y. 2010) (taking judicial notice of geographic information through Google Maps, and collecting similar cases); *United States v. Brown*, 636 F. Supp. 2d 1116, 1124 n.1 (D. Nev. 2009) (same); David J. Dansky, *The Google Knows Many Things: Judicial Notice in the Internet Era*, 39 COLO. LAW. 19, 24 (2010) ("Most courts are willing to take judicial notice of geographical facts and distances from private commercial websites such as MapQuest, Google Maps, and Google Earth."). And this Court has acknowledged that courts may consider judicially-noticed facts at the pleading stage, in deciding a motion to dismiss. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).[2]

Google Maps' Street View feature consists of "panoramic, street-level photographs . . . captured by cameras mounted on vehicles owned by Google that drive on public roads and photograph their surroundings." *Joffe v. Google, Inc.*, No. 11–17483, 2013 WL 6905957, at *1 (9th Cir. Dec. 27, 2013), *aff'g In re Google Inc. St. View Elec. Commc'n Litig.*, 794 F. Supp. 2d 1067 (N.D. Cal. 2011) (rejecting Wiretap Act challenges to Street View based on its collection of Wi-Fi information). As a result, Google Maps Street View is not some sort of computer simulation. Rather, it provides a collection of numerous street-level photographs of a location—just as the videotape of the car

[2] The absence in this case of a party request to judicially notice Google Maps Street View does not prevent the Court from doing so, since courts may take judicial notice *sua sponte*. *See* Fed. R. Evid. 201(c)(1); *e.g., United States v. Harris*, 331 F.2d 600, 601 (6th Cir. 1964) (per curiam).

chase in *Scott v. Harris* consisted of individual frames that were photographs of the car chase.

Since Google Maps did not start collecting photographs until 2007, it is certain the photographs of downtown Jacksonville shown through Street View were taken several years after the October 2004 demonstration at issue here. However, the Street View photographs show the exact same buildings, alleyways, parking lots, and fenced-off patio depicted in the record map, App. 59a, and described at length in the Second Amended Complaint and lower court opinions. It is apparent that there has been no construction or other alteration of these key architectural features since October 2004. The current Google Map Street View photographs are therefore a proper subject of judicial notice under Rule 201(b), *Scott v. Harris*, and the more recent internet map cases cited above.

The Second Amended Complaint alleges that about 200-300 anti-Bush demonstrators congregated along California Street between Third and Fourth Streets, focused on the Third Street motorcade route. App. 172a-81a (Second Amended Complaint facts section) at ¶¶ 42, 44. A similarly sized group of pro-Bush supporters had congregated on California on the other side of Third Street (the west side). *Id*. at ¶ 46. Then President Bush made the decision to stop at the Jacksonville Inn, so he could dine on the outdoor patio at the rear of the Inn. *Id*. at ¶ 47. This unscheduled decision required the Secret Service to immediately and quickly do whatever they could to best secure the back patio location.

It is at this point that the Respondent protesters begin describing the situation in terms of "equal access" to the President, as measured by the two-

dimensional physical distance between each group of protesters and the President. *Id*. at ¶ 48. This two-dimensional, overhead view is critical to the protesters' ability to articulate a constitutional claim based on the fact that they were moved about a block further away from the patio where the President was dining. This view, however, glosses over or obscures some important architectural and geographic features that plainly justify the Secret Service's decision to move the protesting group all the way to Fifth Street.

The protesters allege that police cleared and blocked the two alleys on Third and California Streets leading to the outdoor patio. *Id*. at ¶ 49. As a result, the protesters claim that they did not have any "access to the President or line of sight to the dining patio." *Id*. at ¶ 50. The protesters also allege that they were effectively "blocked" by the buildings along the north side of California Street, *id*.; and that there was "no significant security difference between the two groups of demonstrators." *Id*. at ¶ 54. Like the car chase videotape in *Scott v. Harris*, Google Maps Street View photographs show that these allegations are profoundly inaccurate.[3]

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[3] Google Maps Street View is easy to navigate. Here's one way to do it: go to www.maps.google.com. In the query box, type "Third and California Streets, Jacksonville OR." Then click and drag the person icon (the "pegman") from the lower right hand corner of the screen to the intersection of Third and California. Then view the many street-level photographs taken by Google's cameras by using the arrow icons on the street, and the rotate view icon at the lower right of the screen. The effect is like being able to walk around the streets of downtown Jacksonville—a virtual tour that (as discussed above) is sufficiently objective and accurate to be a proper subject of judicial notice.

Amici suggest that the Court start its tour at the corner of Third and California Streets, and make its way east from there. The pro-Bush supporters were gathered at the northwest corner of this intersection. In terms of security, the most obvious architectural fact the protestors gloss over is that the United States Hotel, a two-story brick building, stands squarely between the pro-Bush demonstrators on this corner and the patio where the President was dining. Any threat posed by demonstrators carrying handguns or explosives would be completely blocked by this edifice.

Now move east along California Street, towards the Jacksonville Inn (on the north side of the street). This is where the anti-Bush protesters were gathered. After the United States Hotel, one passes a small one-story building identified as the "Bijou" in the record map at 59a. Then comes the Jacksonville Inn, followed by the access alley that was blocked by police. This alley on California Street is at least two feet wider than the one on Third Street that the pro-Bush demonstrators were closer to, and provides much more direct access to the outdoor patio than the Third Street alley. These facts provide a sound reason for the Secret Service's decision to clear California Street, which under the circumstances meant moving the anti-Bush protesters at least to the corner of California and Fourth Streets, away from the Bush supporters.

The Ninth Circuit previously ruled in *Moss I* that the act of clearing California Street between Third and Fourth Streets was not enough to make out a cognizable claim of First Amendment retaliation. Under the Ninth Circuit's view, the pro-Bush group at Third and California and the anti-Bush group at Fourth and California were both roughly equidistant

from the President, so everything looked even-handed. The anti-Bush group was not "disadvantaged" by being moved to the corner of Fourth and California. App. 29a; *Moss v. U.S. Secret Service*, 572 F.3d 962, 971 (9th Cir. 2009).

On remand from *Moss I*, the protesters purported to remedy their claim by filing a Second Amended Complaint that added allegations that they were moved to California and Fifth Streets, a block further away from the President than the pro-Bush demonstrators, and thus were comparatively disadvantaged in their expressive activities. App. 180a-81a, Second Amended Complaint ¶¶ 60-62. The Ninth Circuit majority in *Moss v. U.S. Secret Service*, 675 F.3d 1213 (9th Cir. 2012) considered these new allegations key to stating a First Amendment retaliation claim, because there was supposedly no plausible explanation for moving only the anti-Bush protesters an additional block away from the President. App. 5a, 40a-41a.

The Court can now use Google Maps Street View as an objective tool to evaluate the lower courts' analysis, just as it did with the car chase video in *Scott v. Harris*. As noted, a pro-Bush demonstrator at Third and California looking toward the outdoor patio where the President dined would find himself or herself looking at the two-story brick façade of the United States Hotel—that edifice stood squarely in between the pro-Bush group and the President. Given its large footprint, the hotel is not easy to get around. Any person in the pro-Bush group armed with a handgun or explosive would likely have been unable to use those weapons against the President given the large hotel in between.

By contrast, the view and access of the anti-Bush protesters at Fourth and California was not similarly

impeded. To be sure, there was also a building in between the protesters and the President; but it is a very different building. The Sterling Savings Bank building is one story, not two; and its footprint is about a third the size of the United States Hotel's. Critically, the bank building does not extend past and shield the outdoor patio the way the United States Hotel does. Behind the bank building is a parking lot that provides direct access to the patio where the President was dining. Using Street View, one can explore that parking lot and its access to the patio. One can also place oneself on the northeast corner of Fourth and California Streets, near the defunct gas station, and look toward the patio. The gas station is set back further from the sidewalk. One can stand where the anti-Bush protesters stood near the gas station, look through the parking lot behind the Sterling Savings Bank, and see the brown wooden fence surrounding the back dining patio of the Jacksonville Inn where the President was dining. Indeed, all it takes from Fourth and California is one Street View arrow click and one rotate click to be looking squarely at the brown wooden patio fence. By contrast, from Third and California, one needs about three arrow clicks just to get to the Third Street alley, which does not even afford a direct view of the patio.

Google Maps Street View thus confirms that the two groups of demonstrators were *not* similarly situated from a security perspective, which is what the Petitioner Secret Service Agents were properly concerned about. Consider in particular the most obvious and probable security threat—that a demonstrator might be armed with a concealed handgun.[4]

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[4] Oregon is a "shall-issue" concealed-carry state. *See* OR. REV. STAT. § 166.291 (version effective until 1/1/2014). This Oregon

None of the demonstrators had passed through magnetometers or been searched. Concealed handguns among the demonstrators were thus a very real concern. A shooter in the pro-Bush group had no line of sight to the outdoor patio—the United States Hotel was squarely in the way. A shooter in the anti-Bush group, by contrast, might have had a direct shot at the patio from the corner of Fourth and California. The wooden fence would not stop a bullet. And suppose that a shooter were able to break out from his or her group and run a few steps before taking a shot. A shooter from the pro-Bush group would not improve his or her vantage—the United States Hotel is just too big. But a shooter from the anti-Bush group could get a much better shot by running just a few steps toward the parking lot. The distances may have been roughly the same as the crow flies, but the two street corners are profoundly different as the bullet flies.

In defending its decision to deny qualified immunity, the Ninth Circuit majority relied upon the obvious impact of distance on communication, explaining how one does not need a tape measure or noise dosimeter (*i.e.*, a sound level meter) to appreciate how an additional block of distance can impair communication. App. 5a. While that may be true, it is equally true that one does not need any specialized training in security, weapons, or crowd dynamics to appreciate how the anti-Bush group at Fourth and California posed a substantially greater security threat to the President than the pro-Bush group at Third and California. The difference is obvious. Viewing the protest from the perspective of the Petitioner Secret Service Agents, aided by Google Maps Street View,

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state-wide "shall-issue" statute generally preempts local attempts to regulate handguns more restrictively. *See id*. §§ 166.170-.176.

makes concrete and confirms the Agents' security rationale for moving the anti-Bush protesters an additional block to Fifth Street.

II. The Ninth Circuit's qualified immunity analysis failed to consider the Petitioner Agents' neutral explanation for moving the anti-Bush protesters the additional block.

This Court held in *Iqbal* that whether a complaint's well-pled facts give rise to a "plausible inference" of unconstitutional discrimination or retaliation depends in part on whether there is an "obvious alternative explanation" that could account for the conduct in a constitutionally permissible manner. *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567 (2007). Applying qualified immunity based on an "obvious alternative explanation" can weed out meritless constitutional claims at the pleading stage, thereby vindicating qualified immunity's aim of providing *immunity from suit* and not simply a defense to liability. *Id.; Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

This new rule of pleading is especially important in evaluating qualified immunity claims stemming from situations involving public demonstrations in the presence of important officials, where both First Amendment values and legitimate security concerns are at their respective zeniths. In these situations, protesters will naturally tend to view any conduct that "disadvantages" their protest speech as politically motivated and unconstitutional. But the law enforcement officers accused of engaging in impermissible viewpoint discrimination may well be able to articulate viewpoint-neutral reasons for their conduct.

That situation arose in *Reichle v. Howards*, 132 S. Ct. 2088 (2012). There, protester Howards expressed his antipathy to the Vice President's policies (fully protected speech), but also touched the Vice President (possibly a serious crime). *Id.* at 2091. Secret Service Agent Reichle attempted to investigate Howards to determine whether he posed a threat. Howards was deliberately uncooperative, leaving Agent Reichle with no choice but to arrest Howards. *Id*. While not reflected in the Court's short opinion, the record included discovery depositions that developed Agent Reichle's rationale: Howards had just had an angry and physical encounter with the Vice President; he was being deliberately uncooperative with Reichle's efforts to investigate and clear him; and for all Reichle knew or could learn, Howards might have had a gun in a nearby car that he could retrieve. What Howards perceived as viewpoint discrimination had an obvious alternative explanation.

The record in *Reichle* also developed how Howards sought to avoid summary judgment by testifying that Agent Reichle appeared visibly angry during the encounter—a reaction that Howards ascribed to Agent Reichle's supposed displeasure over Howards' political speech. Again, there was an obvious alternative explanation: Agent Reichle was angry over Howards' refusal to cooperate, which effectively forced Reichle to arrest him (and led to Reichle being sued as a result). Although the interlocutory appeals in *Reichle v. Howards* took place at the summary judgment stage, and this Court chose to apply qualified immunity on the basis of unsettled law, the facts of *Reichle* fit well into *Iqbal*'s new rule requiring courts to consider obvious alternative explanations for alleged unconstitutional conduct. The lower courts in *Reichle* had difficulty applying the rule of *Iqbal* to overcome their

reflexive acceptance of the claimant's version of events and accompanying inferences.

The difficulty in applying the new rule of *Iqbal* in *Reichle* might be ascribed to how the rule represents a paradigm shift in procedure, and such shifts take time to settle in. Other cases show how courts are beginning to apply the new rule to spare government actors from unnecessary and burdensome litigation. *See, e.g., George v. Rehiel*, No. 11-4292, 2013 WL 6768151, at *20 (3d Cir. Dec. 24, 2013) ("The TSA Officials' suspicion was an obvious alternative explanation for their conduct, which negates any inference of retaliation.") (discussed below); *Jabary v. City of Allen*, No. 12-41054, 2013 WL 6153241, at *4 (5th Cir. Nov. 25, 2013) (unpublished) (deeming "not plausible" the plaintiff's equal-protection claim, observing that the city's decision to revoke his tobacco shop's certificate of occupancy was obviously motivated by his alleged sales of tobacco to minors, the shop's close proximity to schools, and his sales of a controversial drug, rather than his race, religion, or national origin); *Chavez v. United States*, 683 F.3d 1102, 1111 (9th Cir. 2012) (noting that an obvious alternative explanation for the border patrol's failure to keep records of stops during roving patrols, which plaintiffs claimed was evidence of a "deliberate pattern and practice, designed to conceal or obfuscate" the allegedly suspicionless stops, was that doing so "would have imposed a substantial administrative burden that interfered with accomplishment of its other law enforcement objectives"); *Air Sunshine, Inc. v. Carl*, 663 F.3d 27, 36-37 (1st Cir. 2011) (concluding that the better and more obvious explanation for the FAA's delay in issuing airplane certifications and performing inspections was not the airline owner's criticism of FAA employees, but rather the airline's failure to follow

proper procedures in seeking the certifications and inspections). *See also, e.g., Tobey v. Jones*, 706 F.3d 379, 403-04 (4th Cir. 2013) (Wilkinson, J., dissenting) (noting that eliminating the distraction that plaintiff's "nearly naked state" caused was an obvious benign explanation for a TSA agent's decision to call the police after the plaintiff, during screening, refused to get dressed after removing his shirt (and sweatpants) to display the text of the Fourth Amendment that the plaintiff had written on his chest as a form of protest against body scans).

This Court can reinforce this trend, and provide a helpful example of the *Iqbal* rule in action, by applying the "obvious alternative explanation" rule here to law enforcement officers charged with protecting individuals or public safety during a political protest. One lesson of cases like *Iqbal*, *Reichle*, and *George v. Rehiel* (the recent Arabic flashcard case, discussed below) is that politically charged situations are fraught with, and naturally prone to, misunderstandings and divergent interpretations. Prior pleading rules treated a claimant's interpretation as sacrosanct, requiring courts to deny qualified immunity and allow lawsuits against law enforcement officers to go forward based on the claimants' interpretation of events, however implausible. *Iqbal* changed this protocol. Now courts must still accept the claimant's well-pled facts as true, but they must also approach the qualified immunity analysis by considering the situation from the perspective of the defendant law enforcement officer and the obvious security concerns that more plausibly explain the officer's actions. The Ninth Circuit majority did not consider the more obvious explanations for the Agents' conduct in this case, even though the issue was thoroughly joined.

The Court should continue the development of the law started in *Twombly* and furthered in *Iqbal* for qualified immunity, by ruling here that the security concerns in protecting the President supply an "obvious alternative explanation" for the Agents' decision to relocate the anti-Bush protesters, rendering their First Amendment retaliation claim implausible.

III. The Agents may consider the content of the demonstrators' speech in evaluating security threats.

Another issue that has not been developed in detail by the parties, but bears careful consideration, is how the content of speech may be justifiably considered by law enforcement officers in protecting persons from assassination or protecting public peace and safety.

The rule that government actors must remain scrupulously neutral as to the content of speech is so well entrenched in our constitutional psyches that it can be difficult to acknowledge that sometimes law enforcement may justifiably react to even core political speech based on its content. Our deep constitutional commitment to robust and uncensored debate in public forums makes it difficult to conceive how a speaker's viewpoint could ever be legitimately considered. But from the perspective of a bodyguard like the Petitioner Agents, or any law enforcement officer concerned about maintaining public safety, there is no bright line between speech that is fully protected and speech that may require a justifiable response. Speech does not exist in a vacuum; it must be considered in context.

Secret Service agents or other law enforcement officers protecting persons or public safety must

necessarily consider the content of speech in evaluating potential threats, since the content of a person's speech can indicate whether that person poses a potential threat. Presidential assassins are usually politically motivated, and political motivations naturally manifest themselves through speech that the First Amendment often protects. "Sic semper tyrannis" (thus always to tyrants) is protected political speech, and fully consonant with mainstream American political values—the phrase appears on the State Seal of Virginia. But if a Secret Service agent hears someone shout this phrase in close proximity to the President, especially in a protest situation where the public has not been screened for weapons, the agent might justifiably stop and maybe even arrest that person because of the obscure Latin phrase's close association with Booth's assassination of Lincoln. *Cf. Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) (the First Amendment does not protect "true threats"); *Scheuer v. Rhodes*, 416 U.S. 232, 246-47 (1974) (qualified immunity protects officials who must "act swiftly and firmly" when faced with "an atmosphere of confusion, ambiguity, and swiftly moving events").

The recent case of *Reichle v. Howards* is again instructive. There, when Vice President Cheney unexpectedly appeared at an open-air mall, a Secret Service agent overheard Howards say into his cellphone that he was going to ask the Vice President "how many kids he's killed today," in reference to his policies in Iraq. 132 S. Ct. at 2091. That phrase comes from a familiar protest chant ("Hey, hey, L.B.J. . . ."), and is thus mainstream political speech. But when a Secret Service agent hears someone say the words "kill" and "Vice President" in the same sentence, that agent may justifiably consider the content of this protected speech in his role as the Vice President's

bodyguard. As Justice Ginsburg noted in her concurring opinion, no matter the Secret Service Agents' views on the Administration's policies in Iraq, "they were duty bound to take the content of Howards' statements into account in determining whether he posed an immediate threat to the Vice President's physical security." *Id.* at 2097 (Ginsburg, J., concurring).

A recent decision by the Third Circuit offers another concrete example of how protected speech may justify a reaction by law enforcement in light of context. In *George v. Rehiel*, No. 11-4292, 2013 WL 6768151 (3d Cir. Dec. 24, 2013), a college student went through airport security at the Philadelphia International Airport in order to fly across country to start his senior year at Pomona college. The student, a Middle Eastern Studies major, was carrying "a deck of Arabic-English flashcards and a book critical of American interventionism." *Id*. at *1. The flashcards included plenty of everyday words and phrases, but also included cards with these words: bomb, terrorist, explosion, attack, battle, kill, to target, to kidnap, and to wound. *Id*. The TSA detained the student to investigate, and the detention lengthened into a few hours while the FBI was called in. *Id*. at *2. The student was released, and he caught a flight to college the next day. *Id*. at *3. In response to the student's *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) lawsuit for First Amendment retaliation, the Third Circuit recognized the protected nature of the student's speech, noting how the parties agreed that it was "beyond dispute that the First Amendment protects George's right to possess, read and study the flashcards and the book he was carrying." *Id*. at *20. But just as saying words like "bomb" or "terrorist" in a TSA line will justifiably get you pulled aside, so too

will carrying Arabic flashcards with these words. *Id*. The Third Circuit therefore affirmed dismissal based on qualified immunity.

In addition to the common tendency to misinterpret any governmental action as politically motivated, the line between protected speech and actionable speech can often be quite thin when it comes to protecting the safety of the President, or protecting public safety in general. *See, e.g., Hunter v. Bryant*, 502 U.S. 224 (1991) (per curiam) (Secret Service agents acted reasonably in making a warrantless arrest of a suspect who wrote a rambling letter warning of a plan to assassinate the President); *United States v. Bagdasarian*, 652 F.3d 1113 (9th Cir. 2011) (discussing whether internet postings threatening the President constituted a "true threat" for which the speaker could be criminally prosecuted). In such circumstances, courts properly apply qualified immunity to provide law enforcement with breathing space so they need not err on the side of self-restraint, for fear of being sued. *Hunter*, 502 U.S. at 229.

Here, the complaint lacks specifics regarding the anti-Bush demonstrators' protest speech. We do not know what the demonstrators were chanting, how they were chanting it, and whether their chosen language and delivery created any particular security concerns for the Secret Service.

But one thing can be readily inferred: the anti-Bush demonstrators came to California Street that evening because they had a bone to pick with the President, so any security issue that might emerge from the situation was more likely to come from the group of anti-Bush demonstrators. From the perspective of the degree of protection afforded their pure political speech, the anti-Bush protesters may have been

similarly situated to the pro-Bush supporters. But from the perspective of a bodyguard, the two groups were not the same. A Secret Service agent may rightfully acknowledge the obvious: a threat is more likely to emerge from a group of protesters than from a group of supporters. *See, e.g., Saucier v. Katz*, 533 U.S. 194 (2001) (holding that a law enforcement official protecting the Vice President was permitted to arrest a banner-carrying protester who emerged from a designated protest area and started walking toward the Vice President).

Of course a clever assassin might plant himself or herself in the pro-Bush group as a diversionary tactic, but bodyguards necessarily evaluate probabilities. A Secret Service agent on the ground might justifiably regard the anti-Bush protesters as the more dangerous of the two groups. And both groups of demonstrators might be justifiably regarded as more dangerous than the group of diners who were already at the Jacksonville Inn when the President arrived, because these people were close to the President by coincidence, whereas both groups of demonstrators deliberately came out to encounter the President.

The marginal difference in security threat implied by protesters' anti-Bush orientation may be slight here, but it is not inconsequential. The question before the Court is whether the Secret Service Agents had some justifiable, non-discriminatory reason to move the anti-Bush group further away from the President than the pro-Bush group. The greater likelihood of a security threat emerging from the anti-Bush group, particularly when coupled with the substantially greater physical access to the President discussed above, provides additional support for the application of qualified immunity in this case.

IV. The supposed constitutional violation of "disadvantaging" a speaker is defined at too high a level of generality.

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. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011). *Accord Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (summarily reversing the Ninth Circuit for evaluating qualified immunity "at a high level of generality"); *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (reversing the Ninth Circuit because "whether the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals"); *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (evaluating a claim at an abstract level of generality would transform "a guarantee of immunity into a rule of pleading").

Here, in the same breath that the Ninth Circuit purported to acknowledge this central rule of qualified immunity analysis, it defined the constitutional right at issue as a right of speakers not to be "disadvantaged" based on their viewpoint. App. 45a. That is a deliberately abstract definition of the constitutional right at issue. As this Court explained in *Anderson v. Creighton*, the doctrine of qualified immunity is rendered meaningless if it can be overcome by alleging a violation of "extremely abstract rights." 483 U.S. at 639. Defining a constitutional right at the appropriate level of specificity is an important and sometimes dispositive part of a qualified immunity analysis. *See Hagans v. Franklin County Sheriff's Office*, 695 F.3d 505, 508-09 (6th Cir. 2012) ("Precedent demands instead that we go down

the stairs of abstraction to a concrete, particularized description of the right. Though not too far down: just as a court can generalize too much, it can generalize too little. If it defeats the qualified-immunity analysis to define the right too broadly (as the right to be free of excessive force), it defeats the purpose of § 1983 to define the right too narrowly (as the right to be free of needless assaults by left-handed police officers during Tuesday siestas).").

It is not surprising that many cases can be cited for the abstract proposition that government actors may not "disadvantage" speakers based on their viewpoint. A proper qualified immunity analysis, however, must address what it means to "disadvantage" a protester in the current factual context, and determine whether such a particular disadvantagement was forbidden by clearly established law. Here, the Ninth Circuit held that the anti-Bush protesters' clearly established First Amendment rights were violated when the Secret Service agents moved them a block further away from the President than a group of pro-Bush supporters. But the Ninth Circuit did not offer a single viewpoint discrimination case that recognized a First Amendment violation based only on the distance permitted between speakers and their intended audience.

Perhaps if this protest had involved identical speakers on a set of abstract Cartesian coordinates, then moving only the anti-Bush speakers away from the President might support a constitutional claim. It is only in this most abstract rendering that the distance between a group of speakers and their intended audience could be viewed as so obviously implicating First Amendment concerns as to require no prior precedent. *Cf. K.H. Through Murphy v.*

Morgan, 914 F.2d 846, 851 (7th Cir. 1990) (Posner, J.) (requirement that the law be clearly established does not mean that there must be a controlling appellate decision precisely on point, because "the easiest cases don't even arise. There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in those circumstances."). But the events at issue took place in the real world—in a small town, with all manner of geography and architecture to contend with, and a very real possibility of concealed weapons among the protesters.

Again, the Court's qualified immunity analysis in *Scott v. Harris* is particularly instructive on the issue of generality. The question before the Court was whether a police officer's decision to end the high-speed car chase by running the suspect off the road was prohibited by the law as established in *Tennessee v. Garner*, 471 U.S. 1 (1985), that police may not use "deadly force" to prevent a fleeing felon from escaping. The claimant in *Scott v. Harris* (who had been paralyzed in the car chase) naturally presented his claim as controlled by *Garner*: he was a fleeing felon, and the police used deadly force to stop his flight. Under this framing of the claim, *Garner* provided clearly established law that prohibited the police officer's decision to run him off the road. The Court, however, did not accept the claimant's invitation to view its prior precedent at the claimant's preferred high level of generality.

The Court held that "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'"

550 U.S. at 382. The Court instead undertook a detailed factual analysis of the situation from the perspective of the officer who had to decide whether and how to stop this particular fleeing felon. The Court contrasted the situation before it with the facts of *Garner*, where a police officer shot a slight and unarmed burglary suspect in the back of the head to prevent him from escaping rather than to protect the public. Under the facts as revealed by the videotape of the police chase, the Court determined that the police officer had acted reasonably under the circumstances to protect the public from Harris's dangerous and reckless driving, and was therefore entitled to qualified immunity. *Id*. at 383-86.

Scott v. Harris confirms that the proper level of generality is a level that takes full account of all of the relevant motivating considerations of the government actor who has been sued. *Accord al-Kidd; Brosseau*. When the Court considers the protesters' claims at a detailed enough level of specificity to take into account the Secret Service Agents' evident security concerns, the justifications for the Secret Service Agents' conduct clearly emerge, and merit qualified immunity.

CONCLUSION

For the reasons set forth above, the judgment of the Ninth Circuit Court of Appeals should be reversed, and this action dismissed based on qualified immunity.

Respectfully submitted,

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