



the public, not on the content of Plaintiffs' speech or viewpoint. On November 15, 2010, Defendants Matthew Thomas and Edward Mims of the Bernalillo County Sheriff's Department ("BCSD") filed a Motion for Summary Judgment (Doc. 141). Defendants Thomas and Mims similarly argue that they did not discriminate against or disparately treat Plaintiffs based on their viewpoint in violation of their constitutional rights. Plaintiffs subsequently filed a Motion for Leave to File Surreply in Opposition to Defendants Thomas and Mims' Motion for Summary Judgment (Doc. 151) to address the issue of the admissibility of the Declaration of Will Plotner, Jr., which Defendants Thomas and Mims raised for the first time in their reply brief. The Court, having considered the motions, briefs, evidence, relevant law, and otherwise being fully advised, concludes that Plaintiffs' motion for leave to file the surreply should be granted and Defendants Sheehan's, Thomas's, and Mims's motions for summary judgment should be denied.

## **I. INTRODUCTION**

This case arises from an August 27, 2007 visit by former President George W. Bush to Los Ranchos de Albuquerque, New Mexico, for a fund raiser at the home of Mayor Larry Abraham. Plaintiffs wished to express to President Bush their disagreement with his views as his motorcade passed by them on its way to the Mayor's home. Plaintiffs allege, however, that Defendants forced them to demonstrate in an area at least 150 yards to the south of the Mayor's home, which was completely out of the President's view when his motorcade drove to the Mayor's home from the northern route. In contrast, Plaintiffs contend that Defendants allowed a group of pro-Bush supporters to stand across from the Mayor's driveway in full view of the Presidential motorcade. Plaintiffs contend that the disparate treatment was based on the content and viewpoint of Plaintiffs' speech in violation of their First and Fourteenth Amendment rights.

## II. FACTUAL BACKGROUND<sup>1</sup>

On August 27, 2007, former President George W. Bush attended a fund raiser for former Senator Pete Domenici at the Los Ranchos de Albuquerque home of Mayor Larry Abraham. (Defs. Board of the County Commissioners for the County of Bernalillo and BCSD's Mem. in Supp. of Mot. for Summ. J. (hereinafter "County Defs.' Mem. (Doc. 94)"), Undisputed Fact ("UF") ¶ 1.) The driveway to the Mayor's residence is located on the west side of Rio Grande Boulevard, a two-lane road that runs north and south through the town of Los Ranchos de Albuquerque. (*Id.*, UF ¶ 10.) Rio Grande Boulevard, in the area near the driveway to the Mayor's residence, has tarmac shoulders as well as wide dirt shoulders on both sides of the road that can fit the width of a truck. (Pls.' Mem. in Opp. to Bernalillo County Defs.' Mot. for Summ. J. (hereinafter "Pls.' Resp. to County Defs.' Mem. (Doc. 99)"), UF ¶ 41.)

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<sup>1</sup>The following facts are undisputed or, if disputed with admissible evidence, are construed in the light most favorable to Plaintiffs, the non-moving party. Many of the following facts are those the Court used in its Memorandum Opinion and Order (Doc. 124) in granting the Motion for Summary Judgment (Doc. 92) filed by Defendants Board of the County Commissioners for the County of Bernalillo and BCSD, who were dismissed from this case. The facts set forth in that opinion were not the Court's "findings," as described by Defendants. Rather, those facts were either undisputed or disputed but construed in Plaintiffs' favor when supported by the record. Defendants Sheehan, Thomas, and Mims incorporate the facts as set forth in the Court's Memorandum Opinion and Order (Doc. 124) in their respective motions. Because those facts set forth by the Court were supported by the record, the Court has included those facts that Plaintiffs do not currently dispute with admissible evidence.

of the United States. (*Id.*, UF ¶ 2.) The Secret Service Pres

Although the Secret Service does not have jurisdiction over a local police officer, its agents try to work as a team with local law enforcement officers. (*See* Pls.’ Resp. to County Defs.’ Mem. (Doc. 99), Ex. G at 52.) Sometimes local officers defer to the Secret Service, sometimes not. (*See id.*) Normally the Secret Service defers to local law enforcement on questions like where protestors are legally allowed to stand, because local law enforcement are more familiar with local codes, regulations, and laws, although the Secret Service has intervened at times in the placement of demonstrators for safety reasons. (*See id.*, Ex. G at 83; County Defs.’ Reply (Doc. 107), Ex. L at 46-47.)

Generally, the Secret Service allows members of the public to walk along the shoulder of a roadway if they are legally allowed to be there, if they are not interfering with the motorcade route, and if they do not pose a public safety risk. (*See* Pls.’ Resp. to County Defs.’ Mem. (Doc. 99), Ex. G at 106-07.) Citizens may be restricted from walking on a shoulder if there is a security issue or the possibility that one of the cars in the motorcade could hit them. (*See id.*) If an individual does not pose a direct threat and is standing on private property, then the Secret Service will do everything possible not to infringe on their constitutional rights. (Defs. Matthew Thomas and Edward Mims’ Mem. in Supp. of Mot. for Summ. J. (hereinafter “Defs.’ Thomas and Mims’ Mem. (Doc. 142)”), UF ¶ 30.) If the Secret Service determines that an individual on private property poses a threat to the President, the Secret Service has the authority to move that individual regardless of whether he or she is on private or public property. (Def. Sheehan’s Mem. (Doc. 133), UF ¶ 10.) Whether or not demonstrators are on private property, Secret Service policy prohibits agents from initiating certain actions with regard to demonstrators, absent some specific facts or observable actions that indicate the demonstrators pose a security threat to the President or the public. (*Id.*, UF ¶ 29.)



a protestor who was invited by a property owner to protest on private property north of the barricade would not have been permitted to do so. (*See id.*, Ex. M at 14-15.)

Special Agent Sheehan was responsible for the site security plan at the Mayor's residence. (*See* Defs.' Reply in Supp. of Mot. for Summ. J. ("County Defs.' Reply (Doc. 107)"), Ex. L at 38-39.) He also was responsible for developing and implementing an overall security plan for the President's visit. (Def. Sheehan's Mem. (Doc. 133), UF ¶ 13; Pls.' Resp. to Def. Sheehan's Mem. (Doc. 136), UF ¶ 33.) No White House employee, Secret Service employee, or any other person directly or indirectly requested or instructed Special Agent Sheehan to designate a particular area where protestors or supporters would be located. (Def. Sheehan's Mem. (Doc. 133), UF ¶ 18 & Ex. A ¶ 10.)

Special Agent Sheehan's direct, on-site responsibility on the day of the event was supervising and monitoring the secure perimeter at the Mayor's residence. (*Id.*, UF ¶ 24.) Rio Grande Boulevard and its shoulder were outside the portion of the secure perimeter, although portions of Rio Grande Boulevard were identified as a vehicle access route, so Special Agent Sheehan, in coordination with BCSD and APD personnel, put in place checkpoints, including the southern checkpoint, to restrict vehicle and pedestrian access to the roadway. (*See* Def. Sheehan's Mem. (Doc. 133), Ex. A ¶ 8; Pls.' Resp. to Def. Sheehan's Mem. (Doc. 136), UF ¶ 40 & Ex. I at 80-83; Pls.' Resp. to Defs. Thomas and Mims' Mot. (Doc. 147), UF ¶ 58.) BCSD and APD personnel were assigned to establish the perimeter at the event site in order to ensure security for the President. (County Defs.' Mem. (Doc. 94), UF ¶ 2.)

The southern checkpoint was established approximately 150 yards south of the Mayor's driveway on Rio Grande Boulevard. (*See* Def. Sheehan's Mem. (Doc. 133), Ex. A ¶ 9.) The reasons for the selection of this location were that the checkpoint was far enough from the Mayor's driveway

to mitigate the impact of a vehicle borne explosive and the areas nearby were wide and flat enough to allow for emergency vehicle parking. (*Id.*) Both APD and BCSD officers were located at the southern perimeter line. (*cers d0*



falls within the purview of his work as the Chief Deputy. (*Id.*) Chief Deputy Linthicum's role for the August 27, 2007 event was to make sure that staffing and resources were adequate, but he was not present at the event. (County Defs.' Reply (Doc. 107), Ex. O at 6-7, 14-15.) According to Chief Deputy Linthicum, the decision as to where BCSD permits demonstrators to stand depends on the particulars of each event, such as the number of demonstrators, who is involved, available resources,

authority to decide whether to let demonstrators through the perimeter. (Pls.' Resp. to Defs. Thomas and Mims' Mem. (Doc. 147), UF ¶ 62.) For example, if asked by an officer whether or not to allow a person through the checkpoint before the perimeter "hardened,"<sup>2</sup> Sgt. Mims had authority to allow or disallow persons through the checkpoint, and if he had a question, according to the chain of command, he was to consult Lt. Thomas. (See Pls.' Resp. to County Defs.' Mem. (Doc. 99), Ex. A at 36-37; Pls.' Resp. to Defs. Thomas and Mims' Mot. (Doc. 147), Ex. A at 50-52.)

During the August 27, 2007 Presidential visit, various protestors, including the individually named plaintiffs and peace organization plaintiffs, were present. (County Defs.' Mem. (Doc. 94), UF ¶ 11.) The protestors came as a peaceful way of showing the President that not all Americans

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<sup>2</sup>The "hardening" of the perimeter refers to the time shortly before the President's arrival when law enforcement personnel blocked Rio Grande Boulevard with vehicles and no longer allowed vehicular or pedestrian traffic through the checkpoints and other barricades. (See Defs.' Thomas and Mims' Mem. (Doc. 142), UF ¶¶ 45-47.)

Pahls about where people could protest during the visit. (*See* County Defs.’ Mem. (Doc. 94), Ex. D at 21 & Pls.’ Resp. to County Defs.’ Mem. (Doc. 99), Pahls Decl. ¶ 9.) Lt. McCauley advised that he did not know the President’s motorcade route and that the police did not intend to allow people to protest directly across the street from the Mayor’s residence. (*See* Pls.’ Resp. to County Defs.’ Mem. (Doc. 99), Pahls Decl. ¶ 9.)

Sgt. Mims, when he began to see demonstrators show up on the south and north sides of the perimeter, gave instructions that, because the bulk of protestors were arriving to the south, that the south side was a good place for those individuals to be. (*See* Pls.' Resp. to Defs.' Thomas and Mims' Mot. (Doc. 147), Ex. E at 30-31, 34-35.) Residents, however, were permitted to stay inside the perimeter. (Defs. Thomas and Mims' Mem. (Doc. 142), UF ¶ 28.)

APD Lt. Les Brown, following Lt. Thomas's directive to keep protestors south of the driveway, told protestors to stay south of the Mayor's driveway. (*See* Pls.' Resp. to County Defs.' Mem. (Doc. 99), Ex. C at 36-37.) When Lt. Brown had a question as to whether to let certain people through the line, he would call Lt. Thomas. (*See* Pls.' Resp. to Def. Sheehan's Mem. (Doc. 136), Ex. D at 20.) Lt. Brown considered BCSD to be basically in control of the event; however, during the motorcade, he considered APD to be in charge because APD had most of the manpower. (*See* Pls.' Resp. to County Defs.' Mem. (Doc. 99), Ex. C at 11.)

APD Sergeant Joshua McDonald was assigned to the south end of the Rio Grande perimeter by either Lt. Thomas or Sgt. Mims. (*See id.*, Ex. I at 9-10.) Two Secret Service agents came by in a golf cart and told Sgt. McDonald not to let any pedestrian traffic head north past his line, which was a driveway.<sup>3</sup> (*See* Pls.' Resp. to Def. Sheehan's Mot. (Doc. 136), Ex. A at 9-10, 12-13.) Officer Pat Ficke was stationed south of the Mayor's house. (*Id.*, Ex. B at 7-8.) Two Secret Service agents in a golf cart also approached Officer Ficke and told him that the protestors were located in a good place there and not to allow them any farther north on the road. (*Id.*)

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<sup>3</sup>The two Secret Service agents who issued the directive are not identified. Although Special Agent Sheehan was driving a golf cart that day, based on the record before the Court, the evidence does not show that Special Agent Sheehan was one of the Secret Service agents personally telling APD officers at the southern checkpoint to stop pedestrians from walking north of the southern checkpoint.

When motor vehicle operators attempted to park on the side of the road prior to the President's arrival, they were asked by local law enforcement personnel to proceed along Rio Grande Boulevard. (Defs.' Thomas and Mims Mem. (Doc. 142), UF ¶ 41.) Law enforcement personnel were generally concerned about the potential threat associated with vehicles parking along the roadway and potentially being loaded with explosives, weaponry, or any other threat to the President or danger to the public. (*See id.*, Ex. H at 44-45.)

When Plaintiff Carter Bundy arrived at the scene to demonstrate, he asked some BCSD officers how close he and other demonstrators could gather as a group. (*See* Pls.' Resp. to County Defs.' Mem. (Doc. 99), Ex. K at 14-15, 17.) The BCSD officers told them they could gather at the cross street south of the Mayor's residence, which was nearly around the bend from the line of sight of the Mayor's driveway, about 300 yards away. (*See id.*)

Plaintiff Merimee Moffitt arrived near the Mayor's residence between 9:30 and 10:00 a.m. on August 27, 2007, with about 12 to 15 members of CODEPINK. (*Id.*, Moffitt Decl. ¶ 5.) They stood where the majority of people were gathered, on the shoulder of Rio Grande Boulevard south of the Mayor's driveway. (*Id.*) At one point, Ms. Moffitt started walking north to determine whether she could stand closer to the Mayor's driveway, but she turned back after protestors from the north told her that they were not permitted to stand north of where they were. (*Id.*, Moffitt Decl. ¶ 6.) Shortly after Ms. Moffitt rejoined the group of protestors, a white van drove past and backed into a private driveway off of Rio Grande Boulevard. (*Id.*, Moffitt Decl. ¶ 7.) A woman in the van announced that she was there to take them north on Rio Grande Boulevard, closer to the motorcade, where they could be seen from private property. (*Id.*, Moffitt Decl. ¶ 8.) As protestors began to take

parking, rather, she was picking people up to take them to a friend's private property to the north. (*Id.*, Moffitt Decl. ¶ 11.) The officer told her that none of the other protestors could go up north and that no one, other than she and her daughter, could go with her. (*Id.*, Moffitt Decl. ¶ 12.) Although one person had already gotten in the van and another person was stepping into the van, they both exited the van and the woman driving the van left according to the officer's orders. (*Id.*, Moffitt Decl. ¶ 13.)

Plaintiff Pahls arrived at the event site between 8:00 and 8:30 a.m. (*Id.*, Pahls Decl. ¶ 10.) Ms. Pahls initially walked back and forth across the street from the Mayor's driveway. (*Id.*) A BCSD officer approached her and asked what she was doing there, to which she replied that she was looking for a place to stand and protest. (*Id.*, Pahls Decl. ¶ 13.) The BCSD officer informed her that people would be allowed to gather on the shoulders of Rio Grande Boulevard either north or south of a certain distance from the Mayor's driveway. (*Id.*) Ms. Pahls then decided to stand to the north of the Mayor's driveway on the east side of Rio Grande Boulevard. (*Id.*, UF ¶ 48.) She was standing at least six or seven feet back from the edge of the road, near a line of trees that appeared to demarcate the shoulder from private property. (*Id.*) A few other protestors, including Plaintiff Mary Lou "Mitzi" Kraft, Plaintiff Laura Lawrence, and Ms. Lawrence's young daughter, gathered with her on the eastern shoulder of Rio Grande Boulevard to the north of the Mayor's driveway. (*See id.*, UF ¶ 48, Pahls Decl. ¶¶ 14, 16.) This section of the shoulder of the road was outside the security perimeter. (*See id.*, Ex. D at 22 & Ex. G at 74-75.)

At some point prior to the President's arrival, a BCSD officer approached Ms. Pahls and told her she could not stand there. (*Id.*, Pahls Decl. ¶ 18.) She informed him that another BCSD officer had given her permission to stand there. (*Id.*) Five or ten minutes later, more BCSD officers came and forced Ms. Pahls and her three companions to move south. (*Id.*, Pahls Decl. ¶ 19.) One of the

BCSD officers adamantly told them that they needed to move at that moment. (*Id.*) This group then moved to the south with the rest of the protestors because they felt the officers might use force if they resisted them. (*Id.*)

A smaller group of supporters of President Bush<sup>4</sup> gathered on property directly across from the Mayor's driveway in the area where Ms. Pahls originally tried to stand before a BCSD officer told her to move. (*See id.*, Pahls Decl. ¶ 21.) Several of the supporters were holding American flags and two individuals held a banner saying "God Bless George Bush! We pray for you!" (*See* Pls.' Resp. to Def. Sheehan's Mem. (Doc. 136), Decl. of Will Plotner, Jr., at Ex. B.)

At some point prior to President Bush's arrival, an individual who identified himself as a landowner who resided on Rio Grande Boulevard across the street from the Mayor's driveway approached Special Agent Sheehan. (*See* Def. Sheehan's Mem. (Doc. 133), UF ¶ 26.) The man asked if he was allowed to stand on the portion of his property on the edge of Rio Grande Boulevard to watch the motorcade as it passed. (*Id.*, UF ¶ 27.) After determining that the landowner did not display any threatening or injurious behavior, Special Agent Sheehan responded that law enforcement would not interfere with his property rights so long as he did not interfere with the

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<sup>4</sup>For ease of reference, the Court will use the term "supporters" to refer to the pro-Bush demonstrators and "protestors" or "demonstrators" to refer to the anti-Bush demonstrators.

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<sup>5</sup>The record is not clear as to whether or not this Secret Service agent was Special Agent Sheehan.

<sup>6</sup>Ms. Pahls declared that, although she could only see the flags the supporters were



property line at the approximate location where supporters were standing is 8.9 feet from the edge of the pavement of Rio Grande Boulevard. (*See* Pls.' Resp. to Def. Sheehan's Mot. (Doc. 136), Decl. of Will Plotner, Jr., ¶¶ 2-4.)<sup>7</sup> The supporters stood on private property during at least part of

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standing." (Pl.'s Resp. to County Defs.' Mem. (Doc. 99), Pahls Decl. ¶ 22.) Ms. Pahls stated that she "believed they would have been standing in the area where the man is standing in the photograph in Exhibit B: either right on the shoulder of the road or about six feet or closer from the road." (*Id.*) Based on her explanation, the Court finds that she has sufficient personal knowledge on which to base her statement that the supporters were on or near the shoulder of the road. As to the supporters' exact distance from the road, her testimony is confusing. She estimates that the supporters were either right on the shoulder or six feet or closer from the road. However, she also testifies that they were standing in the area where the man is standing in Exhibit B. From the photograph in Exhibit B, the man's location appears to be at a greater distance than six feet from the road, possibly as far as 15 feet from the side of the road. Construing the evidence in Plaintiffs' favor, the Court finds that Plaintiffs have some evidence that the supporters were standing somewhere within the range of six to fifteen feet from the road.

<sup>7</sup>Defendants Thomas and Mims assert in their reply that the Court should strike the Declaration of Will Plotner, Jr., from the record because Plaintiffs did not attach the document to their response to Defendants Thomas and Mims's motion for summary judgment and because Plaintiffs had not previously disclosed Mr. Plotner as a witness. Plaintiffs filed a motion for leave to file a surreply to address these issues. Because the issues discussed in the surreply and in Defendants Thomas and Mims's response thereto are pertinent to the issues raised in the motion for summary judgment, the Court will grant Plaintiffs' motion to file the surreply.

With respect to the issue of not attaching the Declaration to their response to Defendants Thomas and Mims's motion, Plaintiffs attached Mr. Plotner's Declaration in support of their Opposition to Defendant Sheehan's Motion for Summary Judgment (Doc. 136) that they filed on September 30, 2010. In their response to Defendants Thomas and Mims's motion, Plaintiffs referenced the previously filed exhibit in accordance with New Mexico Local Rule 10.7. *See* N.M. Local R. of Civ. P. 10.7 ("An exhibit should be submitted only once and may later be referred to by document title and filing date."). The failure to attach the Declaration in this round of briefing is thus not grounds for striking it.

As for the disclosure issue, Rule 26(a)(2)(C) requires expert disclosure in accordance with any court order, and in the absence of a court order, "at least 90 days before the date set for trial." Fed. R. Civ. P. 26(a)(2)(C) (2010). Although the Court initially set an expert disclosure date of May 22, 2008 (Doc. 22), that date was vacated by subsequent orders. No specific expert disclosure date was set by the Court because the parties indicated that they did not intend to use any expert witnesses. No trial date has yet been scheduled in this case. Nevertheless, the Court did give a termination date for discovery, which arguably encompasses Rule 26(a)(2) disclosures. (*See* Order (Doc. 84) (setting December 3, 2009, as termination date for discovery).) There is thus an open question as to whether the disclosure was untimely. The Court need resolve this issue, however, because Defendants will not suffer any prejudice from the Court's

the August 27, 2007 Presidential visit. (*See* County Defs.’ Mem. (Doc. 94), Ex. E at 27-29, Ex. F at 14; Defs. Thomas and Mims’ Mem. (Doc. 142), Ex. G at 101, 103.)

At the time the perimeter “hardened,” the supporters were located on either the edge of the private property line or on the public shoulder across the street from the Mayor’s driveway.<sup>8</sup> (*See* Pl.’s Resp. to County Defs.’ Mem. (Doc. 99), Pahls Decl. ¶ 22, Ex. D at 66-67, & Ex. L at 35-36; County Defs.’ Mem. (Doc. 94), Ex. E at 27-29.) This area has a wide shoulder consisting of a tarmac shoulder and a gravel shoulder. (Pls.’ Resp. to County Defs.’ Mem. (Doc. 99), UF ¶ 58.) The shoulder then slopes down to an open field and there is no fence demarcating the shoulder from the field. (*Id.*) Although BCSD officers did not have a specific survey to establish the exact location of the private property line, they believed that the supporters stood on private property because they were not directly on the road and stood more on the grass. (*See id.*, Ex. D at 66-67 & Ex. E at 36.) Sgt. Mims guessed that the public shoulder was approximately 10 to 15 feet wide, and he believed, based on that estimate, that the area where the supporters were standing was private property. (*See id.*, Ex. D at 66-67.) Special Agent Sheehan likewise understood that the supporters were on private property. (Defs. Thomas and Mims’ Mem. (Doc. 142), Ex. G at 101.)

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consideration of the Declaration at this summary judgment stage. As discussed *infra*, the Court’s analysis does not rely on Mr. Plotner’s survey results. The Court will therefore not strike the Declaration at this time. Nor will the Court resolve at this juncture the admissibility of Mr. Plotner’s testimony at trial.

<sup>8</sup>Ms. Pahls’s estimate of where the supporters were standing is based on where the man is standing in the photograph attached as Exhibit B to her Declaration. (*See* Pl.’s Resp. to County Defs.’ Mem. (Doc. 99), Pahls Decl. ¶ 22.) As discussed *supra* in footnote 6, the man appears to be standing on or very near the private property line, as the distance could be between six feet, which would be on public property, or more than 8.9 feet from the road, which would be on private property. Based on the evidence provided by Plaintiffs and construed in their favor, the Court finds that there is some evidence indicating that Plaintiffs may have been standing on public property when the perimeter hardened. There is therefore a dispute of fact on this issue.

Approximately 30 minutes prior to the President's arrival, according to standard protocol, law enforcement "hardened" the perimeter. (County Defs.' Mem. (Doc. 94), UF ¶ 23 & Ex. G at 26; Pls.' Resp. to County Defs.' Mem. (Doc. 99), Pahls Decl. ¶ 20; Defs. Thomas and Mims' Mem. (Doc. 142), UF ¶ 45.) Personnel from APD blocked Rio Grande Boulevard with marked vehicles. (See County Defs.' Mem. (Doc. 94), Ex. G at 26; Pls.' Resp. to County Defs.' Mem. (Doc. 99), Pahls Decl. ¶ 20.) Officers on horseback were also stationed across Rio Grande Boulevard, about 150 yards south of the Mayor's driveway. (See Pls.' Resp. to County Defs.' Mem. (Doc. 99), Pahls Decl. ¶ 20 & Moffitt Decl. ¶¶ 14-15, 17.) The horses were large, blocking the northern view of the demonstrators standing at the southern checkpoint. (See *id.*, UF ¶ 52.) No vehicular or pedestrian traffic was allowed through the barricade once the perimeter hardened. (Defs. Thomas and Mims' Mem. (Doc. 142), UF ¶ 47.) The purpose of stopping traffic was to ensure the safety of President Bush and the officers on motorcycles, so that nobody could step out in front of them or throw something. (See County Defs.' Mem. (Doc. 94), Ex. F at 13; Pls.' Resp. to County Defs.' Mem. (Doc. 99), Ex. C at 44; Defs. Thomas and Mims' Mem. (Doc. 142), UF ¶ 48.) Once the southern barricade was in place, officers told the demonstrators to form a line behind and parallel to the barricade and not to step north of the line. (See Pls.' Resp. to County Defs.' Mem. (Doc. 99), Moffitt Decl. ¶ 15 & Pahls Decl. ¶ 20.) There were at least 70 protestors at that point. (*Id.*, Moffitt Decl. ¶ 15.) Sometime after officers stopped vehicular traffic on the road, Officer Ficke stopped pedestrians who were trying to walk north on the shoulder of the road. (See Pls.' Resp. to Def. Sheehan's Mem. (Doc. 136), Ex. B at 11.)

At around noon, the President's motorcade approached Mayor Abraham's residence from the north and entered the driveway. (See Defs. Thomas and Mims' Mem. (Doc. 142), UF ¶ 49.) The motorcade never passed by Plaintiffs and the others demonstrators standing to the south of the

residence. (



based on their direct, personal involvement and because the subordinate law enforcement officers were acting under the direct orders and supervision of Defendants Sheehan, Thomas, and Mims.

### **III. STANDARD**

Under the doctrine of qualified immunity, “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). When a defendant raises the qualified immunity defense on summary judgment, the burden shifts to the plaintiff to meet a strict two-part test. *See Nelson v. McMullen*, 207 F.3d 1202, 1206 (10th Cir. 2000). The plaintiff must demonstrate that (1) the defendant violated a constitutional or statutory right and (2) the right was clearly established at the time of the conduct. *Id.* As to the first inquiry, the question is whether the facts alleged, which are taken in the light most favorable to the party asserting the injury, the officer’s conduct violated a constitutional right. *See Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1312 (10th Cir. 2002). The second inquiry is more specific than whether the officer’s conduct violated a constitutional right – the question is whether it would be clear to a reasonable officer that his conduct was unlawful under the circumstances he confronted. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). “[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.”

exact corresponding factual circumstances, as defendants must make reasonable applications of the prevailing law to their own circumstances. *Id.*

If the plaintiff establishes both elements of the qualified immunity test, then the burden shifts back to the defendant to show there are no genuine issues of material fact and that he is entitled to judgment as a matter of law. *Nelson*, 207 F.3d at 1206. Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Quaker State Minit-Lube, Inc. v. Fireman’s*

least intrusive means of doing so. *Ward*, 491 U.S. at 798. Instead, the content-neutral regulation will meet the narrow tailoring requirement so long as it promotes a substantial government interest that would be achieved less effectively absent the regulation. *Id.* at 799.

In contrast, “[i]t is well established law that ‘content-based restriction on political speech in a public forum . . . must be subjected to the most exacting scrutiny.’” *Mahoney v. Babbitt*, 105 F.3d 1452, 1455 (D.C. Cir. 1997) (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)) (emphasis omitted). *See also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002) (“If the regulation were content based, it would be considered presumptively invalid and subject to strict scrutiny.”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.”). The government must show that a content-based restriction is necessary to serve a compelling governmental interest and that it is narrowly drawn to achieve that end. *Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 45 (1983); *Mahoney*, 105 F.3d at 1455. “Viewpoint-based restrictions receive even more critical judicial treatment.” *Mesa*, 197 F.3d at 1047 (quoting *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996)). First Amendment law forbidding viewpoint-based restrictions on speech was thus clearly established at the time of the event and would put a reasonable official on notice that disparate treatment of protestors based on their viewpoint was unlawful. *See, e.g., Mesa*, 197 F.3d at 1047; *Mahoney*, 105 F.3d at 1455.

A plaintiff asserting a First Amendment violation has the burden to prove that the restrictions affect protected expression in a traditional public forum. *American Civil Liberties Union of Colorado v. City and County of Denver*, 569 F.Supp.2d 1142, 1161 (D. Colo. 2008). Once the plaintiff satisfies that burden, the burden shifts to the government to prove the constitutionality of its actions. *Id.* (citing *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816



Here, Plaintiffs have established that they were restricted from protesting across from and north of the Mayor's driveway on public shoulders and on private property in view of the President's motorcade. Evidence in their favor shows that they and their signs were not visible to the Presidential motorcade. Plaintiffs have thus shown that the restrictions affected protected expression in a traditional public forum. The fact that their presence may have been visible to the media, while perhaps diminishing the degree to which Plaintiffs' rights were affected, does not disprove that the restrictions affected Plaintiffs' First Amendment rights because the intended target of the protest was the President himself. Consequently, the burden shifts to the Government to show that the restriction was constitutional.

To determine whether a restriction is content-neutral, courts must focus on the government's purpose in imposing the restriction. *Ward*, 491 U.S. at 791. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an

Plaintiffs, however, have provided evidence suggesting that the proffered private property and security reasons are pre-textual. Many of the protestors initially “gathered” at the southern

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<sup>9</sup>Plaintiffs assert that the exact location of the private property line is significant. The Court disagrees. Officers need not know the exact survey lines along an entire motorcade route

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in order to make distinctions between private and public property along that route. Officers are

restrictions imposed did not actually serve that security interest. *Cf. Citizens for Peace*, 477 F.3d at 1221 (noting that, for content-neutral restrictions, it is not enough that defendant justifies its restrictions based broadly on “security;” rather, question of narrow tailoring must be decided against backdrop of harms for which a *particular* set of security measures are designed). For example, there is evidence that the areas north of the southern checkpoint, where many of the protestors wanted to stand, were outside the security perimeter. A reasonable jury could also find that the proffered manpower concern for keeping protestors in one group to the south of the southern perimeter was pretextual, given the evidence that there was enough manpower to station a separate group of law enforcement officers in front of pro-Bush supporte

show that each government-official defendant, thr

whether there is enough evidence against each Defendant for a reasonable jury to find each liable for the alleged First Amendment violations.

**1. Lieutenant Thomas**

It is undisputed that Defendant Thomas was the BCSD commander in charge of the site security, and he, along with the Secret Service and APD, helped develop the security plan for the event. He acted as the point of contact and immediate supervisor of all local police officers assigned to duty at the event. He directly supervised his officers' conduct while on-site throughout the protest. Furthermore, the evidence in Plaintiffs' favor shows that, although the Secret Service was in charge of the overall event, BCSD and Defendant Thomas in particular had considerable discretion and control over the placement and overall management of all demonstrators.

There is also evidence that he ordered the officers under his command to keep the demonstrators in one group south of the southern perimeter, yet he knowingly acquiesced in the decision not to interfere with the pro-Bush supporters who remained on or near their private property during the event. Although Defendant Thomas may not have specifically ordered his officers to force the demonstrators who were protesting near the pro-Bush supporters on a public shoulder outside the security perimeter to move to the south, a reasonable jury could find, based on all the evidence, that Defendant Thomas's order to keep the demonstrators at the southern perimeter indicated that he contemplated exactly the actions taken by his subordinates. For instance, following the briefing, at least one officer understood Defendant Thomas's order to mean that all demonstrators must be moved to the southern perimeter, including a protestor invited by a property owner to protest on private property north of the barricade. This evidence indicates that the subordinate BCSD officer's subsequent refusal to permit anti-Bush protestors to get into the van that was going to private property north of the southern perimeter was done pursuant to Defendant

Thomas's orders.

Although Defendant Thomas may have deferred to Special Agent Sheehan's instruction that the pro-Bush supporters could remain on their private property, that fact alone does not absolve Defendant Thomas of potential liability. There is evidence that Defendant Thomas issued orders that caused his subordinate officers to not allow Plaintiffs to stand on public shoulders near the entrance to the Mayor's driveway or to protest on private property to the north of the Mayor's driveway, areas outside the security perimeter where they had a right to demonstrate. It is that disparate treatment, over which Defendant Thomas had direct control, that is the basis of his potential liability.

For the foregoing reasons, the Court finds that the facts in Plaintiffs' favor could establish that Defendant Thomas promulgated, created, implemented, or possessed responsibility for the policy that caused the restrictions on Plaintiffs' speech because of their anti-Bush message. Because the Court concludes that Plaintiffs have demonstrated an affirmative link between Defendant Thomas and the viewpoint discriminatory practices sufficient to present their case to a jury, the Court will deny Defendant Thomas's motion for qualified immunity and summary judgment. *Cf. Buck v. City of Albuquerque*, 549 F.3d 1269, 1280 (10th Cir. 2008) (holding that plaintiffs established requisite causal connection between alleged deprivation of constitutional rights and incident commander's actions, where commander was in charge of police response to demonstration, was immediate supervisor and point of contact for officers assigned to duty at demonstration, directly supervised his officers' conduct, and personally issued orders for arrests).

## **2. Sergeant Mims**

For similar reasons, the Court will deny Defendant Mims's motion for qualified immunity and summary judgment. Defendant Mims was the ERT supervisor whose responsibility was the

security of the outer perimeter. He had the authority to allow demonstrators through the perimeter. Defendant Mims gave the briefing during which officers were instructed to move all protestors to the southern perimeter. He also knew of and did not interfere with the pro-Bush supporters' demonstration across from the Mayor's driveway. Given his active involvement in ordering the placement of demonstrators at the event, the inference of viewpoint discrimination that may be drawn from the manner in which his subordinate officers carried out their instructions can be ascribed to him. The Court therefore concludes that the facts, as viewed in the light most favorable to Plaintiffs, are sufficient to establish that Defendant Mims promulgated, created, implemented, or possessed responsibility for the policy that caused the restrictions on Plaintiffs' speech because of their anti-Bush message.

### **3. Special Agent Sheehan**

Special Agent Sheehan was responsible for site security at the Mayor's residence, and he was the site agent for the overall security plan for President Bush's visit. His on-site duty was supervising and monitoring the secure perimeter at the Mayor's house. Special Agent Sheehan knew of and did not interfere with the pro-Bush supporters' demonstration across from the Mayor's driveway. Together with BCSD and APD personnel, Special Agent Sheehan put in place the security checkpoints to restrict access to portions of Rio Grande Boulevard, including the southern



to protest on private property north of the barricade. Given that other BCSD officers enforced the order in that same manner and two Secret Service agents ordered APD not to allow anyone north of the southern perimeter, it is reasonable for a jury to infer that the officers were executing the order in the manner intended by the superiors who issued and/or approved it.

These facts, as construed in Plaintiffs favor, create a question of fact as to whether Special Agent Sheehan is liable for the alleged First Amendment violation. Although Special Agent Sheehan did not personally instruct the local officers at the briefing to keep protestors south of the southern checkpoint, he participated at the briefing and was the agent with ultimate responsibility for the security at the Mayor's residence. At this meeting, federal and local law enforcement planned for the Presidential visit, and the Secret Service decided where the perimeters were and advised local law enforcement of what was or was not acceptable in connection with establishing the secure zone and/or perimeter. These facts suggest that he promulgated, created, implemented or possessed responsibility for the continued operation of the order that caused differential treatment of anti-Bush and pro-Bush demonstrators, satisfying the first and second requirements for liability.

The third requirement to impose liability – that he acted with the state of mind required to establish the alleged First Amendment deprivation – presents a closer question. The evidence construed in Plaintiffs' favor indicates that he participated in the briefing after which multiple officers left with the understanding that all demonstrators must be moved to the southern perimeter, including protestors standing on public shoulders outside the security perimeter and protestors invited by a property owner to protest on private property north of southern checkpoint. The subordinate officers' subsequent execution of the order in a manner that treated anti-Bush protestors differently from pro-Bush supporters, resulting in their anti-war and anti-Bush message not being able to be seen by the Presidential motorcade, suggests that the supervisors in charge of issuing and

approving that order, including Special Agent Sheehan, intended the differential treatment of protestors and supporters that occurred. Again, although there are content-neutral security reasons for establishing a security perimeter, Plaintiffs have submitted sufficient evidence to indicate that the way in which officers enforced the security perimeter was done in a content-discriminatory way. In sum, the Court finds that there is sufficient evidence of an affirmative link between the disparate treatment of the anti-Bush protestors and the pro-Bush supporters by subordinate officers and Special Agent Sheehan's adoption of the order showing his authorization or approval of such misconduct. The Court will therefore deny Defendant Sheehan's motion for summary judgment and qualified immunity.

**C. Fourteenth Amendment**

Plaintiffs are clearly not asserting a separate Fourteenth Amendment claim; rather, they invoke the Fourteenth Amendment "because the Fourteenth Amendment incorporates the First Amendment and makes it applicable to the states." (Pls.' Resp. to Defs. Thomas & Mims' Mot. (Doc. 147) at 24 n.2.) This Court similarly does not construe Plaintiffs' Amended Complaint as stating a separate Fourteenth Amendment equal protection or due process claim. The Court therefore need not grant summary judgment to Defendants on a non-existent Fourteenth Amendment equal protection or due process claim.

**IT IS THEREFORE ORDERED** that

1. Plaintiffs' Motion for Leave to File Surreply in Opposition to Defendants Thomas and Mims' Motion for Summary Judgment (**Doc. 151**) is **GRANTED**;
2. Defendant Kerry Sheehan's Motion for Summary Judgment based on Qualified Immunity (**Doc. 132**) is **DENIED**; and

3. Defendant Matthew Thomas's and Defendant Edward Mims's Motion for Summary

DENIED 30 0 0 12 303.88iE.0785. 30 0 8.2(m)s4.48 - Do.078(\_\_\_\_\_

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A handwritten signature in black ink, appearing to read "Terry Hansen". The signature is written in a cursive style with a large, looping initial "T".