Case No. 06-35937

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEWART BRANDBORG, *et al.*,
Plaintiffs-Appellees,

v.

DAVE BULL, Bitterroot National Forest Supervisor,
Defendant-Appellant,

And

UNITED STATES FOREST SERVICE,
Defendant.

Defendant-Appellant's Interlocutory Appeal From a Judgment
of the United States District Court for the District of Montana

PLAINTIFFS'-APPELLEES' RESPONSE BRIEF

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I. INTRODUCTION

Plaintiffs-Appellees are three long-time conservation activists in Western Montana and a group they belong to, Friends of the Bitterroot. (Collectively referred to hereafter as Friends of the Bitterroot.) The three individuals were excluded and removed from a press conference called by the United States Forest Service and Appellant Bitterroot National Forest Supervisor Dave Bull (Bull) to announce to the public and the media the release of an environmental impact statement (EIS) on a controversial timber sale. *See generally, Wildwest Inst. v. Bull,* 472 F.3d 587, 589 (9th Cir. 2006). As a consequence, they filed this lawsuit. The Government and Bull filed motions to dismiss pursuant to Rule 12(b)(6), F.R.Civ.P. On September 27, 2006, District Judge Donald Molloy issued a decision finding, in part, that Friends of the Bitterroot "have stated a cognizable claim and Bull is not entitled to dismissal based on qualified immunity at this stage." (Excerpts of Record (ER) (filed with Bull's Brief), at p. 31.)

Appellant, Forest Supervisor Bull has filed an interlocutory appeal of Judge Molloy's decision that Bull is not entitled to qualified immunity. In his brief, Bull has focused almost entirely on the issue of whether the Friends of the Bitterroot should have been allowed to *speak* at Bull's press conference. Although Friends of the Bitterroot have always maintained that

they should have been given the opportunity to speak (given their active involvement in the planning of the project), the real issue before this Court on appeal is the more threshold issue of whether Bull erred in preventing them from even attending and observing the press conference. The undisputed evidence at this stage shows that they were escorted out of the press conference because of who they were and the positions that they had taken in the past, not because of what they might say at the press conference. In excluding these individuals from the press conference, Supervisor Bull violated the Friends of the Bitterroot's First Amendment rights.

II. STATEMENT OF THE ISSUES

A. Was the District Court correct in holding that Bull is not entitled to qualified immunity?

B. Does the government speech doctrine shield Bull from his actions of excluding Friends of the Bitterroot from the press conference because of their viewpoint?

C. Were the constitutional rights of the Friends of the Bitterroot violated by their exclusion from the press conference on the basis of their viewpoint when others were allowed to attend who agreed with the Government's message?

D. Was the District Court correct in holding that the principle of viewpoint neutrality is clearly established as applied in this case?

III. STATEMENT OF THE CASE

Friends of the Bitterroot brought this complaint when they were excluded from a press conference concerning the release of a final EIS on a controversial timber sale in the Bitterroot Valley of Western Montana. The press conference was held by Bull, who is the Forest Supervisor of the Bitterroot National Forest, and was intended by Bull and the Forest Service to show the media the "collaborative" nature of this process. (ER at p. 14.) Friends of the Bitterroot had previously attended numerous press conferences, meetings or other public gatherings at the Forest Supervisor's office. (ER at p. 5, ¶ 12.)

This time, however, they were stopped from entering. In order to show the great "community support" for the project, Bull allowed entry only to members of the public who agreed with the Forest Service position. Friends of the Bitterroot were excluded because of their viewpoint opposing the timber sale as proposed. Their opposition, of course, was at odds with any notion that this had been a collaborative effort or that there was great community support for the Forest Service's decision, and therefore was a position the Government did not want highlighted. Because Friends of the

Bitterroot were not allowed to attend the conference, and because this motion to dismiss was filed before the administrative record was filed or any discovery conducted, they do not know exactly how many members of the public were allowed entry, but as stated in the Complaint "at least three" of those who were allowed to attend also spoke at the conference. (ER at p. 6, ¶ 17.)

The District Court denied Bull's motion to dismiss, holding that a designated public forum was created when Bull allowed members of the public to attend the press conference, and when he allowed some of those members of the public to present their personal views on the collaborative nature of the process that the Forest Service was using. (ER at p. 30.) Judge Molloy stated "Plaintiffs' allegation that the speakers' statements demonstrated community support for the USFS's proposed alternatives can be fairly read to suggest the speakers were permitted to express their own opinion on the proposed alternative." (*Id.*) The Court then noted that the principle of viewpoint neutrality is clearly established, recognizing its clear application to this specific case. (ER at p. 31.) Having found a designated public forum and discrimination based upon viewpoint neutrality, all principles that are clearly established, the Court denied the motion to dismiss Bull based upon qualified immunity. (*Id.*)

Bull now appeals, arguing primarily that Friends of the Bitterroot were properly denied the opportunity to *speak* at the press conference. Although alleged in the Complaint, Friends of the Bitterroot's main concern was not their right to *speak*, but rather their right to *attend* the conference in the first place and not be excluded from the culmination of a process under the National Environmental Policy Act (NEPA) in which they previously had played an integral part. For purposes of this response brief, then, Friends of the Bitterroot will focus their arguments on Bull's qualified immunity with respect to his exclusion of them, and not other members of the public, from the conference.

IV. STATEMENT OF FACTS

The individual Plaintiffs-Appellees are long-time conservationists living in the Bitterroot Valley of Western Montana. Stewart Brandborg (Brandborg) is a retiree living in Darby, Montana who has been active in conservation issues his entire life, and served as the Director of the Wilderness Society in Washington, D.C. from 1964 to 1976. His father, Guy Brandborg, was the Forest Supervisor of the Bitterroot National Forest from 1935 until 1955. Since retiring to the Bitterroot Valley in 1986, Brandborg has been active in forest planning and growth issues, and is one of the founders of Plaintiff organization, Friends of the Bitterroot. (ER at p.

2, ¶ 1.) Friends of the Bitterroot is a 501 (c) (3) organization that has been active in the Bitterroot Valley for over sixteen years. Plaintiffs-Appellees Larry Campbell and James Miller are, likewise, residents of the Bitterroot Valley who have been actively involved in conservation issues there for many years. (ER at pp. 2-3, ¶¶ 2-3.) All three had previously commented on the Middle East Fork project at issue herein, and other Forest Service projects in the Bitterroot Valley.

In the summer of 2000, wildfires burned substantial acreage in the Bitterroot National Forest. One of the timber harvest projects proposed by the Forest Service following the fires was the "Middle East Fork" project. In April 2005, the Forest Service released a draft EIS for the project. The Forest Service proposed to "treat" approximately 4,000 acres with a combination of commercial timber harvest and pre-commercial thinning. (ER at p. 4, ¶ 10.)

Friends of the Bitterroot were actively involved in monitoring the proposal. In response to the Forest Service's proposal, Friends of the Bitterroot proposed an alternative, that the Forest Service designated as "alternative 3" and analyzed in the EIS process. (ER at p. 4, ¶ 11.)

On September 22, 2005, Bull scheduled a press conference in his office to announce that the Final EIS was available on the Middle East Fork

Project. Friends of the Bitterroot found out about the press conference from a reporter, and they decided to attend the press conference to find out what Defendants' message was. Friends of the Bitterroot had attended numerous press conferences, meetings or other public gatherings at the Forest Supervisor's office previously. (ER at pp. 4-5, ¶ 12.)

The individual Plaintiffs-Appellees arrived separately at the Supervisor's office, but all were ultimately kept out of the office. Mr. Campbell arrived first. He entered the lobby, told the receptionist that he was going to the press conference, and was waved through toward the conference room. Before he had entered the room, however, he was intercepted by Forest Service public relations officer Dixie Dies who told Campbell he could not attend the press conference. First Dies told Campbell that the press conference was just for the media, but when Campbell pointed out that he could see residents of the area in the room, she then said it was just for people who lived in the project area. When Campbell told her that he, too, lived near the project area, she simply responded that he "was not invited." Campbell saw several Forest Service law enforcement officers behind Dies, including one armed. (ER at p. 5, ¶ 13.)

When Mr. Brandborg arrived at the Supervisor's office, he too sought to enter the conference room, and was likewise told that he was not invited

and would have to leave. At the time Brandborg was told to leave, there was an armed law enforcement officer standing next to the public relations officer. Brandborg left the building. (*Id.*)

When Mr. Miller arrived, he made it into the conference room but was told to leave by Forest Service public affairs officer Nan Christenson. When Miller began to protest, he was approached by an armed law enforcement officer, and was escorted out. (*Id.*, pp. 5-6.)

Brandborg, Campbell and Miller felt threatened and intimidated by their treatment and by the presence of armed law enforcement officers whom the Forest Service used to ensure that they would not enter the room. (ER at p. 6, ¶ 16.)

Several members of the media were in attendance at the press conference. In addition, there were several elected officials. Finally, although it is unclear how many members of the public attended, at least three members of the general public who attended the press conference were invited to speak to the media by the Forest Service. (ER at p. 6, ¶ 17.) At the press conference, the Forest Service announced that it had chosen Alternative 2 as the preferred alternative, as opposed to Alternative 3 proposed by Plaintiffs. (ER at p. 6, ¶ 18.)

After the press conference, Bull spoke to the press about the exclusion of Friends of the Bitterroot from the meeting. He said they were excluded because the agency wanted to provide a "safe environment" for community members who had helped craft the agency's preferred alternative. "We thought it would be really powerful to show how much community support this project has," Bull was quoted in the press. (ER at p. 6, ¶ 19.)

V. SUMMARY OF THE ARGUMENT

Forest Supervisor Bull was not engaging in government speech when he excluded Friends of the Bitterroot from the September 22, 2005, press conference. He was presenting a skewed version of what he characterized as the "public's" position. Bull was admittedly presenting viewpoints – not of the government, but of other individuals as part of the press conference. It is contrived and overreaching to say, as the Government does here, that government speech includes the presentation of an individual's viewpoints because such personal viewpoints are "the message." App. Brf. at pp. 24-25. Under such reasoning, the Government would be allowed potentially unlimited leeway to manipulate and coerce private opinion under the rubric of government speech, while blatantly engaging in viewpoint discrimination. Indeed, the Government wanted those select members to speak at the press conference precisely because of *their* experiences, not as a rubber stamp of a

government message. Bull said: "I tried to provide an opportunity for the media to hear from representatives of the many people who have been involved with the collaborative efforts from the beginning *who feel that their voices have been lost* in the highly charged agency-environmentalist debate." (ER at p. 14, emphasis added.) Thus, it is disingenuous for the Government to argue that these private individuals were "communicating a message specifically designed by Bull." App. Brf. at p. 11.

Here, the Government was not merely announcing its decision on the timber sale. Rather, the government was attempting to make a show of "community support" and purportedly, according to Bull's own statements to the press, had brought in members of the public to show such support. According to Bull's own statements, these individuals who were allowed to attend *were not* providing the "government message," but rather *their own* personal message *as members of the public.* As such, the principle of government speech cannot be used to disenfranchise Friends of the Bitterroot and justify their exclusion from the press conference on the basis of viewpoint. The District Court therefore properly refused to apply the doctrine of government speech to this case and recognized that a constitutional violation was properly pled.

The District Court also properly held Bull potentially liable because discrimination by the government based upon viewpoint is clearly established as a violation of the First Amendment. As discussed below, this Court and the United States Supreme Court have stated numerous times that, regardless of the nature of the forum, viewpoint neutrality must be maintained by the government. As the D.C. Circuit has succinctly said, "the government cannot exclude from a public gathering in a public forum on no other basis those citizens whose views it fears or dislikes or prevent their peaceful expression of those views." *Mahoney v. Babbitt*, 105 F.3d 1452 (U.S. App. D.C. Cir. 1997). The clarity and foundational nature of this principle remains unshaken, regardless of Bull's attempts to compromise this principle by overreaching arguments on government speech. Bull was properly denied qualified immunity on the basis of the clarity of viewpoint neutrality.

A. ARGUMENT

1. Standard for Motions to Dismiss.

Defendants have filed a Motion to Dismiss the Complaint against Defendant Bull under Fed. Rules of Civil Proc. 12(b)(6). Such a motion is granted only when it appears beyond doubt that a plaintiff can prove "no set of facts" in support of a claim which would entitle him to relief. *Conley v.*

Gibson, 355 U.S. 41, 45-46 (1957). Rule 12(b)(6) creates a difficult threshold for defendants:

> [F]or purposes of the motion to dismiss, (1) the complaint is construed in the light most favorable to plaintiff, (2) its allegations are taken as true . . . The district court's inquiry typically is directed simply to the question whether the allegations constitute a statement of a claim for relief under Rule 8(a).

5A Wright and Miller, Federal Practice and Procedure, § 1357 at 304-305.

As the Ninth Circuit has noted, dismissal for failure to state a claim under rule 12 (b) (6) is not appropriate "unless it appears beyond doubt that the plaintiff cannot prove any set of facts that would entitle him or her to relief." *Nursing Home Pension Fund, Local 144 v. Oracle Corp.* 380 F.3d 1226, 1229 (9th Cir. 2004) (*Cited* by Judge Molloy at ER p. 23). Here, Bull's motion to dismiss cannot succeed under this demanding test.

2. Bull is not Entitled to Qualified Immunity.

Supervisor Bull asserts that he is protected from suit by "qualified immunity." A review of qualified immunity cases shows, however, that the theory does not apply here to bar Friends of the Bitterroot's claims. First established in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), the United States Supreme Court more recently enumerated the criteria under which the qualified immunity defense would apply in the case of *Saucier v. Katz,* 533

U.S. 194 (2001). In *Saucier*, the Court said courts must first consider this threshold question:

> *Taken in the light most favorable to the party asserting the injury,* do the facts alleged show the officer's conduct violated a constitutional right? *This must be the first inquiry. Siegert v. Gilley,* 500 U.S. 226, 232 (1991). In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or non-existence of a constitutional right as the first inquiry.

533 U.S. at 201. (Emphasis added.)

As this Court has put it,

> A qualified immunity analysis must begin with this threshold question: based upon the facts taken in the light most favorable to the party asserting the injury, did the officer's conduct violate a constitutional right? If no constitutional right was violated, the court need not inquire further. If, however, a constitutional violation occurred, the second inquiry is whether the officer could nevertheless have reasonably but mistakenly believed that his or her conduct did not violate a clearly established constitutional right.

Jackson v. City of Bremerton, 268 F.3d 646, 651 (9th Cir. 2001).

Thus, because Bull has raised the defense of qualified immunity, a determination of the validity of the Friends of the Bitterroot's constitutional claims must be made at the outset. Under *Saucier* and *Jackson,* if no constitutional right has been violated, then the inquiry ends. But if a

constitutional violation is found "on a favorable view of the parties' submissions, the next sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case." *Id.*

Contrary to the impression that Bull wishes to leave, the phrase "clearly established" is to be construed quite broadly.

> For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful. . . but it is to say that in light of preexisting law the unlawfulness must be apparent.

Hope v. Pelzer, 536 U.S. 730, 739 (2002). There is no requirement that a case be on point with respect to a violation of a constitutional right under a specific factual incident. Under *Hope*, there must only be "fair warning" that such acts are a constitutional violation.

Bull maintains that the District Court made a too general determination with respect to qualified immunity and that the District Court failed to make this determination in the "specific context of the case." App. Brf. at 33, 42, *citing Saucier,* 533 U.S. at 201.

The District Court, however, made a detailed analysis of the facts of this case and properly applied the *Saucier* two-tier analysis. The Court

initially addressed whether a constitutional violation occurred, holding that the allegations viewed in light most favorable to the Plaintiffs showed that government speech was not involved.

> [T]his Court must assess whether the USFS merely facilitated the speech of the public citizens it permitted to attend the press conference or enlisted those citizens to convey the USFS's own message. *Rosenberger*, 515 U.S. at 834. *In making this determination, the Court must accept the factual allegations in Plaintiffs' complaint. Nursing Home Pension Fund,* 380 F.3d at 1229. Plaintiffs' complaint alleges at least three members of the general public were invited to speak at the press conference by the USFS. The complaint further alleges the USFS's reason for permitting some members of the public to speak while excluding others was to show how much community support there was for the project. *Plaintiffs' allegation that the speakers' statements demonstrated community support for the USFS's proposed alternative can be fairly read to suggest the speakers were permitted to express their own opinion on the proposed alternatives.* . . . Viewed this way, the USFS was merely facilitating the speech of public citizens and thus created a designated public forum. Because plaintiffs also allege Bull prevented them from attending and speaking at the press conference due to their viewpoint . . . ., Plaintiffs have sufficiently alleged Bull violated their First Amendment rights.

(ER at p. 30, emphasis added.)

Second, the Court held that viewpoint neutrality was "clearly established." (ER at p. 31.) The Court was correct in stating that viewpoint neutrality is clearly established, as seen in the cases discussed below. Given the overwhelming clarity with which case law requires governmental

neutrality in a designated public forum or, indeed, all fora, the District Court did not err.

This was not a decision like those discussed in *Saucier* or *Anderson v. Creighton*, 483 U.S. 635 (1987), both criminal search and seizure cases. In *Saucier*, the Court said it was not sufficient to simply review a general proposition of whether the Fourth Amendment is violated by use of excessive force as determined by reasonableness standards. Rather, in instances where an arresting officer is exercising discretion, such as probable cause and use of force, the inquiry must be more particularized. When the officer is exercising discretion, the inquiry must be whether the law was sufficiently established so that the officer would be aware that his conduct – his discretion in deciding the degree of force – would be unlawful. Similarly, in *Anderson*, the Court was reviewing a warrantless search of a home and the officer's discretionary decision.

The point of the particularized inquiries in excessive force cases and probable cause cases is that at times a law enforcement officer may have difficulty determining the fine legal distinctions in such matters.

There are no similar fine legal distinctions with respect to application of the holdings requiring viewpoint neutrality. The District Court was correct in simply stating that viewpoint neutrality is clearly established.

There was no need, in this case, to do the pointed inquiry required in search and seizure or excessive force cases.

Given the clarity of the viewpoint neutrality requirement, a reasonable government official in Bull's position would readily understand that exclusion of some of the public from the press conference while allowing others in violated the First Amendment. There is no need to identify a prior identical action by such an official. *Anderson,* 483 U.S. at 640. Precedent directly on point is not necessary to show that a right is clearly established. *Giebel v. Sylvester*, 244 F.3d 1182, 1189 (9th Cir. 2001). If there is no closely analogous case law, a right can be clearly established based upon "common sense." *Id., quoting DeBoer v. Pennington*, 206 F.3d, 857, 865, *vacated on other grounds*, 532 U.S. 992 (2001).

The immunity defense fails because a reasonably competent official such as Bull should be aware of the law governing the official's conduct. *Harlow,* 457 US at 818-819. Lack of knowledge is no excuse. The law of the United States Supreme Court and this Court has been explicit.

Applying the *Saucier* factors, Friends of the Bitterroot will first address the government speech doctrine. Next, Friends of the Bitterroot will address whether there was a violation of their constitutional rights when Bull excluded them from the gathering based solely upon their personal views.

Finally, Friends of the Bitterroot will address how viewpoint neutrality is clearly established such that any reasonable government official would know that persons cannot be excluded by the Government from even a nonpublic forum based upon their own personal views.

3. Government Speech Does Not Insulate Bull From Violation of Friends of the Bitterroot's Constitutional Rights.

Friends of the Bitterroot have alleged that Bull prevented them from attending the September 22, 2005, press conference because they opposed the timber sale proposal that was the subject of the press conference. As the Complaint notes, other members of the public who did not oppose the timber sale were allowed to attend and even participate in the press conference from which Friends of the Bitterroot were excluded. Although it is unclear because there has been no opportunity for discovery and because Plaintiffs were excluded from the conference, Friends of the Bitterroot believe they can show members of the public were allowed to attend who supported the Government's viewpoint.

Bull essentially asserts that he is protected from any liability with respect to viewpoint discrimination because the press conference was "government speech" and therefore viewpoint discrimination is essentially immaterial. He states that "the Government is constitutionally entitled to

engage in its own speech without implicating the First Amendment." (App. Brf. at p. 19.) As will be shown below, that is not the case.

Bull allowed some members of the public to attend, speak and/or provide their opinions at the forum. Bull, however, prevented Friends of the Bitterroot from *even attending* the press conference *solely because of their views and their association with each other.* These actions resulted in a clear denial of Friends of the Bitterroot's related constitutional rights to speech, association, assembly and to redress grievances, based on the content, or perceived content, of the Plaintiffs' speech and views.

Bull, focusing primarily on the free speech aspect of Friends of the Bitterroot case,[1] takes the position that the press conference constituted government speech at which only the government's voice could be heard, and as such, Friends of the Bitterroot had no right to *speak* at the conference. "When the government chooses to speak in favor of its policies and programs, it may do so free from any forum analysis or viewpoint neutrality requirement." (App. Brf. at p. 6.)

But this ignores two important points. First, a press conference is, by definition, an opportunity to disseminate information to the general public:

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1 In their Complaint, Plaintiffs have also asserted that the Forest Service's actions violated their rights to association, assembly and to seek redress from the government. Since the Defendants have not addressed those issues in this motion to dismiss, Plaintiffs will focus on the freedom of speech issues raised by the government.

any information conveyed at a press conference can be printed or published to the wider public.[2] If the press can attend press conferences and report events as surrogates for the public, why can't the public itself attend? Under the facts of this case, there is no indication that these three individuals, one of whom is a nationally recognized elder in the conservation movement, had any intention or ability to disrupt the conference.

Second, the allegations of the Complaint, which must be taken as true, show that Friends of the Bitterroot attempted to attend the press conference "to find out what Defendants' message was." (ER at p. 5, ¶ 12.) Not, necessarily, to speak, not to disrupt, but, as involved members of the public, to *hear* what Bull and the Forest Service had to say. They were not, however, even allowed in the door.

Further, this matter is not controlled by government speech principles either factually or legally. It is important to emphasize that this matter is on appeal on the denial of the motion to dismiss and, as such, the allegations in the Complaint must be viewed in the light most favorable to the Plaintiffs.

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2 *See, e.g. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572, 573 (1989), where the Court said

> Instead of acquiring information about trials by *firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media.* In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. (Emphasis added.)

(*See, e.g. Nursing Home Pension Fund, supra.*) Under the facts as alleged in the Complaint, and as favorably inferred from the Complaint, private citizens were allowed to attend the press conference and/or to express *their own personal views* while Friends of the Bitterroot were excluded because of their views. Paragraph 19 of the Complaint, which must be taken as true at this point, states that Bull said Friends of the Bitterroot were excluded because the agency wanted to provided a "safe environment" for the project's supporters. Thus, this was not about the Forest Service's message but rather about the Forest Service *favoring* one speaker over another, trying to create an impression that the proposal had community-wide support, and thereby manipulating the public debate about the timber sale.

Defendant Bull cites *Rust v. Sullivan*, 500 U.S. 173 (1991), in support of his argument that the press conference was government speech excluded from First Amendment considerations. In *Rust*, pro-choice activists challenged a statute prohibiting public funds from being used in programs where abortion is a method of family planning. The regulations issued under the statute prohibited the use of funds for abortion counseling or for any activity that encouraged abortion. The Court rejected the plaintiffs' assertion that this funding restriction violated their First Amendment rights.

> We (have) held that the government may "make a value judgment favoring childbirth over abortion, and . . . implement

> that judgment by the *allocation of public funds.*" . . .The government can, without violating the Constitution, *selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program* which seeks to deal with the problem in another way. In so doing, the government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another.

Rust, 500 U.S. at 193 (emphasis added).

Because *Rust* is about the funding of government programs, however, it has little bearing on the creation of a forum where some members of the public are allowed to speak. Here Bull was not "buying speech" through a contractual funding arrangement. Indeed, the impression Bull wanted to create in allowing members of the public to address the media at the press conference was that the general public *independently* supported the Forest Service's decision. "We thought it would be really powerful to show how much *community support* this project has." (ER p. 6, ¶ 19, emphasis added.) Allowing such members of the general public to speak to the press, if somehow they were viewed as being compelled to speak because they were somehow beholden to the Forest Service, would have completely defeated the point of allowing them to speak.

Similarly, the case is distinguishable from the recent case of *Johanns v. Livestock Marketing Ass'n.*, 544 U.S. 550, 560 (2005), cited by Bull,

because in *Johanns*, the message was "effectively controlled by the Federal Government." Here, as shown, that was not the case.

Likewise, *Downs v. Los Angeles School District*, 228 F.3d 1003 (9th Cir. 2000), is distinguishable. There, the School District passed a resolution promoting Gay and Lesbian Awareness Month, and provided posters and materials to the schools to post during that month. Staff at one high school created a bulletin board on which faculty and staff could post material consistent with the resolution. Downs, a teacher at the school, was offended by the material and created his own bulletin board on which he posted anti-gay material.

The Court found that Down's First Amendment rights were not violated. Because the school district and board were responsible for recognition of Gay and Lesbian Awareness month and the content of the bulletin boards, the Court found the case distinguishable from cases involving student speech in school newspapers or yearbooks that would trigger First Amendment concerns. "We do not face an example of the government opening up a forum for either unlimited or limited public discussion. Instead, we face an example of the government opening its own mouth." *Downs,* 228 F.3d at 1012. *Downs* is distinguishable because it deals with a schoolteacher's actions in a scholastic setting, a setting in which

his first amendment rights were clearly qualified. Here, there is no such qualification. Unlike *Downs,* in the present case there was no possibility of confusion over the "government speech" from the Forest Service. In order for this kind of confusion to exist, in order for *Downs* to be at all analogous, Friends of the Bitterroot would themselves have to be employees of the Forest Service who disagreed with the agency decision.

Appellants also rely upon *Arkansas Ed. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) and *Kidwell v. City of Union*, 462 F.3d 620, 624 (6th Cir. 2006) for the proposition that the government speech doctrine may still be used to justify viewpoint discrimination even when the government speaks through private parties. App. Brf. at p. 26.

Forbes and *Kidwell* are readily distinguished. In *Forbes*, the question was whether a public radio station had to include all candidates in its candidate forum. Candidates could be excluded because of the "prospect of cacophony" at the debate. 523 U.S. 666, 681 (1998). No such cacophony or any type of disruption occurs when three people only desire to observe the government and other public speakers. *See, Parks v. City of Columbus*, 395 F.3d 643, 651 (6th Cir. 2005) (exclusion from Arts Festival improper where no interference would occur). The Court in *Forbes*, in concluding the debate

was a nonpublic forum, still emphasized that the government could not engage in viewpoint discrimination.

> As Justice Connor has observed, nonpublic forum status 'does not mean that the government can restrict speech in whatever way it likes.' *ISKCON*, 505 U.S., at 687. To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum *must not be based on the speaker's viewpoint* and must otherwise be reasonable in light of the purpose of the property. *Cornelius*, 473 U.S., at 800.

Forbes, 523 U.S at 682, emphasis added.

In *Kidwell*, the Court discussed whether a public forum was created when the town used a private letter in the town newsletter to express its support for certain public projects. *Kidwell,* 462 F.3d 620, 623-24 (2006). There was no evidence submitted that the plaintiffs in that case ever asked for or were refused access to the forum. 462 F.3d at 623. Plaintiffs could only show that another private individual was granted access. That is distinctly different from the situation here where all three members of the Friends of the Bitterroot were denied access, one even by an armed escort, while numerous other members of the public allowed to attend.

The Court in *Kidwell* also expressly found that the town had "approved the content" of the private citizen, such that the message was attributed to the government itself and not to the citizen. *Kidwell,* 462 F.3d at 624. Here, in contrast, the District Court expressly found that the

individuals were giving "their own opinion on the proposed alternatives," not that of the Government's. (ER at p. 30.)

Nor does *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), offer any credible support to Bull's position that government speech may be used to justify viewpoint discrimination. *Hurley* did not involve government speech. Further, as in *Parks, supra*, Friends of the Bitterroot were fundamentally seeking access as attendees.

Several other courts since *Hurley* have addressed its applicability to a government event. The most complete discussion is in the articulate and persuasive case of *Mahoney v. Babbitt*, 105 F.3d at 1456:

> There are two distinctions between *Hurley* and this controversy which are so critical as to make the cases not remotely parallel. In the first place, the organizer of the parade in *Hurley* was a private group exercising its own First Amendment Rights. In the present case, NPS [the National Park Service] is the government. . . . [Second, t]he protesting demonstrators in *Hurley* sought to compel the private organizers to allow their participation in the parade. Mahoney and his co-plaintiffs do not seek compulsion or even permission to participate in the Inaugural Parade. . .

See also Gathright v. City of Portland, 315 F.Supp 2d 1099 (D. Or. 2004) (*Hurley* inapplicable to those attending event), *aff'd in relevant part* 439 F.3d 573 (9th Cir. 2006).

This is not a situation where the government has taken on the role of "patron of the arts, television broadcaster, and librarian." *PETA v. Gittens,* 414 F.3d 23, 29 (2005). Bull cites *PETA* and *United States v. American Library Assn.*, 539 U.S. 194, 204-05 (2003) to support the general proposition that having private speakers does not change the parameters of government speech. Neither the *PETA* case nor *American Library Assn.*, though, addressed the question of whether the government can send its message through private speakers. Rather, they were about government funding of projects or libraries, neither of which have an application here.

Importantly, the parameters of the government speech doctrine, as conceded by the Government [in its brief before the District Court], "are not well developed." App. Brf. at p. 14. In *Sons of the Confederate v. Comm. of Virginia DMV,* 288 F.3d 610, 618 (4th Cir. 2001), the Court said:

> No clear standard has yet been enunciated in our circuit or by the Supreme Court for determining when the government is 'speaking' and thus able to draw viewpoint based distinctions, and when it is regulating private speech and thus unable to do so. Indeed, as we have noted, there is some controversy over the scope of the government speech doctrine."

In *Sons of the Confederate*, Virginia statutes authorized the issuance of special license plates for certain organizations. However, in allowing the issuance of license plates for the Sons of the Confederate, the statute specifically prohibited the licenses to include the group's logo, a

Confederate flag. The Sons of the Confederate challenged this restriction, and the State of Virginia argued that the content of the "speech" on the license plates was government speech, and thus the restriction could not be challenged. The Fourth Circuit disagreed, in doing so reviewing the few cases concerning government speech to date. The Court distilled from those cases four factors to review in determining whether speech is government speech or not:

> (1) the central 'purpose' of the program in which the speech in question occurs; (2) the degree of 'editorial control' exercised by the government or private entities over the content of the speech; (3) the identity of the 'literal speaker'; and (4) whether the government or the private entity bears ultimate responsibility for the content of the speech, in analyzing circumstances where both government and a private entity are claimed to be speaking.

Sons of the Confederate, 288 F.3d at 618.

In analyzing those factors, the Court concluded that the license plates constituted private speech, and that the Sons of the Confederate's First Amendment rights were implicated by the restrictions.

The Supreme Court reached a similar conclusion in *Legal Services v. Velasquez,* 531 U.S. 533 (2001), where it determined that legislation that restricted the ability of Legal Service Corporation to fund groups seeking to amend welfare laws was unconstitutional in violation of the First Amendment, and not protected government speech. "Although the LSC

program differs from the program at issue in *Rosenberger* in that its purpose is not to 'encourage a diversity of views' the salient point is that, like the program in *Rosenburger,* the LSC program was designed to *facilitate private speech*, not to promote a government message." *Id.* 531 U.S. 542, emphasis added. The Court went on to note that it had previously been "instructed by its understanding of the dynamics of the broadcast industry in holding that prohibitions against editorializing by public radio networks were an impermissible restriction, even though the government enacted the restriction to control the use of funds." *Id.*, 531 U.S. at 543, *citing FCC v. League of Women Voters of California,* 468 U.S. 364, 396 (1984).

Applying the *Sons of the Confederate* factors here, the Court should reach the same conclusion as the courts did in that case and in *Velasquez* and *FCC*. First, the central purpose of the program in which the speech occurred is the environmental review process under NEPA. Environmental review under NEPA is specifically intended to include and encourage public participation at all points in the process. *See, e.g. NEPA*, 42 U.S.C. § 4332; 40 C.F.R. §§ 1501.7, 1501.8, 1503.1, and 1505.2.

Second, as to what degree of "editorial control" the government had over those members of the public who spoke, given Supervisor Bull's statement to Senator Baucus that he wanted the media to hear from members

of the public "who feel that *their voices* have been lost in the highly charged agency-environmentalist debate," (ER p. 14, emphasis added) it is hard to envision that the Forest Service wrote their scripts for them. In fact, what Bull did was to "facilitate private speech," which was found to be prohibited in *Velasquez, supra.*

Third, the identity of the invited speakers here was a combination of local elected government officials and private individuals, not just the government propping up or paying for a private figure to convey its message.

The fourth factor, who has "ultimate responsibility" over the speech is similar to the second factor, editorial control. Again, it appears unlikely that the Government had control over what the private speakers were going to say, although unquestionably the government knew these private speakers favored the agency decision. Here, the government did not choose a private speaker to express its (*i.e.*, the government's) message. Instead, it facilitated the ability of certain members of the public to speak in favor of a government program while depriving those who opposed it from even attending the press conference.

Even without applying the four-part test in the *Sons of the Confederate* case, the principle of government speech should not be used to

disenfranchise Friends of the Bitterroot, or insulate Bull from violation of their First Amendment rights. As the Fourth Circuit said in *Sons of Confederate,* the concept of government speech may not be used "to advance a regulatory goal, [and] suppress unpopular ideas or information or manipulate public debate through coercion rather than persuasion." 288 F.3d at 624. The Government may not cause and use "its own speech to drown out the speech of others." *PMG Intern. Div. LLC v. Cohen*, 57 F.Supp 2d 916, 920 (N.D. Cal 1999), aff'd 303 F.3d 1163 (9th Cir. 2002) (upholding the right of the government to select magazines on military bases, but recognizing limits of government speech). Viewpoint discrimination is one of the most condemned actions under a First Amendment analysis. "[T]here are some interests – such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas – that are so plainly illegitimate that" they cannot stand. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

Friends of the Bitterroot are not seeking to prevent the Government from presenting its own message or to obscure that message. The Government may present whatever message it chooses. Nor are Friends of the Bitterroot seeking to include their message with that of the Government.

Friends of the Bitterroot do maintain, however, that government speech may not be used to justify viewpoint discrimination in this situation where other members of the public were allowed to attend a gathering and Friends of the Bitterroot were excluded solely on the basis of viewpoint. Friends of the Bitterroot simply wanted to find out what the Defendants' message was. ER at p. 5. Seeking admission and attendance at the gathering does not operate to disrupt the government message. Indeed, " '[m]erely being present at a public event does not make one part of the event organizer's message for First Amendment purposes. . . .' " *Wickersham v. City of Columbia*, 371 F. Supp. 2d 1061, 1085 (W.D. Mo. 2005), aff'd 481 F.3d 591 (8th Cir. Mar. 22, 2007), quoting *Gathright v. City of Portland, Oregon*, 315 F. Supp. 2d at 1103.

In short, government speech may not be used to sanction exclusion of Friends of the Bitterroot from a press conference, the purpose of which is to facilitate the dissemination of information to the public, on the basis of their viewpoint.

4. Friends of the Bitterroot's First Amendment Rights Were Violated When They Were Excluded From the Press Conference Based Upon Their Viewpoint.

Having shown that the government speech doctrine does not apply here, it is clear that Friends of the Bitterroot's First Amendment rights were

violated because they were excluded from the press conference. The District Court held that the press conference was a designated public forum because members of the public were allowed to present their own personal views regarding the Forest Plan. "Viewed this way, the USFS was merely facilitating the speech of public citizens and thus created a designated public forum." (ER at p. 30.) While Friends of the Bitterroot agree with that holding, it is not necessary for this Court to decide what forum was present. Viewpoint discrimination is prohibited by the government even in a nonpublic forum. *Brown v. California Department of Transportation,* 321 F.3d 1217, 1222, 1225 (9th Cir. 2003); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 978 (9th Cir. 1998).

Control over access to a nonpublic forum may be made by the Government *only* if the "distinctions drawn are reasonable in light of the purpose served by the forum and are *viewpoint neutral.*" *Cornelius v. NAACP Legal Defense and Educational Fund, Inc., et al.*, 473 U.S. 788, 806 (1985), emphasis added. If distinctions are made based upon viewpoint, the Court has noted that there is a real danger of "chilling individual thought and expression." *Rosenberger v. Rector and Visitors of the University of Virginia, et al.*, 515 U.S. 819, 835 (1995). Such a "chilling" of the dissenting view was exactly the purpose of exclusion of Friends of the

Bitterroot from the press conference. The entire point was to promote in a misleading fashion the "community support" for the project – a "community support" that was defined by the government to exclude dissenting views.

The First Amendment forbids the government from acting in ways that favor one form of speech at the expense of another. *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384, 394 (1993). The purpose of the gathering was admittedly to show public and community support for the alternative selected by the Forest Service. Friends of the Bitterroot had been an integral part of the community that had participated in the process under which the plan was developed and selected. Indeed, the Forest Service had selected and evaluated their alternative proposal as an alternative evaluated in the EIS. There is no question that their views were included in the general subject of the press conference. The only reason for their exclusion was their viewpoint. Thus, the First Amendment violation occurred regardless of how the forum is characterized.

Moreover, federal officials may not insulate themselves from opposing viewpoints by excluding some members of the public while allowing others members. For instance, in 1971, President Nixon spoke at a Billy Graham tribute at the Charlotte, N.C. Coliseum. The City declared a holiday, and tickets for the event were freely available to the public.

Sparrow v. Goodman, 361 F. Supp. 566, 568 (W.D. N.C. 1973). The Secret Service, and its agents, excluded numerous individuals from the event based upon their apparent opposition to President Nixon or to the Vietnam War. The Court found that "suppression of dissent was the standard for exclusion from the event" and that the Secret Service violated the plaintiffs' rights by ejecting them in a manner "directed towards the suppression of dissent or prevention of any expression or demonstration of dissents, from reigning points of view." *Id.* at 584. The Court found that this represented a "wholesale" violation of at least six constitutional rights, including the rights to speech and expression, the right to assembly, the right to redress grievances, and the right to due process. *Id.* In the same manner here, the Friends of the Bitterroot were excluded from the press conference solely because of their dissenting views.

This holding in the *Sparrow* case was soundly approved by the Court in *Mahoney v. Babbitt*, 105 F.3d at 1459, where the Court stated:

> In short, all constitutional authority supports the position we would have thought unremarkable, that a government entity may not exclude from a public forum persons who wish to engage in First Amendment protected activity *solely because the government actor fears, dislikes, or disagrees with the opinions of those citizens.*
>
> Emphasis added.

This principle of viewpoint neutrality applies regardless of the forum. But, even if this Court were to use a forum analysis, the District Court was correct in deciding that the press conference created a designated public forum. As this Court has said:

> 'Forum analysis divides government property into three categories: public fora, designated public fora, and nonpublic fora.' *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 964 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 1674 (2000) (quoting *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998)). A designated public forum exists where '*the government intentionally opens up a nontraditional forum for public discourse.*' *Id*. 'Restrictions on expressive activity in designated public fora *are subject to the same limitations that govern a traditional public forum*,' *i.e.*, strict scrutiny. *Id.* at 964-965 (citing *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992)).

Hopper v. City of Pasco, 241 F.3d 1067, 1074 (9th Cir. 2001) (emphasis added).

Here, the press conference, by its very nature and the way it was handled, was a designated public forum. Members of the press were invited, for the specific purpose of disseminating information to the broader public. Members of the public were invited, such members being selected on the basis of their perspectives. Some of these members of the public were then invited by Defendants to speak to the assembled media. Indeed, the process under NEPA that culminated in the completion and release of the EIS for the

Middle East Fork timber sale is by its nature, as already noted, a public process, with opportunities for public participation throughout. Thus, the Forest Service held an event in a public building to which the press was invited to (in order to disseminate information gathered to the general public), about the culmination of a process that was public throughout. But then Supervisor Bull kept the Friends of the Bitterroot out solely because of their views.

The infirmity in Supervisor Bull's actions was not only that he did not invite the Friends of the Bitterroot to observe or participate, but also in his reasons for inviting those members of the public who *were* allowed to observe and participate while *excluding* Friends of the Bitterroot. In a letter to Senator Baucus, Supervisor Bull said "[I]n regards to the press conference, I tried to provide an opportunity for the media to hear from representatives of the many people who have been involved with the collaborative efforts from the beginning who feel that their voices have been lost in the highly charged agency-environmentalist debate." (ER at p. 14.) In other words, Supervisor Bull chose to invite those with a certain viewpoint to attend and speak at the press conference, while excluding others who did not share that viewpoint. Such favoring of one view over

another is precisely what the Supreme Court has said it will not countenance. *See, e.g., City Council v. Taxpayers for Vincent,* 466 U.S. at 804.

Ironically, it is just the kind of discomfort that Supervisor Bull sought to protect his supporters from when he excluded the Friends of the Bitterroot that the Supreme Court has said is central to the concept of free speech. A principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 55-56 (1988). *See also Tinker v. Des Moines School District,* 393 U.S. 503, 509 (1969) (a particular expressive activity could not be prohibited because of a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint").

Defendant Bull's actions in allowing members of the general public supporting his agency's decision to attend and speak at the press conference while denying members of the general public who disagreed with his agency's decision the right to even attend this press conference infringed on Friends of the Bitterroot's clearly established First Amendment rights.

5. The Prohibition Against Viewpoint Discrimination Is Clearly Established.

Finally, under the test set forth in *Saucier v. Katz,* 533 U.S. at 201-202, once it has been determined that a constitutional right has been violated by an officer of the government, the next inquiry is whether that right was "clearly established." In order to find that a principle was "clearly established," the court "need not find a prior case with identical, or even materially similar, facts. Our task is to determine whether the preexisting law provided the defendants with 'fair warning' that their conduct was unlawful." *Flores v. Morgan Hill Unified School Dist.,* 324 F.3d 1130, 1136-37 (9th Cir. 2003). The principle of viewpoint neutrality is firmly and clearly established as discussed above. *Cornelius*, *Rosenberger*, and *Lamb's Chapel*, to name but a few, all require viewpoint neutrality even in a nonpublic forum. This Court has long recognized this requirement. *Children of the Rosary v. City of Phoenix,* 154 F.3d 972 (9th Cir. 1998). Bull had "fair warning" that excluding people on the basis of their viewpoint was a violation of the First Amendment.

Moreover, this case is clearly distinguishable from *Houchins v. KQED,* 438 U.S. 1 (1978), cited by Bull for the proposition that "there is no First Amendment right of access." (App. Brf. at p. 43.) In fact, *Houchins* involved the question of whether the *media* was entitled to open access to a

prison. The Court ruled the media did not have a constitutional right to prisons or inmates, but the case did not involve members of the general public seeking the *same* right as the media to *attend* a press conference intended to disseminate information to the public.

Nor can Bull persuasively maintain that government speech insulates him from this constitutional violation. Government speech defense has never been extended as far as the Government is now trying to reach. Under *Sons of the Confederate,* Bull's actions do not constitute government speech. Government speech has its limits and cannot be used to drown out the voices of others. That principle is clearly established.

VI. CONCLUSION

The rights claimed by Friends of the Bitterroot lie at the core of the First Amendment's protection.

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

Thornhill v. Alabama, 310 U.S. 88, 101-102 (1940).

Put another way, "[T]he First Amendment protects the public and the press from abridgement of their rights of access to information about the

operation of their government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 584.

If the government is going to invite some members of the public to attend and to speak at a public press conference, it may not then forbid other members of the public from even attending this same public forum, based on their viewpoint or on what they might say. Here, three active, concerned citizens who were involved extensively in a public process leading up to Bull's final decision were excluded from the press conference solely because of their views and the positions that they had taken in the past. Such discriminatory action is not sanctioned by our Constitution and decisions by the U.S. Supreme Court and this Court in construing the Constitution. As such, Bull has failed to demonstrate that he is entitled to qualified immunity.

DATED this 3rd day of May, 2007.

By _____

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32-1, I certify that Plaintiffs'-Appellees' Response Brief in this case is proportionally spaced using Times New Roman 14-point typeface, and contains 9,402 words.

David K. W. Wilson, Jr.

CERTIFICATE OF SERVICE

I certify that on May 3, 2007, I mailed two copies of the foregoing by first class, postage prepaid, US mail, to each of the following counsel of record:

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