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1 P R O C E E D I N G S

2 (10:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in Case 13-115, Wood v. Moss.

5 Mr. Gershengorn.

6 ORAL ARGUMENT OF IAN H. GERSHENGORN

7 ON BEHALF OF THE PETITIONERS

8 MR. GERSHENGORN: Mr. Chief Justice, and may
9 it please the Court:

10 The Ninth Circuit held that individual
11 Secret Service agents could be held personally liable
12 for their on-the-spot decision to reposition a group of
13 about 200 to 300 demonstrators who were within weapon's
14 range of President Bush as he made an unscheduled -- as
15 he made an unscheduled stop for dinner at an outdoor
16 restaurant patio.

17 JUSTICE SOTOMAYOR: May I ask a question?
18 So were the pro-Bush demonstrators. In fact, the
19 pro-Bush demonstrators were across the street pretty
20 much at a diagonal to the President, and they were
21 permitted to remain there the entire time. He -- they
22 had a throwing distance of a bomb or a shooting distance
23 as well.

24 MR. GERSHENGORN: So, Your Honor, the
25 pro-Bush demonstrators were differently situated from

1 the anti-Bush demonstrators in several fundamental
2 respects. With respect to the weapons range, there --
3 there was a two-story building between the pro-Bush
4 protestors and the -- where the President was dining.
5 It's in stark contrast to the open alley that led down
6 precisely to the six-foot wooden fence behind which the
7 President was dining, which is where the anti-Bush
8 protestors were.

9 JUSTICE SOTOMAYOR: That was after the
10 second move, not the first.

11 MR. GERSHENGORN: No, Your Honor. At the
12 first move, when the President arrived for dinner,
13 the -- the pro-Bush protesters were on the north -- the
14 anti-Bush protesters were on the north side of
15 California Street between Third and Fourth, and the
16 alley that led right down to the restaurant patio was
17 right there. The -- they were at the head of the alley.

18 So they were very differently situated from
19 the pro-Bush protesters.

20 JUSTICE SCALIA: Counsel, I don't understand
21 the government to be making the argument, and I can't
22 understand why it isn't making the argument, that it
23 doesn't matter whether there was any intent to suppress
24 anti-Bush demonstrations, that in this area, as in
25 traffic stops, we don't consult subjective intent.

1 If -- if a policeman stops somebody,
2 and it's, oh, you stopped me only because I was coming
3 back from an anti-Bush demonstration, we wouldn't -- we
4 wouldn't listen to that argument. We'd say, did you
5 have a broken taillight or not? If you had a broken
6 taillight, we do not inquire into the subjective intent
7 of the officer. Why is it any different here?

8 MR. GERSHENGORN: Your Honor, I don't
9 believe we are avoiding the argument that Your Honor
10 suggests.

11 JUSTICE SCALIA: You haven't made it.

12 MR. GERSHENGORN: We don't think it's -- I
13 think, Your Honor, with respect, that we have. Our
14 position is that it is not clearly established law, that
15 if there were an objectively reasonable --

16 JUSTICE SCALIA: You don't even have to get
17 into that. You don't have to get into clearly
18 established law. It's a very simple case. If you say,
19 was there objectively a reason to move these people? If
20 there was, if you had an ulterior motive that was
21 unconstitutional, we don't inquire into it.

22 MR. GERSHENGORN: Your Honor, we agree with
23 that. We just have framed it as terms of -- in terms of
24 clearly established law, that if we think along the
25 lines of what this Court said in *Reichle* with respect to

1 retaliatory arrest, if there is an objectively
2 reasonable basis for the move -- for the repositioning,
3 such as a valid security rationale, it's not clearly
4 established that the presence of animus would be enough
5 to take -- to raise a constitutional --

6 JUSTICE KAGAN: Well, do you agree with
7 that, Mr. Gershengorn? Because you have these
8 hypotheticals in the last page of your brief where you
9 say that a complaint could survive a motion to dismiss
10 if the Secret Service members had, you know, announced,
11 had admitted that they had an intention to discriminate
12 or if they had told the local police that.

13 So I took what you were saying there to say,
14 if there is evidence of a very clear nature, that it was
15 all about animus and it was nothing about security, then
16 the complaint would survive.

17 MR. GERSHENGORN: So, Your Honor, I think
18 that the way we reconcile the two positions is the
19 following: If there is no objective legitimate security
20 rationale, and it is animus, we agree that it would be
21 clearly established law that the officers could not have
22 taken -- the agents could not have taken responsibility
23 -- could not have taken the actions.

24 However, if on the record there is an
25 objectively reasonable security basis, then we don't

1 think it's clearly established that, even if the
2 individual officer didn't take the action for that
3 reason and took it for animus, that it's not clearly
4 established that that is a constitutional violation --

5 JUSTICE KENNEDY: Could you get oblige us by
6 answering Justice Scalia's question. Forget clearly
7 established. What do you think the law is or ought to
8 be? If the only motive for the officer's action, for
9 the Secret Service action, is one based on viewpoint
10 discrimination, but that nonetheless there was an
11 objective reason that could have justified the action,
12 what should the outcome be there as a matter of law?
13 Forget clearly established.

14 MR. GERSHENGORN: We don't think they've
15 stated a constitutional violation in that context.
16 However, what the Court did in Reichle --

17 JUSTICE SCALIA: I don't -- what does that
18 answer mean?

19 MR. GERSHENGORN: That means there is no
20 constitutional violation.

21 JUSTICE KENNEDY: So you -- so you say that
22 any time there is an objective basis for the Secret
23 Service to act to move a protester, the fact that this
24 wasn't the motive at all, but that it was viewpoint
25 discrimination is irrelevant.

1 MR. GERSHENGORN: So, Your Honor, I want
2 to --

3 JUSTICE KENNEDY: Is that your position or
4 is it not?

5 MR. GERSHENGORN: That is our position, but
6 I don't think that's what we need to win this case.

7 JUSTICE BREYER: I know that, but the reason
8 that you -- the reason I think these questions are being
9 asked, my impression is exactly what Justice Scalia said
10 in respect to a Fourth Amendment case against a police
11 stop.

12 But my impression also is that where you
13 have a First Amendment case and it's not against the
14 policeman, against Secret Service, this Court has not
15 said that.

16 Am I right about that? And the reason that
17 your position, if I am right, is relevant is because I
18 think maybe we shouldn't say that for the first time in
19 a case where the government hasn't even argued it.

20 MR. GERSHENGORN: So, Your Honor, I --

21 JUSTICE BREYER: Now -- and what is the
22 answer to what I just said?

23 MR. GERSHENGORN: The answer to your Honor's --

24 JUSTICE BREYER: Am I right on part one, and
25 am I right on part two?

1 MR. GERSHENGORN: Your Honor, you are right
2 on part one. The Court has never held it. What the
3 Court -- the closest the Court has come is in Reichle
4 where what the Court said was in a case of retaliatory
5 arrest, it was not clearly established -- the Court
6 didn't reach the constitutional question. The Court
7 said it was not clearly established that where there was
8 objective probable cause for arrest, retaliatory animus
9 was not relevant.

10 We think a number of the same factors that
11 motivated the Court in Reichle could motivate the Court
12 here as well, were they to reach that question, and I'll
13 explain why in a second. But we do not need to win on
14 that question because it's not clearly established. So,
15 Your Honor, with respect --

16 JUSTICE BREYER: Well, we all know you don't
17 need to win on that question. The question is: Should,
18 in your opinion, the Court reach that question. And my
19 hesitation would be that it is one thing to talk about
20 ordinary policemen. It is another thing to talk about
21 First Amendment matters where we are engaged with a kind
22 of special protective force, and certain residences
23 there that make -- residences that may make a person
24 hesitate to extend into that area. And so what is the
25 government's view?

1 MR. GERSHENGORN: So, Your Honor, I've been
2 asked the government's view on a couple of things, so I
3 want to be very clear.

4 The question of what is our position is the
5 position articulated by Justice Scalia. The question of
6 what we need to win, it's qualified immunity.

7 The question of whether the Court should
8 reach the constitutional question, I think our answer
9 would be no, that the parties haven't breached it as
10 Your Honor said, that the normal course would be to do
11 what the Court said in Reichle and say that it's not
12 clearly established. But --

13 JUSTICE SCALIA: I can't understand why you
14 didn't brief it then in that case. I cannot understand
15 why you didn't brief it. And -- and talking about
16 things that we haven't -- haven't held in the past, we
17 haven't even held in the past that -- that there is a
18 Bivens cause of action for a First Amendment violation,
19 have we?

20 MR. GERSHENGORN: No, Your Honor.

21 JUSTICE SCALIA: Do we have any cases that
22 has held that?

23 MR. GERSHENGORN: No. And we agree with
24 that, but the argument was not preserved below, so we
25 have not presented it here.

1 CHIEF JUSTICE ROBERTS: Is that a
2 relevant -- well, what is your position on that? Is it
3 pertinent in analyzing qualified immunity that there's
4 no private right of action for the asserted
5 constitutional violation?

6 MR. GERSHENGORN: We do believe, Your Honor,
7 that it is -- it is -- the Court would have jurisdiction
8 to reach it because it's a logically antecedent question
9 and that it would be something that the Court could
10 consider. It's not something --

11 CHIEF JUSTICE ROBERTS: But I don't mean
12 what the Court could consider.

13 MR. GERSHENGORN: Yes.

14 CHIEF JUSTICE ROBERTS: I want to know
15 whether or not -- well, the question is simple. Can you
16 only -- can you not violate the Constitution if there's
17 no right of action against you, or do you look and say,
18 well, whether there's a right of action or not, it still
19 violates the Constitution?

20 MR. GERSHENGORN: Your Honor, I think that
21 the presence of -- the Court's hesitant to recognize
22 Bivens and the factors that go into the -- that gave the
23 Court hesitance to extend Bivens to First Amendment
24 claims are relevant to the analysis here. We didn't
25 raise this argument because it wasn't preserved below,

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1 but we do think the very same factors that should --
2 that would give the Court pause about recognizing a
3 Bivens actions are the ones that would cause the Court
4 to reverse the Ninth Circuit's decision here.

5 JUSTICE KENNEDY: Well, on -- on the merits
6 of the case, if you were called to brief the Secret
7 Service, what would you say in response to this
8 question: Do we have any duties under the First
9 Amendment when we are protecting the President with
10 respect to crowds and -- and people that are close to
11 him? Do we have any First Amendment duty?

12 MR. GERSHENGORN: Your Honor, we would --
13 first of all, as the policy -- I know Your Honor hasn't
14 asked this, but I just want to make clear. There's a
15 policy that would generally prohibit the Secret Service
16 from doing that, an internal policy. With respect to
17 what the Constitution --

18 JUSTICE KENNEDY: They're asking about a
19 law, they say we want to know what the law is. We're
20 law enforcement officers. Will you please tell us what
21 the law is.

22 MR. GERSHENGORN: I would say, Your Honor,
23 that the law is not clearly established. This Court has
24 never held that the Secret Service --

25 JUSTICE KENNEDY: They said that's why we've invited

1 you to lunch, so that you will tell us what the law is.

2 (Laughter.)

3 MR. GERSHENGORN: And we may yet get
4 clarity. But as --

5 JUSTICE SOTOMAYOR: You actually are arguing
6 that it's not --

7 JUSTICE KENNEDY: Could I --

8 JUSTICE SOTOMAYOR: -- that it's not --

9 JUSTICE KENNEDY: -- have an answer to this
10 question, please?

11 CHIEF JUSTICE ROBERTS: Answer Justice
12 Kennedy's question.

13 MR. GERSHENGORN: We would tell -- I think I
14 would have to say in candor, Your Honor, that in part
15 because of some of the discussion we're having, that we
16 think the better view of the law would be if you have an
17 objective security rationale for the action, that the
18 retaliatory animus would not render that
19 unconstitutional.

20 JUSTICE ALITO: Well, can I ask you a
21 question?

22 MR. GERSHENGORN: But I would have to say
23 that that's not clearly established and there's a
24 rule --

25 JUSTICE SOTOMAYOR: Do you think it's not

1 clearly established that you can't discriminate
2 solely -- I've used the word "solely." No security
3 reason, no nothing. You can't discriminate solely on
4 the basis of viewpoint?

5 MR. GERSHENGORN: That's correct, Your
6 Honor. We agree with that.

7 JUSTICE SOTOMAYOR: That's constitutionally
8 established?

9 MR. GERSHENGORN: And I take that as
10 different from the hypothetical that Justice Scalia
11 proposed.

12 JUSTICE SOTOMAYOR: No, no, no. Let me
13 go --

14 MR. GERSHENGORN: Okay. Yes.

15 JUSTICE SOTOMAYOR: -- step by step. You
16 agree that's clearly established.

17 MR. GERSHENGORN: Yes, Your Honor.

18 JUSTICE SOTOMAYOR: All right. What you
19 don't think is clearly established is a mixed motive
20 case.

21 MR. GERSHENGORN: That's correct.

22 JUSTICE SOTOMAYOR: That's a different
23 issue. So the question here is: Is this a mixed motive
24 case or not?

25 MR. GERSHENGORN: Your Honor --

1 JUSTICE SOTOMAYOR: That -- the other side,
2 I think, is saying it's not, that there was no valid
3 security reason, no objective security reason for this
4 move.

5 MR. GERSHENGORN: And I think our response
6 to that, Your Honor, is we would agree that's clearly
7 established. If there were -- if no reasonable officer
8 could believe there was a security rationale and it was
9 only on the basis of animus, then it would be clearly
10 established. We believe --

11 JUSTICE SCALIA: That's not a mixed motive.
12 Why -- why do you accept the description of that as a
13 mixed motive case?

14 MR. GERSHENGORN: I don't think that -- I
15 don't think Justice Sotomayor --

16 JUSTICE SCALIA: If you agreed with my
17 hypothetical, the point is it doesn't matter what the
18 officer's motive was. It does not matter. If there's
19 an objective basis for a traffic stop, even if his sole
20 motive was discriminatory, the stop is nonetheless
21 valid. This is not a mixed motive issue.

22 MR. GERSHENGORN: Your Honor, I took Justice
23 Sotomayor to be asking me a different question: If
24 there is no objective security rationale, which takes it
25 out of Your Honor's hypo, then we agree it is clearly

1 established and we believe this complaint fails because
2 they have failed to satisfy Iqbal.

3 JUSTICE SCALIA: Then don't -- just don't
4 call it mixed motive. It confuses everything. It
5 confuses everything.

6 MR. GERSHENGORN: No, that I don't think is
7 mixed motive. But what Justice Sotomayor was asking
8 was, I thought, something different, which is that --
9 whether there is a sort of Mount Healthy but-for
10 causation. And I would say -- I just want to be very
11 clear what our position is here. I know I'm being asked
12 on the merits, but just to get our the position on
13 qualified immunity.

14 It is not clearly established that taking
15 viewpoint discrimination into account in a security
16 situation violates the Constitution. It is not clearly
17 established that if there is objective security
18 rationale, even if you act then in animus, that that
19 would violate the Constitution.

20 CHIEF JUSTICE ROBERTS: Justice --

21 MR. GERSHENGORN: But we agree --

22 CHIEF JUSTICE ROBERTS: Justice Alito has
23 been trying to get a question in.

24 MR. GERSHENGORN: I'm sorry, Your Honor.

25 JUSTICE ALITO: No, no. It's certainly not

1 your fault.

2 (Laughter.)

3 JUSTICE ALITO: This question about the --
4 the issue that you've been addressing in response to
5 Justice Scalia's question. In -- in the Fourth
6 Amendment context where it is purely -- the inquiry is
7 purely objective, we have case law on what is reasonable
8 suspicion, what is probable cause. Now, if you apply
9 that to a First Amendment case where there -- where it's
10 asserted that there is a security -- there may or may
11 not be a security concern, would it not be necessary for
12 us to identify a -- a degree of suspicion or probable
13 cause that the Secret Service would have to have before
14 making -- before moving people for security reasons?

15 I imagine whenever the President is out in
16 public, there is some degree of risk. You want no risk?
17 You know, keep him in a bunker. So at some point -- do
18 you see what I'm saying? They --

19 MR. GERSHENGORN: I do, Your Honor.

20 JUSTICE ALITO: The Secret Service has to
21 make a decision about how much information they need
22 before they can -- they should move people or change a
23 route or something like that. So the courts would then
24 have to set that standard.

25 MR. GERSHENGORN: Your Honor, I think it

1 would have to be a very deferential standard and it
2 would -- and I think that that is proper under this
3 Court's case law.

4 If I could attack that in sort of two ways.
5 The way the Court addressed this issue in Reichle we
6 think is quite parallel to how it would address it in
7 this First Amendment context. What the Court said in
8 Reichle was: First, the existence of probable cause in
9 that case is likely to be an issue in every -- in
10 virtually every case. And we think in this situation,
11 the existence of a legitimate objective security
12 rationale, in part because that's what the agents do and
13 in part because of statute that -- that requires the
14 agency to protect the President, a legitimate security
15 rationale is likely to be in every case first.

16 Second, what the Court said in Reichle was
17 that it's very difficult to distinguish animus from the
18 proper use of reliance on protected speech because --
19 because the Court has recognized that it is valid at
20 times to take into account the nature of one's speech
21 in -- in making arrests and other security decisions.
22 And the same would be true here.

23 And we think there's a third factor here
24 which is important, which this Court has recognized,
25 that the physical security of the President occupies a

1 special place in our constitutional structure, as
2 Justice Breyer put it in his Rubin dissent, and that the
3 Secret Service has a special role to play.

4 JUSTICE KENNEDY: Would you say that under
5 your view of the case, that there is a First Amendment
6 interest that protesters have, but that it is virtually
7 unenforceable in the context of crowd control?

8 MR. GERSHENGORN: No, Your Honor, we would
9 not say that. We think there are --

10 JUSTICE KENNEDY: Because it seems to me
11 that if this complaint doesn't survive, nothing will.

12 MR. GERSHENGORN: So, Your Honor, I'd like
13 to address that in a couple of different ways. First of
14 all, there's a very big difference between whether
15 there's a Bivens action stated and whether there are
16 other ways to enforce constitutional rights. So it is
17 possible and there have been suits that have sought
18 injunctive and declaratory relief before things like
19 inaugurations, political conventions, even just regular
20 presidential visits. Those would be unaffected.

21 Second, there are -- there are situations in
22 which plaintiffs, and there are pending challenges now,
23 have challenged Secret Service policies, for example a
24 Secret Service policy that no -- that bars certain
25 supports for signs from a parade route. That's being

1 challenged now in the court.

2 And then if there are Bivens claims, we
3 think there are allegations that would survive. But we
4 do recognize that this would -- that -- that a ruling on
5 qualified immunity here would cut back on damages claims
6 against individual agents, but we think that's
7 appropriate in light of the difficulties they face. The
8 agent --

9 JUSTICE SCALIA: You know, I really -- I
10 really don't understand what the government is doing
11 here. It seems to me you want to win this case, but not
12 too big.

13 (Laughter.)

14 MR. GERSHENGORN: Your Honor --

15 JUSTICE SCALIA: In -- in light of the
16 arguments waived below and the arguments not made here,
17 you want us to find for you, but on the narrowest
18 possible ground. I would think it is in the interest of
19 the United States and the Secret Service to say there
20 are no Bivens First Amendment actions, but you don't
21 make that argument. Didn't make it below; don't make it
22 here.

23 Likewise, it would be in their interest to
24 say, oh, this is just like a traffic stop. It doesn't
25 matter whether we had a -- a bad motive so long as there

1 was an objective reason, that's the end, but you don't
2 make that argument here either. I -- I really can't
3 understand what the government is trying to do here.

4 MR. GERSHENGORN: Your Honor, we are -- we
5 are doing our best to make with the arguments that we
6 have before the Court. We think that the -- that the
7 qualified immunity standards that we have articulated
8 and the position on clearly established law we have
9 taken is sufficient for this Court to decide the claim.
10 Although. As I've tried to say, we agree with both of
11 the propositions that Your Honor has said and in a
12 properly preserved case we would be likely to address
13 them.

14 JUSTICE KAGAN: Mr. Gershengorn, suppose
15 that we changed the facts here and that both the
16 pro-Bush demonstrators and the anti-Bush demonstrators
17 were in the same place and they were at the foot of the
18 alleyway, so that there was an objective security
19 rationale, but that the Secret Service members -- and
20 they were in all respects the same except that they had
21 different signs. Some signs say the President is great
22 and some signs say the President is terrible. And the
23 Secret Service members had only removed the ones with
24 the signs that said the President is terrible.

25 So what would your analysis of that be, both

1 under the clearly established, but also, I want you to
2 get to what you think the law is there.

3 MR. GERSHENGORN: All right. So under --
4 under clearly established, Your Honor, I think we do
5 think that that would make a plausible case that there
6 -- that the agents acted without a valid security
7 rationale because they -- because they moved the
8 anti-Bush protesters, but not the pro-Bush.

9 JUSTICE KAGAN: I think you're changing my
10 hypothetical, or let me just explain my hypothetical.

11 MR. GERSHENGORN: Okay.

12 JUSTICE KAGAN: I put them both at the foot
13 of the alleyway because that meant that both have a
14 straight shot, you know, that they can throw a grenade
15 into the patio, which is, I take it, what the nature of
16 your objective security consideration is. So that's
17 true of both of them. But you only move the ones that
18 say the President is terrible.

19 MR. GERSHENGORN: So we would say, Your
20 Honor, first on clearly established, that it is not
21 clearly established that the Agency couldn't do that,
22 but we recognize that the Court is -- is concerned about
23 that situation where an agent -- an agent has a
24 legitimate -- an objective security rationale, but acts
25 solely on the basis of animus and I think it would

1 support that kind of inference. But I would urge the
2 Court to think, as it thinks about it about the flip
3 case, which is an agent who has an objective security
4 rationale --

5 JUSTICE KAGAN: But just -- just tell me
6 what your answer to that case is. What do you think --

7 MR. GERSHENGORN: The answer is it would not
8 be clearly established, that they --

9 JUSTICE KAGAN: And do you think it would be
10 unlawful? Forget clearly established.

11 MR. GERSHENGORN: The government's position
12 is if -- although we haven't briefed it in this case --
13 the government's position would be the one articulated
14 by Justice Scalia. But we recognize that is not
15 something that the Court has yet held and so I think --

16 CHIEF JUSTICE ROBERTS: I don't think that's
17 responsive to Justice Kagan's hypothetical. Justice
18 Scalia's hypothetical, there is an objective reason for
19 stopping the car. It's violating traffic regulations,
20 which is the broken taillight. I understood my
21 colleague's question to be there is no objective
22 security rationale.

23 MR. GERSHENGORN: I'm sorry. I had
24 understood it differently. Did you believe -- I thought
25 you were saying there was an objective --

1 JUSTICE KAGAN: I said both can throw a
2 grenade into the patio area, but in fact you only remove
3 the people who have the anti-President sign --

4 MR. GERSHENGORN: So I took the fact --

5 JUSTICE KAGAN: -- notwithstanding that the
6 security consideration applies to both equally.

7 MR. GERSHENGORN: So I took that to be that
8 there is an objective security rationale, and I think in
9 that situation, we would say that the -- A, it's not
10 clearly established -- but that we believe that the
11 better answer is the one from Justice Scalia because
12 there's an objective security rationale.

13 CHIEF JUSTICE ROBERTS: Well, no. I thought
14 the question was there's no differential security
15 rationale. In other words, maybe it's not the question
16 my colleague asked, but I'll --

17 JUSTICE KAGAN: No, that is.

18 CHIEF JUSTICE ROBERTS: -- I'll ask it.

19 MR. GERSHENGORN: Okay.

20 CHIEF JUSTICE ROBERTS: Let's say you have
21 to move the President in an emergency situation. You've
22 got two options, go through the anti-Bush crowd or go
23 through the pro-Bush crowd, and you've got to do it
24 right away. Is it a justified security rationale to say
25 that we think it's more likely that it will be

1 problematic if you evacuate the President through the
2 anti-Bush crowd than through the pro-Bush crowd?

3 MR. GERSHENGORN: We do not think that would
4 be unconstitutional, Your Honor. But --

5 CHIEF JUSTICE ROBERTS: So in other words,
6 the viewpoint itself constitutes a security
7 consideration?

8 MR. GERSHENGORN: That's what this Court
9 said in Reichle, that there are times, not that it
10 inevitably --

11 JUSTICE KENNEDY: And so, your answer to
12 Justice Kagan is that it would be proper if you have
13 only 15 minutes, a limited amount of time, to move the
14 people with the -- with the adverse -- with the signs
15 that criticize the President?

16 MR. GERSHENGORN: That's correct, Your
17 Honor. We think that that --

18 JUSTICE KENNEDY: So your answer to Justice
19 Kagan is that there is no violation if they move just
20 the Bush protesters. That's your answer.

21 MR. GERSHENGORN: That's correct, Your
22 Honor. But I -- and if I could just say a word or two
23 about the --

24 JUSTICE SOTOMAYOR: I don't know -- I
25 thought what the Chief was going to say, there's no

1 differential reason to move one or the other. Let's
2 assume you have an equal amount of time, you can get
3 everybody moved, and you just are choosing to move the
4 Bush -- anti-Bush demonstrators.

5 MR. GERSHENGORN: Your Honor, I understand
6 that this is an unattractive hypothetical for the
7 government's position. And if I could explain why
8 nonetheless I think it's the right answer because the
9 flip side is if you have an agent who has a legitimate
10 security rationale and is going to move against somebody
11 who's hostile -- who's showing a message that's hostile
12 to the President, you don't want that agent to hesitate.
13 That's what this Court said in Hunter. The Court said
14 in Hunter there are times when we don't want a
15 reasonable official to hesitate before he acts and
16 nowhere is that more important than when the specter of
17 presidential assassination is in order.

18 But I want to be crystal clear that we don't
19 need that -- I think I've said that before, but I just want to
20 make sure -- that we don't that to win. It just has to
21 be clearly established. If I could --

22 JUSTICE KAGAN: I mean, suppose I add to my
23 hypothetical and I say -- and the Secret Service goes to
24 the local police and says -- and, you know, doesn't talk
25 about grenades at all and really just says we have got

1 to get these anti-President people out of here because
2 they're annoying the President; let's do it right now,
3 and that's what they do.

4 MR. GERSHENGORN: I think, Your Honor, that
5 at some point you would cross over into a position where
6 you would say there -- there is a real question about
7 whether there's an objective security rationale and we
8 would be in a situation --

9 JUSTICE KAGAN: Well, there is one. I mean,
10 there is one in a sense of as we look back, we can see
11 that there's an alleyway and that somebody could have a
12 grenade, but there is evidence that that's not at all
13 what was in the heads of the Secret Service members.

14 MR. GERSHENGORN: Your Honor, I recognize
15 that that is -- as I said, I think that is a -- that is
16 the -- the hardest case for us and I recognize that's
17 why Your Honor posed it. But I urge Your Honor to think
18 about from the flip side, which is if you adopted the
19 rule that Your Honor's question would -- not attributing
20 to you, but might lead one to adopt, that the result is
21 an agent who has a legitimate security rationale but is
22 operating against people who are expressing a viewpoint
23 must hesitate.

24 And I think it's important in this context
25 to remember that what we have are Secret Service agents

1 who are making on-the-spot judgments while protecting
2 high-level officials.

3 JUSTICE BREYER: We understand that and I
4 think that that's the problem, and I think you're being
5 sort of picked at for this reason in my mind, and I
6 don't know if you have an answer to this. I know
7 everyone understands the importance of guarding the
8 President in this country. Everyone understands the
9 danger. You can't run a risk. At the same time, no one
10 wants a Praetorian Guard that is above the law, and we
11 have examples of history of what happens when you do
12 that. So everyone is looking for some kind of line that
13 permits the protection but denies the Praetorian Guard.
14 And if you have anything to say that we're immersed in
15 details about how to get to that general objective, I
16 would love to hear it from either side.

17 MR. GERSHENGORN: Your Honor, very briefly,
18 then I'd like to reserve. I think the simplest way to
19 reserve it is actually -- to resolve this, is to hold
20 that it's not clearly established, that it's a mixed
21 motive case; it is not clearly established that the
22 situation Justice Scalia posed would be
23 unconstitutional; and that under Iqbal, that the
24 plaintiffs have not alleged what they would need to
25 allege under clearly established law, that it was the

1 sole motive for their actions and there was no
2 objectively reasonable security rationale.

3 I'd like to reserve the balance, Your Honor.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Wilker.

6 ORAL ARGUMENT OF STEVEN M. WILKER
7 ON BEHALF OF THE RESPONDENTS

8 MR. WILKER: Mr. Chief Justice, and may it
9 please the Court:

10 The Plaintiffs have pled a plausible claim
11 for intentional viewpoint discrimination in violation of
12 core First Amendment principles. We have done so for
13 three interrelated reasons and we've pled it as a sole
14 cause. This was solely the cause, not security
15 rationale, but the sole cause of the move here was the
16 viewpoint being expressed.

17 JUSTICE GINSBURG: Would you have taken the
18 same position if all that had been was the first move,
19 that is, the move to Fourth Street? Then there would
20 have been about an equal distance from the pro-President
21 demonstrators.

22 MR. WILKER: I think that would be a more
23 difficult case for us to prevail because we wouldn't
24 have one of the prongs on which we rely, which is the
25 disparate treatment as one of the factors we rely on to

1 establish the inference of intent.

2 JUSTICE GINSBURG: Well, then would you say
3 that you would have no tenable case if they moved them
4 just the one street over so they wouldn't be in a
5 position to throw a hand grenade to the patio?

6 MR. WILKER: I think as a practical matter,
7 we would probably -- we would likely not have as tenable
8 a case as we do. If in fact the only reason for the
9 move was the officer's intent to move the anti-Bush
10 demonstrators further from where they were so that they
11 could be heard less well, that would in our view state a
12 claim for relief. It would be a more difficult claim
13 because we are trying to establish intent and we're
14 trying to establish intent from the inferences from the
15 various facts that occurred that evening.

16 JUSTICE SCALIA: Counsel, do you acknowledge
17 that -- that the issue here is whether the law was
18 clearly established? Do you agree with that?

19 MR. WILKER: I think the -- I think we
20 believe the law was clearly established by this Court's
21 precedents.

22 JUSTICE SCALIA: I'm not saying whether you
23 believe it is. Is that the -- if you find it wasn't
24 clearly established, do you lose, is what I'm saying?

25 MR. WILKER: Well, I think this Court's

1 qualified immunity precedents make that clear.

2 JUSTICE SCALIA: Okay. Now, how can it be
3 clearly established if we have never held that there is
4 a Bivens cause of action for a First Amendment
5 violation? We've never held that, have we? How can you
6 possibly say that the violation here is clearly
7 established.

8 MR. WILKER: I think you can, Justice
9 Scalia, hold -- find from this Court's decisions in its
10 viewpoint discrimination holdings, like Rosenberger,
11 like R.A.V. v. St. Paul, like Pinette, where the Court
12 has clearly made it clear that viewpoint discrimination
13 is a pernicious form --

14 JUSTICE SCALIA: Oh, it is pernicious. But
15 is there a Bivens action for it? The Constitution does
16 not create a cause of action for this. 1983 doesn't
17 cover this. We invented it out of -- really out of
18 nothing, and we have not extended that to First
19 Amendment violations up to now.

20 MR. WILKER: Up to now. And that argument
21 was not made below, nor preserved to --

22 JUSTICE SCALIA: Well, regardless of whether
23 it was made below, it certainly goes to the argument
24 that was made below and here, that the violation here
25 was not clearly established.

1 MR. WILKER: Well, I think it's different to
2 say whether or not there is a remedy for the violation
3 as to whether the violation was clearly established.

4 JUSTICE SCALIA: Well, okay.

5 MR. WILKER: The violation was clearly
6 established. Whether or not there is a remedy for that
7 violation under Bivens --

8 JUSTICE SCALIA: That's a good point.

9 MR. WILKER: -- is a different question.

10 JUSTICE SCALIA: That's a good point.

11 CHIEF JUSTICE ROBERTS: Mr. Wilker, let's
12 say something happens back in the patio area where
13 you -- you're the head of the Secret Service detail.
14 You've got to evacuate the President right away. Do you
15 go through the anti-Bush crowd or through the pro-Bush
16 crowd? You've got to decide right now quickly. I'm
17 serious. You have to make a split-second decision.
18 Which way do you go?

19 MR. WILKER: I think whichever way provides
20 the clearest egress.

21 CHIEF JUSTICE ROBERTS: No, no. They are
22 both the same. That was one of your propositions, that
23 there is no way to distinguish there.

24 It's too late. You've taken too long to
25 decide. It's a serious point.

1 MR. WILKER: It is a serious point.

2 CHIEF JUSTICE ROBERTS: You've got to decide
3 like that.

4 MR. WILKER: But that's not the position
5 that -- that's not the position the agents were in on
6 October 14, 2004.

7 CHIEF JUSTICE ROBERTS: No. I know. But if
8 we're trying to decide whether viewpoint can ever be a
9 security justification, we have to consider all of the
10 possible situations.

11 So again, if you had to decide right now do
12 you go through the anti-Bush crowd or the pro-Bush
13 crowd? Guns are going off, explosions. Which way do
14 you go?

15 MR. WILKER: I truly don't know the answer
16 to your question because I'm not --

17 CHIEF JUSTICE ROBERTS: Really?

18 MR. WILKER: -- a security expert. I don't
19 know where the guns are coming from. I don't know what
20 the --

21 JUSTICE SCALIA: You're the farthest thing
22 from a security expert if you don't know the answer to
23 that one.

24 (Laughter.)

25 JUSTICE SOTOMAYOR: That's actually not much

1 of an answer for lots of reasons, but the most, if you
2 don't know, how are we supposed to know?

3 MR. WILKER: Well, because that's not the
4 issue that's presented to this Court for decision today.
5 We're -- this is not a case in which the Secret Service
6 made a split-second judgment as to which evacuation
7 route to take with the President.

8 CHIEF JUSTICE ROBERTS: Well, but with
9 respect, my point is that we do have to adopt a general
10 principle, and if we say viewpoint can never be a
11 consideration, then you have to say when there is an
12 emergency going on, it's just as likely there will be a
13 problem if we go through the pro-Bush demonstrators or
14 the anti ones, which seems to me to be, on its face,
15 implausible.

16 MR. WILKER: Well, in the context of an
17 emergency, there may be a different rule than there
18 would be in the context of a considered decision to take
19 viewpoint into account in making a decision, which is
20 what we have alleged here.

21 CHIEF JUSTICE ROBERTS: So then you think
22 there -- well, there may be situations in which
23 viewpoint alone may be a security consideration.

24 MR. WILKER: There may be. And I think if
25 there were individuals directly in proximity to the

1 President, not, you know, 90 feet or 80 feet away, but
2 directly, could the Secret Service take into account, I
3 think that's what this Court said in Reichle, is that
4 the Court can into account where it said in the
5 proximity of the President, or in that case the Vice
6 President.

7 JUSTICE KAGAN: Mr. Wilker, do you concede
8 that, looking back on this just in a hindsight kind of way,
9 that there is an objective security rationale here, that
10 they are standing at the foot of the alleyway, that you
11 could throw a grenade into the patio area? Do you
12 concede that just looking at the situation and not
13 thinking, not taking into account any evidence of what
14 was in their heads, that there in fact is an objective
15 security rationale for moving people from this area?

16 MR. WILKER: I think if you -- if the
17 concern was the mouth of the alley and that the riot
18 geared police guarding the mouth of the alley were not
19 sufficient to protect the alley and protect against that
20 kind of incursion, the more simple solution in this case
21 would simply be to move people slightly to the east or
22 west where they had buildings between them and the
23 President.

24 JUSTICE BREYER: The question is, what is --
25 there are so many different theories floating in this

1 case that I've had a hard time trying to figure out what
2 you want me to decide -- on what theory you want me to
3 decide. Is your allegation that the Secret Service
4 agents were motivated in part by security reasons and in
5 part by bad -- what you would say, bad viewpoint
6 reasons? Or is your theory the Secret Service was
7 motivated only by viewpoint and zero by security?

8 MR. WILKER: It's the latter.

9 JUSTICE BREYER: It's the latter. Okay. So
10 then if it is the latter, I think you're hearing the
11 government saying, yes, that is clearly established,
12 that they could not in fact be motivated only by bad
13 viewpoint reasons and zero by security, and therefore,
14 you have stated a claim, if your complaint does say what
15 we both just agreed you wanted to say.

16 JUSTICE SCALIA: I don't think the
17 government has conceded that.

18 JUSTICE BREYER: All right. Maybe they
19 didn't and I have to decide that.

20 JUSTICE SCALIA: I don't think the government
21 conceded that at all.

22 JUSTICE BREYER: Okay. Then I would have to
23 decide is it the case that if the Secret -- if the
24 Secret Service was motivated not at all by security and
25 a 100 percent by viewpoint, does that state a claim?

1 Now, we'd running into the Bivens problem, et cetera.

2 But leaving all that out of it, the next
3 question would be, which I haven't heard argued yet,
4 which is why I raised this, what more do you have to do
5 than state a claim? 5 years ago, I would have thought
6 nothing, that if you have an absurd claim, I'm not
7 saying it's absurd, but if it were absurd, a district
8 court could deal with that. They would deal with it by
9 giving you 5 minutes of discovery and then saying hum,
10 or 10 minutes plus summary judgment. Or have you really
11 certified this under Rule 11? Are you kidding? Be
12 careful. Or you know, they have five or six different
13 weapons. Now, that is what you're arguing, I think.
14 But then along comes Iqbal.

15 MR. WILKER: Uh-huh.

16 JUSTICE BREYER: Now, it's a long way of
17 focusing you on that question.

18 MR. WILKER: And so in Iqbal, this Court
19 said to be plausible it has to be something more than
20 possible. But it -- plausibility is not probability.
21 And the way we establish intent is rarely through the
22 admission to a local law enforcement or to someone else
23 that the agent acted for an impermissible reason.

24 What we do to establish intent is plead
25 facts from which intent can be inferred. We believe we

1 have pled -- pleaded facts from which intent can be
2 inferred, both with respect to the disparate treatment,
3 with respect to the time that elapsed from the
4 President's decision to dine, from the time he sat down,
5 and then 15 more minutes until the decision was made to
6 move the demonstrators.

7 CHIEF JUSTICE ROBERTS: Well, Iqbal says a
8 little bit more than that, not that you just have to
9 allege facts. In Iqbal, and just quoting here from page
10 681, the Court goes on to consider the factual
11 allegations in the complaint to determine if they
12 plausibly suggest an entitlement, and they go on to say,
13 but given more likely explanations, they do not
14 plausibly establish this purpose.

15 So based on just your complaint, we have to
16 determine whether there are more likely explanations.
17 And we have in your complaint the idea that they are at
18 the front of the alleyway, it's a six-foot wooden fence.
19 Can we -- we certainly can look at those in deciding not
20 simply whether you've pled the cause of action, but
21 whether it's more plausible than those other
22 justifications.

23 MR. WILKER: I think, though, once we meet a
24 certain threshold of plausibility, unless the competing
25 inference is so compelling to make our claim

1 implausible, that it involves at the pleading stage such
2 a great burden that no plaintiff could ever satisfy it.
3 The Secret Service or any defendant could always --
4 could always articulate some rationale for their action
5 that would create a competing inference.

6 CHIEF JUSTICE ROBERTS: That's what we said
7 in --

8 JUSTICE KAGAN: Mr. Wilker, sorry to take
9 you back to this, but in this --

10 MR. WILKER: Right.

11 JUSTICE KAGAN: -- case, do you concede that
12 a reasonable officer, even if not these officers, these
13 officers might have had a terrible motivation, but that
14 a reasonable officer could look at this map and say,
15 look at the distance between the alley and the outdoor
16 patio, you can throw an explosive in there, that seems
17 really bad, let's get these people out of the way?
18 Could a reasonable officer have said that?

19 MR. WILKER: Could a reasonable officer have
20 said that, that given the proximity? Certainly that's a
21 possible conclusion. I can't say that that's an
22 impossible conclusion.

23 But the answer to that -- it doesn't,
24 because the answer to that is to take a measured
25 response consistent with the Secret Service's own

1 guidelines, which is not to take viewpoint into account,
2 to be respectful of those First Amendment rights of
3 people who are demonstrating on the public streets in
4 the center of town. This is core.

5 JUSTICE GINSBURG: And have you -- you've
6 conceded that there would be a security interest, in the
7 hypothetical that Justice Kagan raised, that there are
8 -- people are in front of that alley where they could
9 throw a grenade. Once you concede that, then you say,
10 but the security interest, the valid security interest
11 is washed away because, in fact, it was reported.

12 MR. WILKER: I think there's a distinction.
13 Could there be a security interest? Yes, there could
14 hypothetically be one. Was there one? We say there was
15 not, for the reasons articulated in our briefs and for
16 the constellation of facts that we have alleged in our
17 complaint.

18 JUSTICE KAGAN: I'm not sure I understand
19 that, because it seems to me there either is or isn't a
20 valid security interest. Now, whether they acted
21 because of that valid security interest is, of course, a
22 different question, and you might say, well, there was a
23 valid security interest, but that's not why they acted.

24 But as to the first question, I mean, there
25 either is one or there isn't one, no? And we look at it

1 and we say, what would a reasonable police officer think
2 of the security interest here? What would a reasonable
3 police officer do? Would he clear this area or not?

4 MR. WILKER: The -- the question is whether
5 proximity alone of a peaceful group of protesters is
6 enough to create a security; and in hindsight, you could
7 look at that and you could conclude that. I
8 respectfully disagree that that means there was one on
9 the evening in question. That's a factual question.
10 Was there, in fact --

11 JUSTICE BREYER: You say in your complaint,
12 "The Defendants claim that Defendant Secret Service
13 agents told Tao and the police defendants that the
14 reason for the Secret Service's request or direction was
15 that they did not want anyone within handgun or
16 explosive range of the President. To the extent the
17 agents, in fact, made such an assertion, the assertion
18 was false, and the Defendant Tao and police defendants
19 knew or should have known that it was false."

20 So you think it's false. They think it's
21 true. That's called a dispute of fact. And the normal
22 circumstance is that the judge has various weapons at
23 his disposal, legal weapons, to try to prevent -- to try
24 to prevent court's time being wasted, officer's time
25 being wasted and other's time being wasted on factual

1 allegations that are unlikely to be true. That was true
2 before Iqbal as well as after. That's your position,
3 isn't it?

4 MR. WILKER: Well, yes and no. I mean, I
5 think "unlikely" may be the wrong word. And this case
6 in -- Court in Swierkiewicz said it doesn't matter
7 whether the case -- it's not a question of whether the
8 case is likely to be proven true. The question is have
9 you pled enough. Now, clearly that preceded Iqbal, but
10 Iqbal didn't purport to change that calculus.
11 Ultimately, we are still at the pleading stage. We
12 believe we have pled enough facts to create a basis for
13 the inference of intent.

14 JUSTICE ALITO: Well, what about the other
15 situation, which is similar to your case but not exactly
16 similar -- not exactly the same. You don't plead any
17 evidence of direct intent -- any direct evidence of
18 intent on the part of the officers, but you have two
19 groups. One's pro, one's anti, and the officers put one
20 group one place and one group the other place. Now, the
21 distance from the President to the two groups is not the
22 same. One is somewhat closer, one is somewhat farther
23 away. The -- the things that are in between the group
24 and the President are different. Maybe in the group
25 that's further away, you might think the things are --

1 they might -- one might think that there are fewer
2 obstructions, maybe there are more obstructions on the
3 other side. So you plead that the -- the placement of
4 the anti-group was less favorable than placement of the
5 pro-group and is that enough?

6 MR. WILKER: We acknowledge that's not
7 enough under this Court's precedence.

8 JUSTICE ALITO: What more do you need?

9 MR. WILKER: We -- we do need to allege
10 personal participation and intent. We understand --

11 JUSTICE ALITO: Well, you -- you plead
12 intent. Would you be -- if you pled intent based just
13 on the disparate impact, would you be in violation of
14 Rule 11?

15 MR. WILKER: I don't -- I don't think we'd
16 be in violation of Rule 11. I don't know that under
17 Iqbal that that would be enough. I think prior to
18 Iqbal, that would have been enough.

19 JUSTICE ALITO: What more would you need?

20 MR. WILKER: I think you need other evidence
21 from which you can infer an intent and we've pled other
22 evidence. One is the time that elapsed from the time
23 the decision was made, which lessens the -- which
24 suggests and supports the inference -- supports the
25 inference that it wasn't a security-based determination,

1 but, in fact, was based on a viewpoint animus.

2 CHIEF JUSTICE ROBERTS: Just to make sure,
3 we're talking about the 15 minutes between --

4 MR. WILKER: We're talking about both.

5 CHIEF JUSTICE ROBERTS: Between when and
6 when?

7 MR. WILKER: So we're talking about the time
8 the President made the decision and -- and the initial
9 security arrangements were made approximately at 7
10 o'clock.

11 CHIEF JUSTICE ROBERTS: Right.

12 MR. WILKER: Then the President sat down at
13 approximately 7:15, and then another 15 minutes elapsed
14 before the decision is made to -- to move the anti-Bush
15 demonstrators.

16 CHIEF JUSTICE ROBERTS: And the first --
17 they first cleared the alley, right?

18 MR. WILKER: Yes.

19 CHIEF JUSTICE ROBERTS: And then the
20 movement that you're concerned about.

21 MR. WILKER: Right.

22 CHIEF JUSTICE ROBERTS: Now, doesn't it make
23 sense, just hypothetically, if you're the Secret Service
24 agent and you suddenly have this challenge dropped in
25 your lap at the last minute, you say, okay, here's the

1 thing, the first thing we've got to do is clear the
2 alley, right, because that's right up against where he's
3 standing. So you take care of that. You clear the
4 alley. Then after you have more time to assess the
5 situation, you say, okay, now we've got to get these
6 people who are at the foot of the alley, we've got to
7 move them.

8 In other words, they had to act not in an
9 emergency situation, but reasonably quickly and they did
10 it step by step.

11 MR. WILKER: And we understand that's the
12 competing inference that the government has offered
13 here. We respectfully disagree that on the facts that
14 we've alleged that that's so compelling that it renders
15 our allegation implausible.

16 CHIEF JUSTICE ROBERTS: But here's where we
17 get back to Iqbal. It doesn't have to be so compelling.
18 It simply has to be more likely, is the quote from Iqbal
19 on 681, and it has to be an obvious alternative
20 explanation. And that's enough, no matter what you've
21 alleged.

22 MR. WILKER: But we rely on the language
23 elsewhere in Iqbal, which we think has to be read
24 together, which is, plausibility doesn't mean
25 probability. And so if -- if the contention is that if

1 there's a more likely explanation, ours is then --
2 then -- then we're being held to a probability standard
3 that this Court said we weren't being held to on a
4 pleading standard, and which we would suggest to the
5 Court is not consistent with Rule 8 with a short and
6 plain statement of the claim. Again, we haven't had an
7 opportunity to develop a factual record here.

8 JUSTICE BREYER: All right. How do you do
9 that? Because I want to follow up on just what the
10 Chief Justice said. Imagine that what he just said is
11 the real case. You have a client, imagine, who's quite
12 sincere, absolutely sincere, and really feels he was
13 very badly treated, and you can sign a Rule 11
14 statement, but suppose that the facts are just what he
15 said. Then suppose that Iqbal were not the law. Forget
16 Iqbal for the moment.

17 Now, you've got my hypothetical.

18 MR. WILKER: I think so.

19 JUSTICE BREYER: All right. What weapons
20 does the district judge have, which I have so blithely
21 been assuming, to prevent a waste of time by the Secret
22 Service, a demoralization of the service leaning in the
23 direction of being overly careful and therefore risking
24 the President. What procedural weapons does the present
25 law, absent Iqbal, give him to dispose of a case quickly

1 without disturbance if the true facts are what the Chief
2 Justice said?

3 MR. WILKER: Well, I think there has to be
4 some opportunity to develop a factual record. And the
5 trial courts have ample authority to control discovery
6 under the Rules of Civil Procedure.

7 CHIEF JUSTICE ROBERTS: So discovery is your
8 answer. And of course it is. You've got allegations.
9 You're going to go to trial. The first thing you're
10 going to do is file interrogatories, you're going to
11 file requests for admission, you're going to file
12 discovery requests to the Secret Service. And the
13 district court's going to have to allow some of that,
14 isn't he, if he's allowed your allegations to go
15 forward?

16 MR. WILKER: I think -- I think the Court
17 would have to permit us to engage in some discovery of
18 the agents regarding are there reports of the events of
19 the evening? Do they admit certain facts or deny them?
20 Should we have an opportunity to take brief depositions
21 of the agents? And I think those are appropriate steps.
22 That's not full and unbridled discovery. The rules
23 already limit discovery to a certain degree. The
24 presumptive limits on depositions. They --

25 JUSTICE BREYER: But what about -- what

1 about the --

2 CHIEF JUSTICE ROBERTS: The first thing
3 you'd want -- I say the first thing you'd want to know
4 is whether this was a departure from established policy.
5 So the first question in -- if I were drafting
6 interrogatories would be, what is your policy with
7 respect to moving demonstrators at a presidential event?
8 What do you do? And I can see the Secret Service
9 saying, well, that's kind of a bad thing to make it
10 public because there are people out there who want to
11 kill the President, and if you go through your discovery
12 and say, this is how we look at that situation, this is
13 what we do, that gives people a -- a guideline for how
14 to break through the security arrangements.

15 MR. WILKER: Well, the court -- the trial
16 courts, the district courts have -- also have ample
17 authority to enter protective orders. There has been no
18 assertion that the information that would be required
19 here, and we don't know because we haven't gotten to
20 that stage, and I think it's premature to get to that
21 stage whether there would be any claims of secrecy that
22 would limit what we could or could not do in the context
23 of discovery. But those are matters that can be best
24 addressed by the district court in the first instance,
25 and can be addressed by the normal and appropriate means

1 that district courts use all the time to address
2 sensitive information when it's presented as part of the
3 lawsuit in Federal court.

4 JUSTICE ALITO: What -- then what does
5 happen if a district court does allow discovery of
6 things what the Secret Service thinks are confidential?
7 Under certain -- how far should demonstrators be away
8 from the President? How high must a fence be before we
9 think that it provides security against a thrown object?
10 Suppose the district court allows discovery of all of
11 that. What are they supposed to do?

12 They have to file a mandamus petition with
13 the court of appeals and get -- have the court of
14 appeals -- try to persuade the court of appeals to
15 review a discovery order?

16 MR. WILKER: I think that ultimately is one
17 remedy and it's a remedy provided for in our system
18 whenever we have an issue in which sensitive information
19 may be involved in connection with a Federal lawsuit.
20 That's not -- it's not an answer to say that simply
21 because there might be some information that the Secret
22 Service would rather not share, that that should stop us
23 in our tracks to begin with. Those are the kinds of
24 determinations that a district court should be trusted
25 to make in the first instance and which district judges

1 make every day in this country.

2 JUSTICE GINSBURG: There was -- in Judge
3 Berzon's opinion, she seemed to think it was very
4 important that when the President got into the motorcade
5 to leave only one side had access. So leaving aside
6 what happened when the group was moved, would you take the
7 position that not moving them back before the President
8 left was a violation of their First Amendment rights?

9 MR. WILKER: We have not taken that
10 position. We have not asserted that they had -- that
11 there was an obligation to hold the President in
12 position so that the demonstrators could be moved back
13 to their former position.

14 Our position is they shouldn't have been
15 moved in the first place, because there wasn't a valid
16 security reason and that the reason they were moved was
17 solely because of the viewpoint they were expressing.
18 And the fact that that's not a separate claim that they
19 weren't moved back, but it is an indication that they
20 were removed from where the President would be passing,
21 in our view, that supports the inference of viewpoint
22 discrimination.

23 JUSTICE KENNEDY: The question of mixed
24 motive or improper motive, if we can get back to that
25 for just a minute. Assume that the law -- and this is

1 the Wren case -- is as follows. If there is improper
2 motive for an arrest, but that there was an objective
3 basis that would have made the arrest and that did make
4 the arrest reasonable, there is no violation of the
5 Constitution.

6 Assume that's the law and forget clearly
7 established, forget -- assume that's the law. It seems
8 to me that for you to prevail, you have to say we should
9 make a First Amendment exception because the First
10 Amendment is so important. Or that there has to be, in
11 another context, an amendment for racial profiling. So
12 that the rule that I have just stated has to be
13 qualified in some way. It seems to me you almost have
14 to say that in order to prevail in this case.

15 MR. WILKER: I would suggest to you that
16 Wren is the exception, that Wren in the Fourth Amendment
17 context, that says if there is an objective -- if there is
18 an objective basis, I think that's reflected in Reichle.
19 But as the Court in Iqbal noted, in the First and Fifth
20 Amendment context, at least in the context of State
21 actors, the Court has held that invidious intent is a
22 basis for liability. Intent to violate those
23 constitutional rights is a basis, and so --

24 JUSTICE SCALIA: Excuse me. I'm not sure.
25 If you stop a car because you think the participants in

1 it were coming back from a protest against President
2 Bush, is that a Fourth Amendment case or a First
3 Amendment case, if that's your allegation?

4 The only reason the car was stopped was
5 because of the viewpoint that these people have. Is that a
6 Fourth Amendment case or a First Amendment case?

7 MR. WILKER: No. That would be a First
8 Amendment case.

9 JUSTICE SCALIA: Yeah, I would think so.
10 And you think that so long as you make that First
11 Amendment allegation, it doesn't matter if you have a
12 broken taillight.

13 MR. WILKER: I think for the terms of the
14 First Amendment claim, it wouldn't matter if the
15 circumstances demonstrated and created a basis for that
16 inference of intent.

17 JUSTICE SCALIA: Wow.

18 JUSTICE ALITO: Just out of curiosity, was
19 there anything to prevent someone from leaving one these
20 groups and going over to the other group?

21 MR. WILKER: There was after the President
22 made the decision. The allegations in the complaint
23 state that the local law enforcement restricted
24 movements between the two groups after the security
25 perimeter was established.

26 JUSTICE ALITO: Somebody couldn't have just

1 walked away and taken a circuitous route and gone to the
2 other group? That would have been -- the police would
3 have stopped them from doing that?

4 MR. WILKER: Is it theoretically possible
5 that they could have taken a large enough circle around
6 there? I think that is a theoretical possibility. But
7 the police did in fact stop movement across Third
8 Street.

9 One of the factors that we haven't addressed
10 today is the Secret Service's actual policy and practice
11 that we've alleged in our complaint. And that plausibly
12 and convincingly supports the inference of intent here.

13 We've alleged not less than 12 other
14 incidents during the first 4 years of the Bush
15 Administration in which Secret Service agents were
16 involved in viewpoint suppression activities. Now, we
17 haven't proven those, but again we are at the complaint
18 stage.

19 That allegation, along with the official
20 policy of the Bush White House to suppress dissent at
21 presidential appearances, also supports the inference
22 that these officers were acting for a viewpoint
23 suppressive reason.

24 CHIEF JUSTICE ROBERTS: I suppose you would
25 then seek discovery with respect to those 12 other

1 episodes, because you're saying those are viewpoint
2 discrimination, how can you decide until you know the
3 facts of those?

4 MR. WILKER: We would seek certain limited
5 discovery with respect to those incidents to see if they
6 bear out the allegations that we have made.

7 CHIEF JUSTICE ROBERTS: The same range of
8 things that we talked about earlier: Interrogatories,
9 requests for production, discovery, with respect, not
10 just to your case, but to the 12 others?

11 MR. WILKER: To the extent that the Secret
12 Service denies that those allegations or that these
13 officers deny those allegations in an answer, which we
14 haven't yet seen --

15 JUSTICE SCALIA: You wouldn't seek limited
16 discovery; you would seek unlimited discovery.

17 (Laughter.)

18 JUSTICE SCALIA: You might get only limited
19 discovery, but --

20 MR. WILKER: I'm not sure I would seek
21 unlimited discovery, because then I might be
22 overburdened with material that would have no relevance
23 to the case. What we would seek is information
24 sufficient to draw conclusions about those events and
25 whether they are sufficiently similar to support the

1 inference we would seek to establish in this case, that
2 these officers -- these agents acted with the intent we've
3 alleged they acted with.

4 JUSTICE SOTOMAYOR: The sole.

5 MR. WILKER: The sole intent.

6 If there are no further questions.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Mr. Gershengorn, you have 4 minutes
9 remaining.

10 REBUTTAL ARGUMENT OF IAN H. GERSHENGORN

11 ON BEHALF OF THE PETITIONERS

12 MR. GERSHENGORN: Thank you, Mr. Chief
13 Justice:

14 A couple of points. First, I think, Justice
15 Kagan, in response to your hypothetical, the concession
16 that in hindsight there may have been a valid security
17 rationale ends this case, because if it was true in
18 hindsight, it was certainly true at the time in the kind
19 of rapid -- in the kind of rapid decision-making that was
20 called for, as the Chief Justice alluded to. I think at
21 that point the case is over in our favor.

22 Second, the kinds of discovery that
23 my friend on the other side --

24 JUSTICE SOTOMAYOR: Could I just clarify a
25 factual matter. There are two alleyways. There was one

1 on Third Street that the President went into, and then
2 there is one by the patio dining room. What access was
3 there between Fourth Street and the patio? Because I
4 thought that the alley was on California Street, the
5 entrance to the alley was on California Street.

6 MR. GERSHENGORN: The entry to the alley is
7 on California Street. That's the one where the
8 anti-Bush demonstrators were. The alley that the
9 motorcade went through, which is on Third Street, which
10 is neither -- neither group of protesters could get to because
11 the police had blocked off traffic north of California
12 Street so that -- no protests, no demonstrators could
13 get there at all.

14 If I could return on the discovery point.
15 The discovery that my colleague has suggested he would
16 seek is exactly the nightmare scenario that the Secret
17 Service fears. It's exactly what qualified immunity is
18 designed to prevent. When there is a legitimate
19 security rationale, discovery into what the agents were
20 thinking, what the Secret Service's policies were is
21 exactly what there shouldn't be. It's exactly what the
22 Court said in Hunter that it didn't want, which is
23 agents hesitating before they did their job.

24 JUSTICE GINSBURG: Mr. Gershengorn, suppose
25 it's originally set up by the police, the motorcade is

1 coming down, each side has roughly equal access. Then the
2 Secret Service comes along and said: Clear the
3 anti-Bush demonstrators. Suppose that, that -- those
4 were the facts. Would there be a valid Bivens claim?

5 MR. GERSHENGORN: Your Honor, the question
6 would depend on whether there was a valid security
7 rationale. I think in the context of a motorcade --

8 JUSTICE GINSBURG: The rationale is just it's
9 more likely that the people who are against the
10 President would be harmful to him than the people who
11 are for him.

12 MR. GERSHENGORN: Your Honor, I think that
13 would be a much more difficult case in the context of a
14 motorcade where the security of the President is much
15 different than when the President is on an outdoor patio
16 separated only by a small fence. And I do think that
17 that is one of the major differences between where
18 the -- the treatment of the pro-Bush protesters and the
19 anti-Bush protesters here is that the -- an allegation
20 that could be based on differential treatment because
21 the pro-Bush protesters were in position to see the
22 motorcade when it left, and therefore, as the complaint
23 alleges in Paragraph 55, that that somehow undermines
24 the agents' security rationale for moving the anti-Bush
25 protesters during the meal, it just doesn't wash.

1 And then if I could turn just very quickly,
2 Justice Breyer, to your suggestion that the district
3 court could -- could control discovery. That's exactly
4 what the Court rejected in Twombly, exactly what the
5 Court rejected in Iqbal. As a practical matter, once
6 that door is open, the agents lose the security and
7 peace of mind that they need and they're subjected to
8 the very burdens they shouldn't be subjected to.

9 And then if I could just close with a quick
10 point on the Iqbal. We don't think under the
11 allegations here, as the Chief Justice pointed to the
12 key passage in Iqbal, that these allegations are any
13 more than consistent with the obvious alternative
14 explanation.

15 I've addressed the pro-Bush protesters. The
16 diners are very differently situated for a security
17 perspective because they had no anticipation of seeing
18 the President, and the Secret Service could screen
19 additional folks coming in. It's very different from a
20 crowd outside an alleyway.

21 The advance manual that the other side
22 points to supports us, not them. What it said is --

23 CHIEF JUSTICE ROBERTS: You can finish your
24 sentence.

25 MR. GERSHENGORN: What it says, Your Honor,

1 is that security concerns are for the Secret Service.
2 If it's a political concern, that's for the advance
3 team.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Counsel.

6 The case is submitted.

7 (Whereupon, at 11:08 a.m., the case in the
8 above-entitled matter was submitted.)

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