UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BLACK LIVES MATTER D.C., et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.

Defendants.

No. 1:20-cv-01469-DLF

PLAINTIFFS' OPPOSITION TO FEDERAL LINE-LEVEL DEFENDANTS' MOTION TO DISMISS

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March 16, 2021

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INTRODUCTION

Plaintiffs seek redress for a concerted and coordinated governmental attack on peaceful demonstrators: As alleged in the Third Amended Complaint ("TAC"), ECF 52, on the evening of June 1, 2020, law enforcement officers at Lafayette Square near the White House charged, clubbed, tear-gassed, and violently dispersed civil rights demonstrators who were lawfully and peacefully protesting police brutality against Black people in the United States. Officers assaulted journalists and demonstrators, and endangered children in the crowd. Officers repeatedly hit unarmed, unthreatening people with batons and shields, knocking them to the ground. Demonstrators struggled to breathe amidst the chemical attack. This was no routine, orderly clearing of a safety perimeter for the President's movement. Rather, it was an attack by government officers against their own people, of a degree unprecedented on U.S. soil for the past half-century. Defendants Daniels, McDonald, Seiberling, Cox, Sinacore, Hendrickson, Jarmuzewski, and Feliciano are eight U.S. Park Police officers (hereinafter "Line Officer Defendants") who participated in the attack.

In moving to dismiss, ECF 146 ("Line Ofcrs. MTD"), Line Officer Defendants echo the erroneous reasoning advanced by various co-defendants: They ignore the well-pleaded allegations of the complaint, instead relying repeatedly on their own version of the facts despite Plaintiffs' detailed account in their complaint based on firsthand experience and news reports corroborating their allegations. Line Officer Defendants argue that Plaintiffs cannot sue them because they have not alleged personal interactions with them, *id.* at 31-39, but this argument ignores basic principles of tort and conspiracy law that wrongdoers acting in concert are jointly and severally liable. They ask the Court to reduce the *Bivens* cause of action to the vanishing point, *id.* at 7-31, despite precedent showing its continued vitality in vindicating demonstrators' rights. They invoke qualified immunity from the constitutional claims, *id.* at 40-56, in the face of a wealth of binding

and persuasive authority demonstrating the unconstitutionality of their conduct. In both their *Bivens* and qualified immunity arguments, these Defendants insist that their conduct was justified because of presidential security, *id.* at 15-18, 40-56, but they cannot explain how they were protecting the President by attacking the Plaintiffs while he was giving a speech in the Rose Garden. Line Officer Defendants repeatedly emphasize that they were "just following orders" (or similar formulations), *id.* at 22, 27, 31, 42, 43, 44, 47, 51, but this Circuit and others have taken a dim view of this defense, which does not exempt officers from the requirements of clearly established law. And Defendants' analysis of the conspiracy claims, *id.* at 56-60, misunderstands the elements of those claims.

Plaintiffs' responses on these points will largely track their arguments in their principal opposition brief to the initial motions to dismiss, ECF 98, and—with respect to Line Officer Defendants' "just following orders" defense, their argument about their interactions with the individual Plaintiffs, and their *Bivens* argument that both their own low rank and their co-defendants' high rank shield them from liability—Plaintiffs argue along the same lines as in their opposition to the Kellenberger motion to dismiss, ECF 148. Plaintiffs also address particular subpoints, authorities, and facts that Line Officer Defendants raise. *See* Part I, below (Defendants' personal responsibility); Part II (qualified immunity and the constitutional merits); Part III (*Bivens*); Part IV (claims under §§ 1985 and 1986).

In light of Line Officer Defendants' arguments, this brief addresses more thoroughly than prior briefs the justification for holding liable officers who did not necessarily interact directly with Plaintiffs, *see* Part I; viewpoint discrimination, *see* Part II.B.3; and *Bivens*, *see* Part III.

Plaintiffs incorporate by reference their statement of facts in their omnibus brief, ECF 98, and add specific facts from the operative complaint as relevant to each argument below.

For the reasons that follow, Line Officer Defendants' motion to dismiss should be denied.

LEGAL STANDARD

A complaint need only provide "a short and plain statement … showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). When ruling on a motion to dismiss, the Court must accept as true all facts plausibly pleaded in the complaint, drawing all reasonable inferences in plaintiffs' favor. *Hurd v. District of Columbia*, 864 F.3d 671, 678 (D.C. Cir. 2017). "Plausibility does not mean certainty," only that the claim "rises 'above the speculative level.'" *Sandvig v. Sessions*, 315 F. Supp. 3d 1, 11 (D.D.C. 2018) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To the extent inferences must be drawn to show that the defendant is liable, they must merely be reasonable, *Hurd*, 864 F.3d at 678, and need not be the only possible inferences. *Evangelou v. District of Columbia*, 901 F. Supp. 2d 159, 170 (D.D.C. 2012). Indeed, "[a] complaint survives a motion to dismiss even if there are two alternative explanations, one advanced by the defendant and the other advanced by the plaintiff, both of which are plausible." *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (cleaned up). Plaintiffs may plead with less specificity, and even "on information and belief," "where the facts are peculiarly within the possession and control of the defendant, or where the belief is based on factual information that makes the inference of culpability plausible." *Evangelou*, 901 F. Supp. 2d at 170 (cleaned up).

Critically, the Court cannot resolve factual disputes on a 12(b)(6) motion to dismiss. *E.g., Behrens v. Tillerson*, 264 F. Supp. 3d 273, 278 (D.D.C. 2017); *Burnett v. Wash. Metro. Area Trans. Auth.*, 58 F. Supp. 3d 104, 108-09 (D.D.C. 2014). Rather, "unresolved factual questions preclude dismissal" at this stage. *Beyond Pesticides v. Monsanto Co.*, 311 F. Supp. 3d 82, 88 (D.D.C. 2018).

ARGUMENT

I. Plaintiffs Have Sufficiently Alleged Line Officer Defendants' Participation In The Violation Of Their Rights (Claims 1, 2, 5 & 6).

Line Officer Defendants are wrong that they cannot be sued—either on the merits, Line Ofcrs. MTD 32-38, or as a matter of standing, *id.* at 38-39—in the absence of discrete encounters between these officers and the named Plaintiffs. On the contrary, joint tortfeasors are liable for each other's coordinated actions, as are co-conspirators, and Plaintiffs have alleged in detail a coordinated attack by Defendants, including these Defendants, on all the Lafayette Square demonstrators, including the named Plaintiffs. Additionally, regarding their First Amendment claims, Plaintiffs have alleged that these Defendants *directly* violated their rights by dispersing their demonstration and thereby shutting down their speech. Accordingly, Plaintiffs have stated a claim on the merits and also have adequately alleged their standing. *See* Part I.A, below.

To the extent Line Officer Defendants are claiming that Plaintiffs have pleaded the violations with insufficient specificity or plausibility, that argument also fails. Plaintiffs' detailed allegations are plausible and easily clear Rule 8's "low bar." *Holt v. Walsh Grp.*, 316 F. Supp. 3d 274, 282 (D.D.C. 2018). *See* Part I.B, below.

A. Line Officer Defendants are liable under ordinary tort law principles for their participation in violating Plaintiffs' rights.

Line Officer Defendants are joint tortfeasors and co-conspirators and therefore are liable for each other's coordinated actions. Except where courts have specifically held otherwise (as with *respondeat superior* liability), ordinary tort-law principles apply to constitutional tort claims under 42 U.S.C. § 1983, *see, e.g.*, *Wesby v. District of Columbia*, 841 F. Supp. 2d 20, 41 (D.D.C. 2012), *aff'd*, 765 F.3d 13 (D.C. Cir. 2014), *rev'd on other grounds*, 138 S. Ct. 577 (2018); *accord Louis v. District of Columbia*, 59 F. Supp. 3d 135, 147 (D.D.C. 2014), and "the bodies of law relating to

the two forms of litigation (42 U.S.C. § 1983 and *Bivens*) have been assimilated in most respects," *Williams v. Hill*, 74 F.3d 1339, 1340 (D.C. Cir. 1996) (cleaned up); *see, e.g., Higazy v. Templeton*, 505 F.3d 161, 175-76 (2d Cir. 2007) (applying ordinary tort principles to *Bivens* action); *Egervary v. Young*, 366 F.3d 238, 246 (3d Cir. 2004) (same).

Line Officer Defendants ignore the basic tort law principle that "where several independent actors concurrently or consecutively produce a single, indivisible injury," each is liable. *Wesby*, 841 F. Supp. 2d at 41 (D.D.C. 2012) (quoting *Watts v. Laurent*, 774 F.2d 168, 179 (7th Cir. 1985)); *accord Louis*, 59 F. Supp. 3d at 147; *see also* Restatement (Second) of Torts § 876(a) ("For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he does a tortious act in concert with the other or pursuant to a common design with him[.]"). Thus, this Court has recognized in various contexts that concerted acts establish liability for all participants. For example, in an unconstitutional arrest case, this Court held that officers present at the scene who did not conduct the arrests but "actively participated" by signing and completing portions of the arrest forms or providing investigative information to the arresting officers were jointly liable with the officer who conducted the arrests. *Wesby*, 841 F. Supp. 2d at 41-42 (cleaned up). Similarly, this Court held that in an unconstitutional search case, officers who did not conduct the search can be held liable where they participated by standing in a strategic position to enable the search to occur. *Fernandors v. District of Columbia*, 382 F. Supp. 2d 63, 74-75 (D.D.C. 2005).

Appellate courts likewise recognize, in decisions cited approvingly by this Court, that officers who participate in misconduct but do not directly come into contact with a plaintiff can be jointly liable for their colleagues' unconstitutional actions if the officers were "integral" to the misconduct, in that they were "participants" "rather than bystanders." *Boyd v. Benton County*, 374 F.3d 773, 780 (9th Cir. 2004) (in challenge to excessive force via the use of a flash-bang grenade

during a search, supporting officers who did not deploy the grenade could be liable because, among other things, it occurred as "part of the search operation in which every officer participated in some meaningful way," knowing it was to be deployed); *accord James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990) (in challenge to unconstitutional search, officers who did not perform the challenged search but who provided armed backup and guarded civilian bystanders could be liable); *see Fernandors*, 382 F. Supp. 2d at 75 (relying on *Boyd* and *James*); *Wesby*, 841 F. Supp. 2d at 42 (relying on *James*). Indeed, even Defendants' own Second Circuit authority recognized that liability may extend to an officer "who, with knowledge of the illegality, participates in bringing about a violation of the victim's rights but does so in a manner that might be said to be 'indirect'—such as ordering or helping others to do the unlawful acts." *Provost v. City of Newburgh*, 262 F.3d 146, 155 (2d Cir. 2001). In sum, officers who participate in the violation of plaintiffs' rights need not interact with plaintiffs to be held liable.

None of Defendants' authorities shake this consensus. They merely stand for the corollary proposition that, in contrast to officers who "actively" participate in a violation, officers cannot be liable for misconduct simply for "being a member of the same operational unit as a wrongdoer," *Felarca v. Birgeneau*, 891 F.3d 809, 820 (9th Cir. 2018), or based on their "mere presence at the scene," *Calvi v. Knox Cty.*, 470 F.3d 422, 428 (1st Cir. 2006), or based on misconduct in which they had "no role," *Chuman v. Wright*, 76 F.3d 292, 295 (9th Cir. 1996).[1] As a result, Defendants'

[1] *Accord Jones v. Williams*, 297 F.3d 930, 935 (9th Cir. 2002) (quoting this language from *Chuman*); *Estate of Brutsche v. City of Fed. Way*, 2006 WL 3734153, at *8 (W.D. Wash. Dec. 14, 2006) (same); *see also Burns v. City of Concord*, 2017 WL 5751407, at *10 (N.D. Cal. Nov. 28, 2017) (requiring "some fundamental involvement in the conduct that allegedly caused the violation" (citation and internal quotation marks omitted)); *cf. Provost*, 262 F.3d at 155-56 (officer not liable for unconstitutional arrest because he lacked "aware[ness] of the facts that made the arrest unconstitutional"). The Sixth Circuit once suggested, in an unpublished decision more than twenty years ago, that it applied a different rule from the Fifth Circuit *James* case. But the Sixth *(footnote continues)*

authorities show, officers cannot be liable where they were entirely uninvolved in the complained-of misconduct. *See Johnson v. Moseley*, 790 F.3d 649, 655 (6th Cir. 2016) (arresting officers were not liable for arrestee's claims of subsequent malicious prosecution, because "Plaintiff has not alleged that [the officers] participated in the investigation after his arrest"); *White v. United States*, 863 F. Supp. 2d 41, 46 (D.D.C. 2012) (officers involved solely in a *chase* of plaintiffs' decedent, following another officer's attempt to stop him, were not liable for claim that initial *stop* was unlawful); *Burke v. Lappin*, 821 F. Supp. 2d 244, 248 (D.D.C. 2011) (high-level officers were not liable for day-to-day decisions about incarcerated plaintiff in which they "could not have possibly participated"). Thus, the consensus of cases, including several decisions of this Court, define a clear line between individuals who may be held liable because they actively participated in the wrong as joint tortfeasors and those who may not because they had no role in the misconduct.

The alleged actions of the Line Officer Defendants fall squarely on the joint-tortfeasor side of the line. Plaintiffs allege that they participated in a coordinated, concerted effort to drive all the demonstrators—including Plaintiffs—from Lafayette Square and its environs by force, violating Plaintiffs' First and Fourth Amendment rights. Plaintiffs allege the coordinated nature of the attack throughout the complaint, *see* TAC ¶¶ 82-83 (Defendants attacked Plaintiffs together pursuant to common orders); TAC ¶¶ 88-100 (describing simultaneous attack by many law enforcement officers from different agencies); TAC ¶ 107 (alleging coordination and a "concerted plan" based

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Circuit's decision, after rejecting liability for one officer too far removed from the knock-and-announce violation at issue because "mere presence" or "mere backup" cannot be the basis for liability, *Aquisto v. Danbert*, 165 F.3d 26, at *3 (6th Cir. 1998) (mem.), nonetheless upheld liability for a different officer who entered the plaintiff's home as part of the search team even though he did not personally decide when the door would be broken down or break it down himself, *see id.* at *2, *4. This decision accordingly is distinguishable for the same reason as Defendants' authorities: Plaintiffs here do not seek liability based on anyone's "mere presence" or role as "mere backup"; rather, they allege active participation in the concerted attack.

on the detailed facts presented). And Plaintiffs have specified how each of these Defendants participated in this attack. Defendants Jarzmuzewski, Hendrickson, and McDonald, together with other officers, "rushed forward and attacked the assembled protesters without warning or provocation." TAC ¶ 83. Defendant Feliciano "joined in the initial charge" dispersing protesters and "bashed a protester," before "pursu[ing] protesters . . . as they retreated." *Id.* ¶¶ 92, 95. Defendant Cox, with other officers, "advance[d] . . . and charged after the protesters who continued fleeing from the officers' attack." *Id.* ¶ 93. Defendant Daniels "charged into [protesters,] shoving [a] journalist aside," *id.* ¶ 98, and Defendant Sinacore "rushed" an injured demonstrator "from behind and slammed him against the wall of a building" before chasing him and beating him with a baton as he tried to escape. *Id.* ¶ 91. Defendant Seiberling, on horseback, joined in dispersing protesters. *Id.* ¶ 90. In actively attacking and scattering the demonstrators, Line Officer Defendants were "much more than . . . mere bystanders," *Fernandors*, 382 F. Supp. 2d at 75, to the attack.

Defendants stress that certain of their conduct—in particular, riding a horse—is not itself unconstitutional in isolation, but that misses the point; joint-tortfeasor or "participant" liability does not require that each officer's action *by itself* amount to a constitutional violation. *Boyd*, 374 F.3d at 780. Each of these Defendants' participation in the attack and the dispersal of protesters (as alleged) was at least as integral to the constitutional violations as that of the "officer who does not enter an apartment, but stands at the door, armed . . . while other officers conduct the search," *id.*, and these Defendants can therefore be held liable if Plaintiffs can prove the facts as alleged.

Line Officer Defendants' argument fails as to the conspiracy claims for similar reasons. Because conspirators are liable for the acts of the conspiracy, plaintiffs need not identify which of several conspirators injured them; they need only prove (and at this stage, plausibly allege) that these Defendants were members of the alleged conspiracy. *See Oxbow Carbon & Minerals LLC*

v. Union Pac. R.R. Co., 81 F. Supp. 3d 1, 7 (D.D.C. 2015). As discussed in Part IV below, Plaintiffs have adequately alleged that the Defendants were part of the conspiracy to violate their civil rights.

Line Officer Defendants' argument fails as to the First Amendment claims for an additional reason: each of the officers *personally* violated Plaintiffs' rights by charging at the demonstrators to disperse their constitutionally protected demonstration. *See* TAC ¶¶ 83, 90-93, 98. The result of that charge was to "disrupt the protest and drive Plaintiffs and other class members out of Lafayette Square and its vicinity." TAC ¶ 88; *accord* TAC ¶ 107-08.

Plaintiffs' standing follows directly from the principles discussed above. Plaintiffs were injured by the attack in which all of these Defendants participated. TAC ¶¶ 120-27, 135-37, 141-45, 150, 159-64, 172-76, 187, 194, 198-201. Plaintiffs' injuries were caused by these Defendants—directly (for the First Amendment claim) and (for all claims) via their role as joint tortfeasors and members of a conspiracy. And damages, of course, provide redress. *E.g., Ord v. District of Columbia*, 587 F.3d 1136, 1144 (D.C. Cir. 2009). The complaint thus alleges Plaintiffs' standing in their own right, so Defendants' arguments about third-party or class-based standing, *see* Line Ofcrs. MTD 38-39, are irrelevant.

B. Plaintiffs' allegations are plausible.

Interwoven with Defendants' erroneous argument that the complaint does not sufficiently connect them to the Plaintiffs' injuries as a matter of law is their equally incorrect suggestion that Plaintiffs' allegations are not plausible as a matter of fact.

To the extent Plaintiffs' allegations of coordination require drawing inferences, they must merely be reasonable to survive a motion to dismiss. *Hurd v. District of Columbia*, 864 F.3d 671, 678 (D.C. Cir. 2017). Here, it is a perfectly reasonable inference that a large group of officers who charged, beat up, and tear-gassed Plaintiffs were carrying out a joint action—rather than that each

officer, individually and spontaneously, decided to use wildly excessive force at the same moment against people who posed no threat. On a motion to dismiss, where two competing explanations are plausible, the plaintiff's is credited. *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015). Indeed, this inference is more than plausible: Line Officer Defendants themselves assert that that they acted in concert pursuant to orders. Line Ofcrs. MTD 22, 42, 43, 44, 47, 51.

Defendants' characterization of the complaint as containing no more than "generic allegations attributing wrongdoing to an undifferentiated group of 'officers' or 'defendants,'" *id.* at 33-34, is demonstrably wrong. As laid out in the previous section, Plaintiffs have alleged specifically what role each Defendant played in the Lafayette Square attack. *See* TAC ¶¶ 83, 91-95, 98. No further detail is required: Plaintiffs are not required to provide evidence at the complaint stage; rather, it is sufficient that the truth of each allegation is more than "speculative." *Sandvig*, 315 F. Supp. 3d at 11 (quoting *Twombly*, 550 U.S. at 570).

The Defendants are also mistaken that Plaintiffs' inability to identify the specific officers who attacked them personally is fatal to their claims. Line Ofcrs. MTD 37. This Court has pointed approvingly to a Ninth Circuit decision reversing the dismissal of a Fourth Amendment claim by a plaintiff who could not identify which of several officers had arrested her; that court refused to permit the officers to "'hide behind a shield of anonymity and force plaintiffs to produce evidence that they cannot possibly acquire.'" *Wesby*, 841 F. Supp. 2d at 42 (quoting *Dubner v. City & County of S.F.*, 266 F.3d 959, 965 (9th Cir. 2001)). Defendants' sole authority on this point, *Haus v. City of New York*, 2011 U.S. Dist. LEXIS 155735 (S.D.N.Y. Aug. 31, 2011), does not address the joint-tortfeasor theory and is thus of no assistance to Defendants.

Finally, Defendants pluck a single word ("assault") out of all the allegations of Plaintiffs Foley and E.X.F. and deem their allegations "conclusory" on the basis of that word. Line Ofcrs.

MTD 37 n.14. But it should go without saying that Defendants cannot "divide and conquer" a complaint by grabbing randomly at individual words and labeling them "conclusory" out of context. Rather, complaints are to be read "as a whole," granting the plaintiffs the benefit of all reasonable inferences. *Menoken v. Dhillon*, 975 F.3d 1, 11 (D.C. Cir. 2020). Viewed in that way, the complaint alleges not just a generic "assault" on Plaintiffs Foley and E.X.F. but specifically that they "began to feel the effects of chemical irritants that were wafting through the air, which made them cough." TAC ¶ 187. This is obviously a reference to the chemical irritants described in detail earlier in the complaint as part of "the deployment of force against the crowd of which [Plaintiffs Foley and E.X.F.] were a part." TAC ¶ 188; *see* TAC ¶ 88 (alleging the use of "flash-bang shells, tear gas, pepper spray, smoke canisters, pepper balls, rubber bullets, and/or other projectiles" against the crowd). Defendants cannot rely on their own blinkered reading of a complaint to have it dismissed.

II. Qualified Immunity Must Be Denied Because Plaintiffs State Claims For Violations Of Clearly Established Constitutional Rights (Claims 1 & 2).

As in their prior briefing, Plaintiffs address qualified immunity together with the merits.

Qualified immunity must be denied if an officer violated clearly established rights of which a reasonable person in his position would have known because either controlling authority or "a robust consensus of cases of persuasive authority" placed the constitutional question beyond debate. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018) (cleaned up). Plaintiffs need not identify a precisely on-point precedent, *see id.*; rather, the law need only have provided "fair warning" that the conduct was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *accord Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam). Independently, qualified immunity must also be denied if the violation is "obvious" "even though existing precedent does not address similar circumstances." *Wesby*, 138 S. Ct. at 590. The Supreme Court recently applied the

"obviousness" principle to summarily reverse a grant of immunity because a lower court failed to recognize that the "particularly egregious facts" alone should have alerted any reasonable officer that the conduct at issue was unconstitutional. *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020).

Although there is on-point authority here, this is also a case of obvious unconstitutionality. Attacking a peaceful protest without warning and with unprovoked and overwhelming force, including the use of chemical weapons, rubber bullets, and a baton charge, is such a clear violation of both the First and Fourth Amendments that no elaboration through case law is needed.[2]

Independent of the violation's obviousness, immunity should be denied also because on-point cases exist in droves holding that the type of conduct that occurred here is unlawful. Taking Plaintiffs' detailed factual allegations as true—as required at this stage—the question isn't close.

Plaintiffs explain in turn why each of the rights at issue was both obviously violated and, independently, clearly established by binding authority or a consensus of persuasive authority such that unlawfulness of Defendants' conduct was beyond debate. Immunity should be denied.

A. No reasonable government official or law enforcement officer could have thought that attacking a peaceful protest was constitutional under the Fourth Amendment.

1. The Fourth Amendment violation was obvious, as the use of force lacked any semblance of justification.

It is black-letter law that a "use of force is excessive and therefore violates the Fourth Amendment if it is not 'reasonable,' that is, if 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' is weightier than 'the countervailing governmental interests at stake.'" *Rudder v. Williams*, 666 F.3d 790, 795 (D.C. Cir. 2012) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). Under this standard, "a police officer must have some

[2] Indeed, this violation was so egregious that many of the Defendants *do not actually defend the conduct on the merits*. *See* ECF 98, at 17, 21-23, 31-32 (explaining how Defendants' various arguments either do not contest the merits or rely on facts at odds with the complaint).

justification for the quantum of force he uses. … [T]he state may not perpetrate violence for its own sake. Force without reason is unreasonable." *Id.* at 977 (cleaned up).

Taking the facts of the complaint as true, *Rudder*'s simple and powerful distillation of the essence of excessive force law—that "[f]orce without reason is unreasonable"—requires denial of qualified immunity. Plaintiffs broke no laws and posed no threat. TAC ¶¶ 86-87. The Defendants gave no audible warning that Plaintiffs were obligated to move. TAC ¶¶ 84-85. Every reasonable law enforcement officer knows that, under the Fourth Amendment, officers cannot use force, much less tear gas and batons, against people who are doing nothing wrong.

The degree of force used underscores how far out of bounds Defendants' conduct was. As the complaint details, Defendants "fired flash-bang shells, tear gas, pepper spray, smoke canisters, pepper balls, rubber bullets, and/or other projectiles and other chemical irritants into the crowd," TAC ¶ 88, "hit, punched, shoved, and otherwise assaulted the demonstrators with their fists, feet, batons, and shields, including demonstrators whose backs were turned from the police and who were trying to flee the officers," TAC ¶ 90, pursued demonstrators on horseback, *id.* (Defendant Seiberling), struck a television journalist with a baton in the back as she was trying to flee the onslaught, TAC ¶ 97, knocked many protesters to the ground, TAC ¶ 90, and "injected danger into what had been a calm protest as those in the street fled mounted police to avoid being trampled, struck by projectiles or gassed." *Id.* Defendants Jarmuzewski, Hendrickson, and McDonald "rushed forward and attacked the assembled protesters without warning or provocation," TAC ¶ 83; Defendant Cox "charged after the protesters who continued fleeing from the officers' attack," TAC ¶ 93. Defendant Daniels "charged into" a group of people who were attempting to flee; one of them was a journalist holding a microphone, whom Defendant Daniels shoved aside. TAC ¶ 98. Defendant Feliciano both joined in the initial charge and subsequently pursued protesters as they

fled; in the course of his actions, he used his riot shield as a weapon to strike multiple fleeing protesters. TAC ¶¶ 92, 95. Defendant Sinacore slammed a man into a building from behind and then beat him when he tried to flee. TAC ¶ 91. Any reasonable officer would have known that this coordinated attack on a group of peaceful demonstrators was a grossly impermissible use of force.

Defendants' attempt to defend this conduct fails because it is premised on a fundamental legal error: no reasonable officer would assume that a violent law enforcement attack against peaceful and law-abiding demonstrators may be justified by alleged unlawful actions by *other* people, on *other* occasions, at *other* places, with no demonstrated connection to the demonstrators at issue. *See, e.g.*, Line Ofcrs. MTD 40 (relying on "the backdrop of unrest in the preceding days"); *id.* at 41 ("Leading up to June 1, 2020, there had been looting, rioting and vandalism all across the District[.]"); *id.* at 42 ("[T]he line-level officers, following a day of civil unrest, were faced with a large crowd during a city-wide state of emergency prompted by a host of illegal acts attending the protests."); *id.* at 43 ("They established a security perimeter in the midst of unsecure circumstances, which included looting, violence, and acts of arson in that same area in the days prior."); *see also id.* at 3, 41 (relying on D.C. Mayor's curfew orders and its accompanying findings, all concerning events prior to June 1).[3]

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[3] Defendants request judicial notice of Mayor Bowser's curfew orders. Line Ofcrs. MTD 2-3 nn.1-2. The Court can take notice of the existence of the orders, but not the underlying facts they assert, which are not "generally known" nor from "sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Regardless, even if the Court takes notice of the facts Mayor Bowser asserted, they do not support Defendants' theory that the attack was necessary for presidential security, because neither order asserts any facts about any events on June 1. *See* District of Columbia, Mayor's Order 2020-068 (issued May 31, 2020), https://www.dcregs.dc.gov/Common/NoticeDetail.aspx?noticeId=N0093754; District of Columbia, Mayor's Order 2020-069 (issued June 1, 2020), https://mayor.dc.gov/sites/default/files/dc/sites/mayormb/release_content/attachments/Mayor%27s%20Order%202020-069.pdf (discussing only events of May 31, 2020).

This guilt-by-association approach to law enforcement is obviously wrong based on first principles. Probable cause to search or seize must be particularized to the persons being searched or seized. *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979); *Barham v. Ramsey*, 434 F.3d 565, 573-74 (D.C. Cir. 2006). Nothing in the complaint connects Plaintiffs or the other demonstrators to alleged criminal conduct by other actors on other days, times, or places—except the common message opposing racial injustice and police brutality. It is only in this sense that the Lafayette Square demonstration of June 1 was a "continuation" of those that had come before. *See* Line Ofcrs. MTD 3 (quoting TAC ¶ 3). The Defendants try to squeeze out of the Mayor's curfew orders the implication that the violence was "*still* ongoing" at 6:30 p.m. on June 1 at Lafayette Square, *id.* at 41, but that assertion is entirely fabricated by Defendants. It is not supported by anything in the Mayor's Order cited, *see* Mayor's Order 2020-069 § I ¶ 4 (describing only events of May 31, not June 1), or in the complaint, which stresses the peaceful nature of the civil rights demonstration during which Plaintiffs were violently attacked by Defendants, TAC ¶¶ 1, 3, 6, 65, 86-87. If Plaintiffs can be assaulted because other people with the same views engaged in illegal activity at some other time and place, then *every* civil rights demonstrator in D.C. this past summer would have been properly subject to beating, tear-gassing, and arrest. This theory is so absurdly wrong that no reasonable officer could have entertained it.

Line Officer Defendants' other principal argument is simply that presidential security is very important. Plaintiffs do not disagree, but Defendants cannot explain how presidential security justified their actions *in the circumstances here*. Governmental interests, even important ones, do not justify all conduct in all circumstances. Would the President's plan to walk across Lafayette Square have justified a decision to shoot the peaceful demonstrators in the vicinity with live ammunition? Of course not. The President was not even present during the attack, as Defendants

acknowledge, *see* Line Ofcrs. MTD 2, 4; he was in the Rose Garden, *see* TAC ¶ 61, meaning that the entire White House was between him and the demonstrators. Defendants cite the D.C. Circuit's dictum that "any 'public gathering presents some measure of hazard to the security of the President and the White House,'" Line Ofcrs. MTD 43 (quoting *Quaker Action Grp. v. Morton*, 516 F.2d 717, 731 (D.C. Cir. 1975) ("*Quaker Action IV*")), but that generalization cannot decide concrete cases unless courts are to accept the view—which no court has—that all demonstrators anywhere near the White House are subject to attack at any time and with any degree of force, simply because of "this hazard inherent to any unscreened crowd." *Id.*; *cf. Quaker Action IV*, 516 F.2d at 733 n.49a (noting that even "the Government has never proposed a complete ban on [Lafayette Square] demonstrations, the only absolutely riskless way of avoiding all conceivable danger to the White House from such demonstrations"). On the contrary, the D.C. Circuit has specifically rejected "the Government's argument that mere mention of the President's safety" defeats a claim of a constitutional right. *Quaker Action Grp. v. Hickel*, 421 F.2d 1111, 1117 (D.C. Cir. 1969) ("*Quaker Action I*"). Instead, courts must "assure [them]selves that [the Government's] conclusions rest upon solid facts and a realistic appraisal of the danger rather than vague fears extrapolated beyond any foreseeable threat." *Id.*

Accordingly, the words "presidential security" are not a talisman that wards off all Fourth Amendment scrutiny; rather, like any other law enforcement interest (including the interests in the lives of officers themselves and of civilian bystanders), it is subject to a Fourth Amendment reasonableness analysis. And like any other interest, it may be so attenuated from a particular decision to use force and so plainly inadequate to justify the quantum of force applied that in some circumstances it provides no justification at all. That is the case here. Immunizing any putative presidential security-related use of force from Fourth Amendment scrutiny would effectively

permit the President to declare his intent to visit any location and then send officers out ahead of him to attack anyone in the area—as opposed to simply ordering people to move out of the way of a forthcoming presidential movement, audibly, and with enough time to comply.

Again, as alleged in the complaint, Plaintiffs were not asked or ordered to move. They were not disobeying any orders of that kind or any other. They posed no threat to the President—who was on the other side of the White House—or to anyone else. Yet Defendants swept them away from Lafayette Square using tear gas, rubber bullets, and an armed charge. None of this was remotely necessary to create a safe path for the President, or otherwise protect presidential security, and no reasonable officer could have believed that it was.

Shorn of Defendants' obviously wrong guilt-by-association approach, nothing ties Defendants' presidential-security justification to the calm circumstances at 6:30 p.m. on June 1 except a handful of assertions at odds with the complaint. According to Defendants, their action was justified "given the limited and brief nature of the incursion," Line Ofcrs. MTD 42, and because of the presence of "a large and potentially dangerous crowd near the President, and a use of force no greater and no longer in duration than being pushed away from a small area." *Id.* at 44; *see also id.* at 45 ("[Plaintiffs] were subject to no more than being briefly pushed out of a small area[.]"). But these characterizations of the violent onslaught Plaintiffs experienced are wholly at odds with the complaint, which alleges a vicious attack of overpowering force, including tear gas, rubber bullets and an armed charge against peaceful demonstrators whom the federal officers then pursued as they fled. TAC ¶¶ 88-100. Further, the notion that the crowd was "potentially dangerous" is constructed out of whole cloth by Defendants and contradicts the complaint, which squarely alleges that the crowd was peaceful, and specifically alleges that at the moment of Defendants' attack, "the Plaintiffs and the members of the Plaintiff class were not engaging in

unlawful conduct" or "any conduct that posed a threat of violence against any person, property, or public safety generally." TAC ¶¶ 86-87. A motion to dismiss is not the place to resolve factual disputes, and deciding a motion to dismiss based on matters outside the pleadings is reversible error. *Hurd*, 864 F.3d at 686-87. Moreover, calling the attack "limited and brief" (or similar formulations) does not plug the fundamental hole in Defendants' argument: given the absence of a threat, there was no reason for any attack on the demonstrators at all.

Defendants further argue that the complaint contains "no suggestion that [these] officers could differentiate among lawful protesters and those who might have infiltrated the crowd to do violence." Line Ofcrs. MTD 6. This argument concedes that the violence against the protesters was not based on individualized suspicion. Moreover, the very premise that anyone "might have infiltrated the crowd to do violence" such that Defendants *needed* a method for identifying such people has no basis in the complaint; it comes solely from Defendants' own imagination. Plaintiffs have alleged in detail that their peaceful, non-threatening protest was broken up by Defendants' massive and indiscriminate use of force. Defendants must meet these allegations squarely rather than knocking down a straw man based on alternative facts of their own creation.

Qualified immunity does not suspend the normal rules of civil procedure. *See Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014) (per curiam). Should Defendants be able to substantiate a justification for their uses of force, they may seek qualified immunity again later in the case. That possibility is irrelevant to the unavoidable conclusion that the facts in the complaint state a claim for the violation of Plaintiffs' clearly established Fourth Amendment rights by the use of overwhelming force against peaceful, law-abiding demonstrators.

2. Precedent independently places the Fourth Amendment violation beyond debate.

The unconstitutionally excessive nature of the force used here was clearly established not only because it was obvious, but also because it is demonstrated by binding authority, a consensus of persuasive authority, or both. The D.C. Circuit has specifically held that baton strikes against non-threatening and non-resisting individuals violate the Fourth Amendment. *See Rudder*, 666 F.3d at 795 (baton strike "unprovoked and without warning" violates the Fourth Amendment). The D.C. Circuit has also specifically recognized the unjustified use of chemical agents to be unconstitutionally excessive. *Norris v. District of Columbia*, 737 F.2d 1148, 1152 (D.C. Cir. 1984) (R.B. Ginsburg, J.). Additionally, there is a consensus view, both in this Court and among the federal courts of appeals, that the gratuitous use of tear gas (or comparable chemical agents) on a person who is not threatening anyone or resisting officers is excessive force. *See, e.g., Tracy v. Freshwater*, 623 F.3d 90, 98-99 (2d Cir. 2010); *Asociación de Periodistas v. Mueller*, 529 F.3d 52, 60-62 (1st Cir. 2008); *Fogarty v. Gallegos*, 523 F.3d 1147, 1160-61 (10th Cir. 2008); *Henderson v. Munn*, 439 F.3d 497, 502-03 (8th Cir. 2006); *Vinyard v. Wilson*, 311 F.3d 1340, 1348-49 (11th Cir. 2002); *Headwaters Forest Def. v. County of Humboldt*, 276 F.3d 1125, 1128-30 (9th Cir. 2002); *Park v. Shiflett*, 250 F.3d 843, 852-53 (4th Cir. 2001); *Adams v. Metiva*, 31 F.3d 375, 385-86 (6th Cir. 1994); *Jones v. Ritter*, 587 F. Supp. 2d 152, 157 (D.D.C. 2008).

Accordingly, courts have for decades denied qualified immunity for such uses of force, *see Henderson*, 439 F.3d at 503-04; *Vinyard*, 311 F.3d at 1355; *Adams*, 31 F.3d at 387, including specifically in the context of protests, *see Fogarty*, 523 F.3d at 1160-62 (denying qualified immunity for 2003 incident in which police forcibly escorted non-threatening, non-resisting antiwar protester through cloud of tear gas); *Headwaters Forest Def.*, 276 F.3d at 1130 (in 1997, "it would be clear to a reasonable officer that it was excessive to use pepper spray against the

nonviolent protestors" who "were sitting peacefully, were easily moved by the police, and did not threaten or harm the officers"); *Lucha Unida de Padres y Estudiantes v. Green*, 470 F. Supp. 3d 1021, 1026, 1046-47 (D. Ariz. 2020) (clearly established in 2017 that use of pepper spray against non-threatening and non-resisting protesters was unconstitutional); *Hamilton v. City of Olympia*, 687 F. Supp. 2d 1231, 1241-43 (W.D. Wash. 2009) (clearly established in 2007 that police cannot pepper spray protester attempting to assist an injured protester without posing a threat, or use batons and pepper spray on protester calmly trying to cross the street); *Brenes-Laroche v. Toledo Davila*, 682 F. Supp. 2d 179, 189, 192 (D.P.R. 2010) (clearly established in 2007 that baton strikes to non-threatening, non-resisting protesters were unconstitutional); *Secot v. City of Sterling Heights*, 985 F. Supp. 715, 721 (E.D. Mich. 1997) (clearly unreasonable in 1995 to "[strike] plaintiff while he was peaceably standing in the picket line and not threatening an officer or other member of the public"); *Lamb v. City of Decatur*, 947 F. Supp. 1261, 1264 (C.D. Ill. 1996) (denying qualified immunity for firing pepper spray into crowd of peaceful demonstrators).

Line Officer Defendants try to sidestep all this authority by insisting that only a binding precedent involving "a presidential appearance, an alleged dispersal order emanating from the Attorney General himself, a city-wide curfew and emergency order, a large and potentially dangerous crowd near the President, and a use of force no greater and no longer in duration than being pushed away from a small area," could suffice to clearly establish the law. Line Ofcrs. MTD 44. Other Defendants take a similar approach. *See* ECF 127 (Barr), at 16; ECF 138 (Adamchik), at 17-18. In addition to the obvious flaw that the Defendants' formulation of the test incorporates facts that contradict the complaint (e.g., "a use of force no greater and no longer in duration than being pushed away from a small area"), *see* Part II.A.1 above, Defendants' view of the inquiry is wrong because it would transform qualified immunity into *un*qualified immunity. Were the inquiry

as granular as Defendants describe, immunity would be granted in every case. Clearly established law "do[es] not require a case directly on point," *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (internal citation omitted); indeed, the Court specifically rejected a "rigid gloss" requiring plaintiffs to point to cases with "materially similar" facts. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). What Plaintiffs' cases show is that no reasonable officer could have thought an unprovoked attack on peaceful, law-abiding, non-threatening demonstrators was constitutional. That is sufficient to defeat immunity.

To the extent Defendants seek to distinguish Plaintiffs' broad consensus of both binding and persuasive authority by relying on conduct of *other* demonstrators at *other* times and places, *see* Part II.A.1 above, that approach is itself refuted by binding precedent. *Ybarra v. Illinois*, 444 U.S. 85 (1979), rejected the theory that one person can be searched or seized based on suspicion of someone else: "[A] search or seizure of a person must be supported by probable cause particularized with respect to that person." *Id.* The D.C. Circuit applied this principle in *Barham v. Ramsey*, 434 F.3d 565 (D.C. Cir. 2006), which affirmed the denial of qualified immunity to a police commander who ordered hundreds of demonstrators arrested after witnessing vandalism by *some* demonstrators, *id.* at 569-70: the "mass arrest … violated the clearly established Fourth Amendment rights of plaintiffs by detaining them without particularized probable cause." *Id.* at 573. Directly refuting the argument that Defendants here could use force against Plaintiffs based on actions of *other* people at *other* times, the court explained that even if the official "had probable cause to believe that *some* people present that morning had committed arrestable offenses, he nonetheless lacked probable cause for detaining *everyone* who happened to be in the park," *id.*, as he had "no basis for suspecting that all of the occupants of [the park] were then breaking the law or that they had broken the law." *Id.* at 574.

Defendants' use of force against Plaintiffs at Lafayette Square on June 1 based on the actions of other demonstrators on other dates at other locations is even more attenuated than the use of force in *Barham*—which Line Officer Defendants do not even cite, much less distinguish. Whereas the authorities' mistake in *Barham* was arresting many people based on the actions of a few *at around the same time and place*, here the Defendants attempt to justify force against Plaintiffs based on the acts of unknown others *at entirely different times and places*. That is obviously impermissible.

Defendants' reliance on *Carr v. District of Columbia*, 587 F.3d 401 (D.C. Cir. 2009), which distinguished *Barham* in the narrow circumstance where individuals in a group engage in criminal behavior *and* the group is acting "as a unit" such that "all members of the crowd violated the law," *id.* at 408, is equally misplaced. Plaintiffs' complaint here alleges that they were engaged in peaceful, lawful conduct, and nothing remotely suggests they were acting "as a unit" with some other, unidentified people who allegedly broke the law at other times or places. The narrow *Carr* exception to *Barham*—and a comparable out-of-circuit case, *see Bernini v. City of St. Paul*, 665 F.3d 997, 1003-04, 1005 (8th Cir. 2012) (distinguishing *Barham* where "the police ... attempted to discern who had been part of the unit" that they reasonably believed "had committed a crime" and "was acting as a unit")—obviously did not apply, and no reasonable officer could have thought that they did.

Defendants' other citations are likewise unavailing. They cite *Stigile v. Clinton*, 110 F.3d 801 (D.C. Cir. 1997), about the constitutionality of random drug testing, and *Wood v. Moss*, 572 U.S. 744 (2014), which adjudicated no Fourth Amendment issue at all, for the general proposition that presidential security is very important, but neither case suggests that the use of force against non-violent protesters is necessary to serve that interest. Defendants also rely on *Berg v. Kelly*, 897

F.3d 99 (2d Cir. 2018), which concerned the temporary detention of protesters, but that could not have provided any guidance to Defendants here because it involved neither police violence nor an excessive force claim, and because it did not rule on the constitutional merits, only that the particular facts there did not present a violation of *clearly established* law. *See id.* at 109-12. *Saucier v. Katz*, 533 U.S. 194 (2001), is likewise no help to the officers here: the conduct at issue there was very different—the claim "for the most part depend[ed] upon [one] 'gratuitously violent shove,'" *id.* at 208, and in any event, *Saucier* did not rule on the merits, just whether the plaintiff's claim was for a violation of a right that was clearly established, *see id.* at 207-09. Defendants' remaining authorities are even more clearly inapposite: they involved law enforcement responses to protesters who posed threats to officers or the public, broke the law, and/or physically resisted officers' efforts to cajole them into compliance by peaceful means. *See Felarca v. Birgeneau*, 891 F.3d 809, 814-15, 817-18 (9th Cir. 2018) (protesters erected tents against university policy, ignored police dispersal orders, and obstructed police removal of tents); *White v. Jackson*, 865 F.3d 1064, 1079-80 (8th Cir. 2017) (protester disobeyed orders to stop approaching while "proceeding directly toward the police skirmish line"); *Wardlaw v. Pickett*, 1 F.3d 1297, 1303-04 (D.C. Cir. 1993) (plaintiff, shouting, "rushed" toward two officers carrying out an arrest; officers responded by hitting him "no more than three or four times"). Line Officer Defendants quote the last of these cases for the proposition "not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment," *Wardlaw*, 1 F.3d at 1303 (cleaned up), but that dictum is badly out of place here, where Plaintiffs allege not an isolated push or shove, but an overwhelming and coordinated violent attack on the peaceful crowd.

Based on both binding and persuasive authority, qualified immunity for Plaintiffs' Fourth Amendment claims should be denied.

B. Defendants violated Plaintiffs' clearly established First Amendment rights in a manner that was obvious because of its egregiousness and, independently, contravened binding precedent.

Defendants' attack on a peaceful and lawful demonstration was a blatant suppression of core political speech in one of the nation's most important public forums. Invoking presidential security, Line Officer Defendants argue that their actions were a permissible content-neutral restriction on time, place, and manner. Line Ofcrs. MTD 47-54. That is the wrong framework for analysis, as Plaintiffs explain below, but even applying the intermediate-scrutiny standard Defendants propose, no reasonable officer could have believed the attack was constitutional: it blatantly failed the narrow tailoring requirement by burdening far more speech than necessary. The correct standard forbids dispersing demonstrations absent a "clear and present danger." Defendants' actions were also plainly unconstitutional under that standard. Yet another independent, clearly established constitutional violation was discrimination against Plaintiffs on the basis of viewpoint—Plaintiffs plausibly allege that demonstrators with different messages would have been welcome.

Plaintiffs will address in turn the three distinct ways that Line Officer Defendants' conduct clearly violated the First Amendment: (1) by burdening far more speech than necessary to serve the government's asserted interest (i.e., failing intermediate scrutiny); (2) by breaking up a demonstration absent a clear and present danger; and (3) by discriminating based on viewpoint.

1. By assaulting and completely scattering a lawful, peaceful demonstration, Defendants burdened far more speech than necessary.

Line Officer Defendants argue that their actions should be analyzed as a content-neutral restriction on the time, place, and manner of speech. That is the wrong standard: it is generally applied to regulatory restrictions on expression—not to on-the-spot police actions that shut down otherwise-permitted demonstrations. Plaintiffs will discuss and apply the correct standard in the

next section, but in any case, Defendants' actions were clearly unconstitutional even under a time/place/manner analysis.

One of the requirements of a valid content-neutral restriction is that it is "narrowly tailored." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). This means that "it must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (quoting *Ward*, 491 U.S. at 799).

Any reasonable officer would have known that Defendants' assault on Plaintiffs was not "narrowly tailored" to the government's interest. The overwhelming use of force put Plaintiffs and all the demonstrators to headlong flight out of the path of projectiles, chemical weapons, and rampaging officers, some on horseback. TAC ¶¶ 81-103. The egregiousness of Defendants' use of force is compounded by its disproportionality to any legitimate government objective. If the goal had been simply to move people out of the President's way for his walk by creating a "security perimeter," *see* Line Ofcrs. MTD 49, the demonstrators could have been clearly and audibly instructed which direction to move and how far—something the Secret Service knows how to do. *See Wood v. Moss*, 572 U.S. 744, 751-54 (2014) (Secret Service moved demonstrators away from where President Bush was unexpectedly dining). Although under intermediate scrutiny Defendants need not have used the least restrictive means, the existence of substantially less burdensome alternatives is "relevant" under this Circuit's case law, *Lederman v. United States*, 291 F.3d 36, 44 (D.C. Cir. 2002), and Defendants' blitzkrieg was practically the *most* restrictive means they could have used: short of firing on the Plaintiffs with live ammunition, Defendants could not have more forcefully disrupted the demonstration and scattered its participants. Defendants' crackdown, even analyzed as a content-neutral restriction, dramatically fails intermediate scrutiny.

This conclusion would be obvious to any reasonable officer. Thus, Line Officer Defendants are wrong that they are immune absent a decision holding "that rushing forward with batons and shields to create a security perimeter for the President in front of the White House in the midst of civil unrest violates the First Amendment." Line Ofcrs. MTD 49. *See Taylor v. Riojas*, 141 S. Ct. 52, 54 & n.2 (2020) (rejecting qualified immunity where the alleged facts were "particularly egregious," despite the absence of a case on point); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (noting that qualified immunity can be denied where "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question" (citation and internal quotation marks omitted)), *quoted with approval*, *Taylor*, 141 S. Ct. at 53-54.

To resist the obvious conclusion that attacking a peaceful protest with overwhelming force violates the First Amendment, Defendants again rely on facts not alleged in the complaint. First, they posit that the "the danger [to the President] was immediate and acute." Line Ofcrs. MTD 52; *see also id.* (citing "the potential danger posed by infiltrators within the unscreened crowd of thousands"). That view finds no support in the complaint, which avers precisely the opposite. TAC ¶ 87. Demonstrations occur at Lafayette Square frequently, TAC ¶ 51, so the location alone could not have made this demonstration a threat. Defendants' attempt to divine danger based on the behavior of other people at other times and places, *see* Line Ofcrs. MTD 52 (relying again on "days of civil unrest"), is contrary to binding precedent. *See* Part II.A.2, above. Defendants cite protesters' negative views about President Trump as a basis for security concern, Line Ofcrs. MTD 52, but if political opposition equaled a threat, the First Amendment would be meaningless. *See, e.g., Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam) ("What is a threat must be distinguished from what is constitutionally protected speech."). Indeed, the fact that Defendants

cite the protesters' views as justification for considering the protesters a security threat confirms that the attack was viewpoint-based, as discussed in Part II.B.3, below. And nothing in the complaint suggests that there was in fact any threat to the President (who, as noted, was in the Rose Garden, on the other side of the White House, TAC ¶ 61, at the time of the attack)—let alone a threat that justified the level of violence deployed here. Indeed, that claim is not just absent from the allegations in the complaint; it is diametrically opposed to them. *See* Part II.A.1 above.

Second, Defendants minimize the scope of the government response to the demonstration. In their telling, they were merely "seeking to create a circumscribed security perimeter," Line Ofcrs. MTD 51, while posing no "legal obstacle" to protesting outside of some "expanded perimeter," *id.* at 54 n.18; *see also id.* at 53 (claiming that "until the 7:00 p.m. curfew went into effect, the protesters could still say whatever they wanted, by whatever lawful means they wanted, in whatever place they wanted, except for Lafayette Square—where the President specifically appeared"). The complaint tells a much different story: Defendants gave no indication that anyone would be free to resume demonstrating anywhere in the vicinity "either at a prescribed location or after having moved a prescribed distance away from Lafayette Square." TAC ¶ 108. Indeed, the level of force deployed to shatter the protest was such that even had there been such an announcement, it would have been meaningless—it is fanciful to imagine Plaintiffs fleeing from an onslaught of chemical weapons, projectiles, batons, and a mounted charge, and then calmly stopping to resume their demonstration a block or two away. For the Plaintiffs who ran west, moreover, what they found was not a protected protest zone but the D.C. Defendants firing yet more tear gas at them in coordination with the other Defendants. *See* TAC ¶¶ 100-07. A defendant's own version of the facts is an invalid basis for dismissing a complaint.

If the government, which "bears the burden of showing that its restriction of speech is justified," *United States v. Doe*, 968 F.2d at 90, asserts that the sudden, violent, and complete dispersal of this peaceful protest was narrowly tailored to a legitimate objective, it can support its position with evidence at a later stage, *see id.* at 90-91 (evaluating tailoring by reference to the record, including what evidence the government offered). But courts do not simply "defer to the [government's] unexplained judgment," *id.* at 90; *accord Henderson v. Lujan*, 964 F.2d 1179, 1185 (D.C. Cir. 1992). Rather "it is the government's case to prove." *Doe*, 968 F.2d at 91. Taking the complaint's allegations as true, any reasonable person would have known Defendants' conduct violated the Constitution.

White House Vigil for ERA Committee v. Clark, 746 F.2d 1518 (D.C. Cir. 1984), cited by Defendants, is entirely consistent with this analysis. That case concerned restrictions on the "construction, size and placement" of signs displayed by demonstrators on the White House sidewalk, and on the manner of displaying signs within a twenty-yard "center zone" of the sidewalk. *Id.* at 1522. Although the court upheld these time/place/manner restrictions, *id.* at 1541, it recognized that "a strong argument could have been made that a regulation banning all demonstrations on the White House sidewalk and in Lafayette Park would have been unconstitutional." *Id.* at 1527. It is that recognition, and not the holding of the case—which upheld minor restrictions, but not a total ban, on signs—that speaks to the circumstances presented here. The case did not uphold *any* restriction on the peaceful assembly of *people* in Lafayette Square, or even on the White House sidewalk. The same is true of *United States v. Musser*, 873 F.2d 1513 (D.C. Cir. 1989), on which Defendants also rely; that case upheld a restriction on unattended signs in Lafayette Square, not a rule regarding any gathering of people. *Id.* at 1516-18. *United States v. Caputo*, 201 F. Supp. 3d 65 (D.D.C. 2016), another of Defendants' authorities, is not a public-

forum case at all; that case involved a challenge by a White House fence-jumper to a federal statute forbidding entry *onto the White House grounds*—a "nonpublic area" where there is "no First Amendment right to express one's self" to begin with. *Id.* at 68, 70.

Defendants repeatedly quote the Court's observation, in *Quaker Action IV*, that "a public gathering [near the White House] presents some measure of hazard to the security of the President and the White House." 516 F.2d at 731. But despite that statement, in *Quaker Action IV* the court *struck down* the Park Service's restriction on the number of people allowed to demonstrate in Lafayette Square. *Id*. at 733. The court's refusal to defer blindly to the government's assertions about presidential security supports Plaintiffs' point that intermediate scrutiny requires the government to support its case with evidence rather than simply a categorial appeal to security interests.

Defendants' contention that "[t]he limitations in this case were not nearly as substantial [as those in *White House Vigil*, *Quaker Action IV*, *Musser*, and *Caputo*] and thus so too . . . pass constitutional scrutiny," Line Ofcrs. MTD 48, is baffling. The first three of these cases involved restrictions on First Amendment activity far short of sweeping all demonstrators from Lafayette Square at whim, and the fourth involved a restriction of persons from invading the grounds of the White House itself. No reasonable officer could possibly have thought that the validity of restrictions on signs and banners meant that officers can violently drive peaceful demonstrators out of Lafayette Square.

Defendants' strenuous reliance on *Wood v. Moss*, 572 U.S. 744 (2014), is equally misplaced, as the comparison to the circumstances there depends on Defendants' own version of the facts rather than the allegations of the complaint. Like Defendants here, the defendants in that case invoked presidential security, but the similarities end there. Unlike here, *Wood* involved the

relocation of a protest to a nearby area where it could and did continue. *See* 572 U.S. at 754 (noting that "[t]he protesters remained" where the Secret Service moved them). And the legal question at issue was different than the one posed here: *Wood* concerned the *relative* placement of two groups of demonstrators with opposing views, *see id.* at 759-61, not the violent dispersal of a protest. Defendants' attempt to shoehorn the facts of this case into *Wood* depends on Defendants' Orwellian sanitization of events: only by characterizing what happened here as "creating a security perimeter and encouraging protesters to disperse," and "moderate crowd relocation," Line Ofcrs. MTD 55, can Defendants even attempt to compare the two cases. (If tear gas and brutal force are Defendants' idea of "encouraging protesters to disperse," one shudders to imagine Defendants' conception of compulsion.) Defendants twice invoke *Wood*'s refusal to "infer" an unconstitutional Secret Service policy of viewpoint discrimination from a few earlier "alleged instances of misconduct," *id.* at 55, 56 (quoting *Wood*, 572 U.S. at 763-64), but it is unclear why they think this helps them: Plaintiffs do not allege, and their claim does not depend on, the existence of any general policy. Both factually and legally, *Wood* is thoroughly inapposite.[4]

Defendants' protest-zone cases from other circuits are similarly inapposite because they did not involve violent dispersals of peaceful demonstrations and because alternative areas to speak were provided. *See Marcavage v. City of New York*, 689 F.3d 98, 102 (2d Cir. 2012) (plaintiffs were asked *seventeen times* to move to the designated demonstration zone before they were arrested for blocking traffic); *Menotti v. City of Seattle*, 409 F.3d 1113, 1128, 1138 (9th Cir. 2005)

[4] Like Line Officer Defendants, Defendants Barr and Adamchik rely heavily on *Wood* despite the stark distinctions of fact (relocation versus violent dispersal) and law (the legal question of relative placement of two groups with opposing messages, which has nothing to do with any of Plaintiffs' theories). *See* ECF 127, at 5-6, 20-24; ECF 138, at 5-7, 23-26. That several Defendants focus on such an obviously inapposite case underscores how far they must stretch to argue that a reasonable officer could have thought the actions at issue here were lawful.

(considering not the dispersal of a particular protest but a facial challenge to the imposition of a no-demonstration zone beyond which "[t]he protestors could reasonably expect their protest to be visible and audible to" their intended audience); *ACLU of Colo. v. City & Cty. of Denver*, 569 F. Supp. 2d 1142, 1153-56, 1181-82 (D. Colo. 2008) (considering not the dispersal of a particular protest but a challenge to security plans for upcoming political party convention and finding "little dispute" that protesters in designated demonstration zone could "see and be seen, as well as be heard, by delegates" to the convention). And *Berg v. Kelly*, 897 F.3d 99 (2d Cir. 2018), is no help to Defendants because it did not involve a First Amendment claim for the removal (much less the violent removal) of demonstrators, *see id.* at 104, and it did not rule on the constitutional merits, *see id.* at 112-13 (granting qualified immunity on a First Amendment retaliation claim, not a claim about any kind of dispersal).

Circuit precedent underscores that presidential security does not preempt normal First Amendment analysis. As noted, the D.C. Circuit strongly suggested in *White House Vigil* that presidential security would not justify a blanket ban on protest in front of the White House, 746 F.2d at 1527, and it struck in *Quaker Action IV* down a limit on demonstrations in Lafayette Square, 516 F.2d at 721, 723, 731. Thus, binding precedent refutes the view that presidential security concerns, no matter how attenuated they may be in a particular context, automatically justify content-neutral speech restrictions or otherwise displace the requirements of the First Amendment. Because Defendants badly and obviously fail at least one of those requirements—narrow tailoring—they violated Plaintiffs' clearly established rights under intermediate scrutiny.

2. Breaking up the protest was clearly established to be unconstitutional absent a "clear and present danger."

Although the constitutional violation was clearly established even under Defendants' proposed test, the correct test to apply here is provided not by cases dealing with general

time/place/manner regulations but with protest dispersals specifically. The leading Supreme Court case in this context holds that the First Amendment forbids the dispersal of lawful demonstrations in a public forum "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963). This standard has been applied across the decades and across the circuits (including this one), providing a broad consensus of authority to underscore the holding of *Edwards* that absent a threat that is both serious and imminent, a lawful, peaceful demonstration may not be dispersed. *See Jones v. Parmley*, 465 F.3d 46, 58 (2d Cir. 2006) (Sotomayor, J.) (applying the "clear and present danger" standard to deny qualified immunity for breaking up a demonstration where "the facts as alleged by plaintiffs reveal an orderly, peaceful crowd"); *Quaker Action IV*, 516 F.2d at 729 (D.C. Cir.) (upholding National Park Service standard for denying demonstration permits near the White House because it was limited to circumstances presenting "clear and present danger"); *accord Keating v. City of Miami*, 598 F.3d 753, 758, 766-67 (11th Cir. 2010) (no qualified immunity for officers who ordered dispersal of peaceful demonstration via tear gas and projectiles); *Collins v. Jordan*, 110 F.3d 1363, 1367-68, 1371, 1372 (9th Cir. 1996) (no qualified immunity for police chief who banned demonstrations citywide and dispersed peaceful protest; "[t]he law is clear that First Amendment activity may not be banned simply because prior similar activity led to or involved instances of violence"); *Cong. of Racial Equality v. Douglas*, 318 F.2d 95, 102 (5th Cir. 1963) (reversing injunction against peaceful civil rights protest as inconsistent with *Edwards*).

The D.C. Circuit has repeatedly recognized that Lafayette Square is not just a "quintessential public forum," *Doe*, 968 F.2d at 87, but one with special status, *id.* at 88—"a primary assembly point for First Amendment activity aimed at influencing national policies," *id.*

at 89, "where the government not only tolerates but explicitly permits demonstrations and protests because of its unique location across the street from the White House," *id.* at 88. It is a "unique situs for the exercise of First Amendment rights." *Quaker Action IV*, 516 F.2d at 725.

Applying these principles, this Court has held that a peaceful, lawful demonstration on the White House sidewalk may not be dispersed in the absence of a serious threat to public safety, and it has rejected the view that a perceived threat of disorder based on previous events provides such cause. *See Tatum v. Morton*, 402 F. Supp. 719, 722-24 (D.D.C. 1974). More recently, this Court has recognized that the right of an "ordinary person[] [to] express[] her views while standing on the public sidewalk in front of the White House" is "clearly established." *Hartley v. Wilfert*, 918 F. Supp. 2d 45, 57 (D.D.C. 2013). Other courts have likewise held that the First Amendment does not permit the dispersal of a peaceful protest in circumstances like those here. *See Keating*, 598 F.3d at 758, 766-67 (no qualified immunity for officers who ordered dispersal of peaceful demonstration via tear gas and projectiles); *Lucha Unida*, 470 F. Supp. 3d at 1039-40, 1045-46 (clearly established in 2017 that police could not block a peaceful march where defendants failed to identify a "clear and present danger of substantial evil"); *Adams v. New York*, 2016 WL 1169520, at *1, *3 (S.D.N.Y. Mar. 22, 2016) (dispersing protesters on public sidewalk was unconstitutional where there was no "immediate threat to public safety or order"); *Pena-Pena v. Figueroa-Sancha*, 866 F. Supp. 2d 81, 88, 93 (D.P.R. 2012) (peaceful protesters at territorial Capitol building, whom police attacked with tear gas and batons, stated claim for violation of clearly established First Amendment rights); *Rauen v. City of Miami*, 2007 WL 686609, at *2, *20 (S.D. Fla. Mar. 2, 2007) (no qualified immunity for officers who broke up peaceful protest with chemical irritants; plaintiffs' "right to peacefully protest in the absence of a compelling government interest in quashing their protest" was clearly established).

As with the intermediate scrutiny argument, the only way for Defendants to distinguish these authorities is via allegations regarding potential security threats contrary to the facts alleged in the complaint. *See* Part II.B.1, above. But taking the complaint's facts as true, the demonstrators posed no threat, much less a "clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Edwards*, 372 U.S. at 237. Like the civil rights protesters whose demonstration was unconstitutionally suppressed in *Edwards*, the civil rights protesters here were exercising their "rights of free speech, free assembly, and freedom to petition for redress of their grievances ... in their most pristine and classic form." *Id.* at 235. Thus, breaking up the demonstration was clearly established as unlawful *both* as an obvious matter based on general principles *and* based on binding authorities and a consensus of persuasive authorities.

3. Viewpoint discrimination violated Plaintiffs' clearly established rights.

Defendants' actions in attacking Plaintiffs' demonstration based on its viewpoint was an independent—and no less clearly established—constitutional violation. *See generally Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) (prohibition on viewpoint discrimination is "a core postulate of free speech law"). D.C. Circuit authority specifically establishes that impermissible viewpoint discrimination occurs where the government treats speech expressing one viewpoint differently than it would have treated a different viewpoint. In *Mahoney v. Babbitt*, 105 F.3d 1452 (D.C. Cir. 1997), the National Park Service revoked a permit for anti-abortion demonstrators at President Clinton's inauguration, and threatened them with arrest, *id.* at 1454, even though the government admitted that "if instead of carrying graphic posters of late term abortions or signs containing criticisms of the President, Mahoney were to carry signs offering congratulations or best wishes to the President, he would not be subject to arrest." *Id.* at 1456. The court struck down this restriction as "blatant discrimination between viewpoints." *Id.*

Contrary to Line Officer Defendants' claim, *see* Line Ofcrs. MTD 50, Plaintiffs have plausibly alleged the same type of discrimination here—that Defendants' attack breaking up their civil rights protest would not have been mounted against a demonstration with a pro-Administration message. *Compare* TAC ¶ 64 (President Trump tweet boasting that "'protesters' at the White House" were "handled . . . easily" by the Secret Service and calling for "MAGA NIGHT AT THE WHITE HOUSE"), *and* TAC ¶ 63 (promoting civil disobedience at various statehouses in opposition to coronavirus-related safety regulations), *with* TAC ¶¶ 53-61 (President Trump calling civil rights protesters "THUGS," advocating calling in the National Guard on them, and urging "overwhelming force" to "dominate" civil rights protesters). That differential treatment is the hallmark of viewpoint discrimination under the D.C. Circuit's binding decision in *Mahoney*, 105 F.3d at 1456.

Indeed, Line Officer Defendants *themselves* cite Plaintiffs' viewpoint as a reason they thought it was necessary to disperse them. *See* Line Ofcrs. MTD 52 (asserting that "the danger was immediate and acute" because the President was about to walk "near a crowd which, according to plaintiffs, viewed him as an instrument 'of centuries of white supremacy'" (citing TAC ¶ 7)). Thus, in addition to the obvious violation of breaking up a peaceful demonstration without sufficient (or really any legitimate) basis, qualified immunity must be denied for the independent reason that Defendants' actions amounted to viewpoint discrimination, as demonstrated by the President's own words and Defendants' own explanation for their actions in this Court.

Line Officer Defendants argue that Plaintiffs' viewpoint-discrimination claim cannot succeed without evidence of Defendants' own individual animosity toward their viewpoint. *Id.* at 50-51. That confuses viewpoint discrimination with retaliation, which is a distinct theory. Whereas First Amendment retaliation requires "retaliatory animus," *Nieves v. Bartlett*, 139 S. Ct. 1715,

1722 (2019), one way for viewpoint discrimination to occur is "when the specific motivating ideology or the opinion or perspective of the speaker is the *rationale* for the restriction" of speech. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (emphasis added). The rationale in question is the *government's* purpose in taking the challenged action, not the subjective motive of an official who carried it out—as demonstrated by *Mahoney*, where the D.C. Circuit did not inquire if any individual defendant held animosity toward the plaintiff's viewpoint but found it sufficient that the government would have treated a speaker with a different viewpoint differently. Likewise, *Rosenberger* did not suggest that school officials (who were sued for damages) had anti-Christian animus when they denied funding to a religious student publication, and there was no reason to suspect that they had such animus, as they were merely enforcing a preexisting school rule. *See id.* at 827.

President Trump's statements show that the demonstrators' expressed viewpoint was the reason for attacking and disbanding the protest. Defendants admit that part of the rationale for the attack was the Plaintiffs' viewpoints. And these Defendants, along with their co-defendants, carried out that attack. Thus, Plaintiffs have plausibly pleaded viewpoint discrimination in violation of clearly established law.

C. That Defendants were "just following orders" is not a basis to dismiss.

Finally, Line Officer Defendants seek refuge in the fact that they were just following orders, *see* Line Ofcrs. MTD 42, 43, 44, 47, 50-51, but this Circuit, like others, has refused to allow a "just following orders" argument to foreclose liability. *See Wesby v. District of Columbia*, 765 F.3d 13, 29 (D.C. Cir. 2014), *rev'd on other grounds*, 138 S. Ct. 577 (2018); *accord, e.g., Kennedy v. City of Cincinnati*, 595 F.3d 327, 337 (6th Cir. 2010) ("[S]ince World War II, the 'just following orders' defense has not occupied a respected position in our jurisprudence, and officers in such

cases may be held liable under § 1983 if there is a reason why any of them should question the validity of that order." (quoting *O'Rourke v. Hayes*, 378 F.3d 1201, 1210 n. 5 (11th Cir. 2004))); *see Busche v. Burkee*, 649 F.2d 509, 517 (7th Cir. 1981) (tracing invalidity of "just following orders" defense back to *Little v. Barreme*, 6 U.S. 170 (1804) (Marshall, C.J.)). Where, as here, defendants could not reasonably have believed their actions to be lawful, "just following orders" is no defense. *See Wesby*, 765 F.3d at 28-29.

III. The Traditional Damages Remedy Against Federal Officers For Violating Demonstrators' First And Fourth Amendment Rights Has Long Been Recognized In This Circuit And No Special Factors Counsel Hesitation Here (Claims 1 & 2).

Defendants argue, Line Ofcrs. MTD 7-31, that no cause of action is available under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which recognized a cause of action arising out of the Constitution for damages against federal agents who violate a person's constitutional rights. *Bivens* reflected both an ideal and a body of law with deep historical roots extending back to the beginning of the Republic. The ideal, articulated by Chief Justice Marshall, was that "'[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'" *Id.* at 397 (quoting *Marbury v. Madison*, 5 U.S. 137, 163 (1803)). And the body of law, exemplified by an early Marshall Court case as well as pre-Revolutionary English cases, showed that executive officials acting beyond their authority could be held liable in damages. *See Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020); ECF 120 (Br. of Fed. Courts Scholars as Amici Curiae), at 6-16. Indeed, "this exact remedy has coexisted with our constitutional system since the dawn of the Republic." *Tanzin*, 141 S. Ct. at 493. Thus, the federal damages remedy recognized in *Bivens* was "hardly ... a surprising proposition" because "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens*, 403 U.S. at 395; *see also Tanzin*,

141 S. Ct. at 491 ("In the context of suits against Government officials, damages have long been awarded as appropriate relief."); *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 66 (1992) ("Blackstone described it as 'a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.'" (citing 3 W. Blackstone, Commentaries 23 (1783)).[5]

More recently, Congress indicated its acceptance of the *Bivens* remedy through two enactments following *Bivens*: amendments to the Federal Tort Claims Act (FTCA) and the Westfall Act. *See Tanzin*, 141 S. Ct. at 191 (noting that Westfall Act "left open claims for constitutional violations"); *Carlson v. Green*, 446 U.S. 14, 19-20 & n.5 (1980) ("[T]he congressional comments accompanying [the FTCA] amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action."); ECF 120 (Br. of Fed. Courts Scholars), at 17-20. [6]

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[5] Although today under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), courts cannot invoke a "federal general common law," to recognize "new claims" or recognize statutory causes of action in the absence of statutory authority, *see Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020), the inherent power to enforce the Constitution itself is neither statutory nor new. *See, e.g., Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) (recognizing "long history of judicial review of illegal executive action"); *Franklin*, 503 U.S. at 65-70 (discussing presumption that when a cause of action exists, federal courts may order any appropriate relief).

[6] *Tanzin* cannot be brushed aside, as Defendants Barr and Adamchik urge, either because it was authored by Justice Thomas, who has elsewhere expressed a desire to overrule *Bivens* entirely, or because the Supreme Court has also characterized the Westfall Act as having "simply left *Bivens* where it found it." *Hernandez v. Mesa*, 140 S. Ct. 735, 748 n.9 (2020). *See* ECF 127, at 3; ECF 138, at 3-4. The first point is not an appropriate way to read Supreme Court decisions: lower courts are bound by what *the Court* has said, and *Tanzin* is an opinion of *the Court*, not a statement by a single Justice to be read contextually with that Justice's other writings and discounted based on that one Justice's views. The second point actually helps Plaintiffs, not Defendants: by 1988, when the Westfall Act was passed, this Circuit had already twice recognized *Bivens* claims for violations of demonstrators' rights, *see* Part III.A, below (discussing the 1977 *Dellums* case and citing the 1984 *Hobson* case), and the Supreme Court's statement that expanding *Bivens* is "disfavored," *Abbasi*, 137 S. Ct. at 1857, would not appear until decades later. Thus, leaving *Bivens* "where [Congress] found it" in 1988 is quite consistent with *Tanzin* and with the application Plaintiffs *(footnote continues)*

Bivens was a Fourth Amendment case. The D.C. Circuit has found the logic of *Bivens* to apply to First Amendment claims, as well. *See Dellums v. Powell*, 566 F.2d 167, 194-95 (D.C. Cir. 1977) (holding that *Bivens* damages were available for demonstrators' First and Fourth Amendment claims against law enforcement officers). Since *Dellums*, a long line of cases in this Circuit has applied *Bivens* to violations of demonstrators' constitutional rights (as detailed below).

The Supreme Court's approach to *Bivens* claims has evolved since its initial recognition of the remedy. In *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), the Court created a two-step inquiry for deciding whether a *Bivens* claim is available. First, courts must assess whether the claim arises in a "new context," and second, if the context is new, the courts must then ask whether any "special factors" counsel "hesitation" in recognizing a *Bivens* remedy. *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020) (summarizing *Abbasi*, 137 S. Ct. at 1857, 1859). Examples of "special factors" are foreign affairs, national security, *see Hernandez*, 140 S. Ct. at 746-47, and the existence of an "alternative remedial structure." *Abbasi*, 137 S. Ct. at 1858.

Nonetheless, although "expanding" *Bivens* is now "disfavored," *id.* at 1857, the Court did not close the door to all *Bivens* remedies, particularly ones that have long existed. Specifically, the Court in *Abbasi* affirmed that the "opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." *Id.* at 1856. The

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seek here. Defendants Barr and Adamchik also attempt to discount the Supreme Court's repeated recognition of congressional endorsement of *Bivens* by citing dicta out of context from *Meshal v. Higgenbotham*, 804 F.3d 417 (D.C. Cir. 2015), *see* ECF 127, at 3; ECF 138, at 3—even though that case expressly stated that it was not "foreclosing" any interpretation of the congressional enactments but merely found them insufficient to overcome a "thumb [that] is heavy on the scale against recognizing a *Bivens* remedy," *id.* at 428, because of the national-security and extraterritoriality concerns in that case (as discussed in the next section). Indeed, as discussed below, *Meshal* is part of a line of cases in this Circuit stating that excessive force by federal law enforcement officers is within the heartland of *Bivens*. 804 F.3d at 424.

Court has not overturned or limited any of its *Bivens* precedents to their facts, despite suggestions that it do so, *see, e.g., Hernandez*, 140 S. Ct. at 750 (Thomas, J., concurring).

Importantly, the existence of "new context" alone does not defeat a claim—otherwise the *Bivens* analysis would end at step one. Assuming for the sake of argument that the context here is "new" under *Abbasi*, Plaintiffs nonetheless prevail because no "special factors" counsel hesitation.

As discussed in detail below, more than four decades of precedent in this Court and the D.C. Circuit show that nothing about a damages remedy for a violation of demonstrators' First and Fourth Amendment rights—particularly violations as egregious as those here—should cause a court to hesitate. The Supreme Court's recent decisions do not cast doubt on this long line of precedent. And the special factors invoked by Defendants are inapplicable to this case.

In seeking to minimize the significance of prior D.C. Circuit precedent, *see* Line Ofcrs. MTD 10, Line Officer Defendants wrongly conflate the two steps of the *Abbasi* analysis. In the very passage Defendants cite, the Circuit explained that its prior cases are not relevant *for the new-context inquiry* (step one). *See Loumiet v. United States*, 948 F.3d 376, 382 (D.C. Cir. 2020) (describing prior cases as "overtaken by *Abbasi*'s holding" regarding the "new-context analysis"), *quoted in* Line Ofcrs. MTD 10. But neither the D.C. Circuit nor the Supreme Court has suggested that prior precedent is irrelevant *to the special factors inquiry* (step two).[7] The Court should faithfully apply this Circuit's cases recognizing a *Bivens* action for violating demonstrators' First and Fourth Amendment rights.

[7] Defendants Barr and Adamchik make this same mistake. ECF 127, at 4-5 n.3; ECF 138, at 5 n.4.

A. Circuit precedent refutes the notion that "special factors" preclude recognizing constitutional damages claims for demonstrators' rights here and distinguishes this case sharply from those in which special factors exist.

Although the Court's two-step framework for assessing the availability of *Bivens* damages is new, the consideration of special factors in determining whether to apply *Bivens* is not. The "special factors" inquiry has existed since *Bivens* itself, 403 U.S. at 396 ("[t]he present case involves no special factors counselling hesitation"), and it existed when *Dellums* and its successor cases were decided. Yet the D.C. Circuit has never suggested that "special factors" preclude the application of *Bivens* to enforce the First or Fourth Amendment rights of protesters. On the contrary, the D.C. federal courts have a long history of allowing *Bivens* First and Fourth Amendment claims on behalf of protesters.

Line Officer Defendants do not dispute the availability of *Bivens* for excessive force claims generally—a point the D.C. Circuit has repeatedly reaffirmed. *See, e.g., Lash v. Lemke*, 786 F.3d 1, 5 n.2 (D.C. Cir. 2014) ("There is no question that [a tased demonstrator] may pursue an excessive force claim under *Bivens*[.]"); *Meshal v. Higgenbotham*, 804 F.3d 417, 424 (D.C. Cir. 2015) (when "a federal law enforcement officer uses excessive force, contrary to the Constitution," that is "the classic *Bivens*-style tort" (quoting *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987); internal quotation marks omitted)). More specifically, in *Dellums*, no special factors prevented the court from applying *Bivens* to a context just like this one: where police violated the First and Fourth Amendments by disrupting a large demonstration in front of the seat of one of our three branches of government (in *Dellums*, the Capitol; here, the White House). If no special factors existed there and then, none exist here and now.

In *Dellums*, the D.C. Circuit considered First and Fourth Amendment claims asserted by demonstrators protesting the Vietnam War on the steps of the Capitol Building. 566 F.2d at 173.

The court affirmed the verdict for plaintiffs on the Fourth Amendment *Bivens* claims, *see id.* at 175-91, and concluded that federal courts were capable of addressing First Amendment *Bivens* claims as well, *see id.* at 194-95. Following *Dellums*, D.C. federal courts have repeatedly recognized *Bivens* damages claims for First and Fourth Amendment claims by demonstrators. *See, e.g.*, *Lash*, 786 F.3d at 5 n.2 (although Park Police officers were entitled to qualified immunity for tasing a demonstrator resisting arrest, "[t]here is no question that Lash may pursue an excessive force claim under *Bivens*"); *Hobson v. Wilson*, 737 F.2d 1, 56, 62-63 (D.C. Cir. 1984) (*Bivens* First Amendment damages claim against FBI agents who impeded protests), *partially abrogated on other grounds, Leatherman v. Tarrant Cty. Narcotics Intel. & Coord. Unit*, 507 U.S. 163 (1993); *Patterson v. United States*, 999 F. Supp. 2d 300, 303, 308-311, 317 (D.D.C. 2013) (demonstrator's *Bivens* First and Fourth Amendments claims for retaliatory arrest); *Hartley v. Wilfert*, 918 F. Supp. 2d 45, 50-54 (D.D.C. 2013) (*Bivens* First Amendment claim for trying to intimidate plaintiff out of protesting near the White House); *Bloem v. Unknown Dep't of the Interior Employees*, 920 F. Supp. 2d 154, 156-57, 159-61 (D.D.C. 2013) (First and Fourth Amendment claims where agents destroyed plaintiff's protest materials); *Lederman v. United States*, 131 F. Supp. 2d 46, 47, 57, 63 (D.D.C. 2001) (*Bivens* First and Fourth Amendment claim for Capitol Police officer's arrest of demonstrator), *rev'd on other grounds*, 291 F.3d 36 (D.C. Cir. 2002); *Torossian v. Hayo,* 45 F. Supp. 2d 63, 66 (D.D.C 1999) (granting qualified immunity but recognizing that "a *Bivens* action ... has been held to be available to plaintiffs claiming violations of the First and Fourth Amendments" against demonstrators); *Masel v. Barrett*, 707 F. Supp. 4, 11-12 (D.D.C. 1989) (demonstrator's *Bivens* excessive force claim).

Regardless of whether these cases can show that the context is not "new" for purposes of *Abbasi*, the D.C. Circuit's longstanding precedent recognizing *Bivens* remedies for First

Amendment claims, Fourth Amendment excessive force claims, and specifically claims under both Amendments *by demonstrators*, show why no special factors counsel hesitation in recognizing such claims. These decisions continue to bind this Court today, in the absence of contrary Supreme Court authority. *See Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 876 (D.C. Cir. 1992). And in terms of harm to national security, foreign affairs, or any of the other reasons causing either the D.C. Circuit or the Supreme Court to hesitate in recognizing *Bivens* claims, the sky has not fallen despite the decades-long and ongoing recognition of *Bivens* damages claims in the protest context, including for activity near the White House, *see, e.g.*, *Hartley*, 918 F. Supp. 2d at 50-52, and at the Capitol, *see*, *e.g.*, *Dellums*, 566 F.2d at 173; *Lederman*, 131 F. Supp. 2d at 57, 63. Given that the D.C. Circuit has already recognized *Bivens* claims without finding that "special factors" counsel "hesitation" in the context of demonstrators' First and Fourth Amendment claims, refusing to recognize such a claim here would contravene Circuit precedent.

The contrast between the factual context of this case and those of recent Supreme Court cases finding special factors counselling hesitation underscores how far apart this case is from those. Whereas *Abbasi* stressed caution in allowing constitutional damages remedies as a means to change national security policy, 137 S. Ct. at 1860-63, it did not speak to any "special factors" pertaining to domestic political demonstrators seeking compensation for egregious violations of their First and Fourth Amendment rights when federal forces violently attacked and disbanded their peaceful demonstration. And whereas *Hernandez* refused to extend *Bivens* to a shooting across an international border because foreign affairs, national security, and congressional acts limiting remedies for foreigners on foreign soil counselled hesitation, 140 S. Ct. at 744-47, it did not invite courts to cut off remedies where U.S. citizens exercising core political freedoms on U.S. soil are met with gratuitous brutality by federal officers. And neither of these decisions instructs

the lower courts to abdicate judicial responsibility for *every* claim where federal officials assert a national security interest, however attenuated. Quite the contrary: *Abbasi* specifically admonished against knee-jerk invocations of security concerns to preclude a *Bivens* remedy, warning that "national-security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'" 137 S. Ct. at 1862 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985)). Even more to the point here, the Court observed that danger of the "abuse" of this label is "heightened" in purely "domestic cases." *Id.*

Special factors that have recently given the D.C. Circuit pause in applying *Bivens* are likewise far afield from this case. Although *Loumiet v. United States*, 948 F.3d 376 (D.C. Cir. 2020), involved a First Amendment *Bivens* claim, the plaintiff there sought damages for retaliatory administrative enforcement actions under the Financial Institutions Reform, Recovery, and Enforcement Act—a statute with its own detailed administrative enforcement scheme and circumscribed provision for judicial review. *See id.* at 384-85. The principle that a comprehensive alternative remedy forecloses *Bivens* is not new and has coexisted harmoniously for decades with this Circuit's *Bivens* jurisprudence regarding demonstrators' constitutional rights; indeed, the *Bivens* precedents most critical to the *Loumiet* holding were from the 1980s. *See id.* at 383-85; *accord Liff v. Office of Inspector Gen.*, 881 F.3d 912, 914-15 (D.C. Cir. 2018) (holding that comprehensive remedial scheme barred government contractor's suit). And *Meshal v. Higgenbotham*, 804 F.3d 417 (D.C. Cir. 2015), which found that national security and foreign affairs counseled hesitation in allowing a claim concerning federal agents' actions with respect to a suspected terrorist who was in the custody of a foreign government in East Africa, *id.* at 426-27, is (literally) a world away from purely domestic law enforcement.

In sum, the special factors at issue in those cases are all far removed from the contexts of *Dellums* and this case, and they do not call into question Circuit precedent repeatedly recognizing *Bivens* First and Fourth Amendment claims by demonstrators and declining to find any special factors counseling hesitation in this field.

B. Presidential security and the other "special factors" invoked by Line Officer Defendants are misplaced here and do not overcome Circuit precedent.

Line Officer Defendants argue that federal law enforcement officers' assault on demonstrators expressing their opposition to systemic racism and police brutality is impervious to a *Bivens* remedy because of four purported "special factors." Line Ofcrs. MTD 14-31. All are misplaced: Defendants' invocation of presidential security is based on facts that contravene the complaint, *see* Part III.B.1, below; the absence of congressional legislation providing a remedy proves nothing because Congress ratified the *Bivens* remedy that already existed for these violations, *see* Part III.B.2; Defendants' argument about alternative remedies does not apply the governing standard and ignores binding Supreme Court precedent, *see* Part III.B.3; and neither these Defendants' low rank nor their co-defendants' high rank provides a shield, because line-level officers are the paradigmatic *Bivens* defendants and concerns about intrusion into high-level policy are not implicated here, *see* Part III.B.4.[8]

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[8] Defendants also cite two additional factors as relevant to the "new context" question only—the supposed lack of judicial guidance in this area and the fact that Plaintiffs have pleaded a class action. Line Ofcrs. MTD 11-12. These contentions do them no good, because even if they make out a new context, that does not negate a *Bivens* claim; it only means that the Court has to consider whether there are special factors counseling hesitation—which, as Plaintiffs show exhaustively in this section, there are not. Defendants' arguments are, in any event, wrong: Judicial guidance is so extensive regarding the excessiveness of the force here under the Fourth Amendment and the unlawfulness of Defendants' attack under the First Amemdment that the violations were clearly established for purposes of qualified immunity. *See* Part II, above. And this Circuit's leading First Amendment *Bivens* case, *Dellums*, was a class action. 566 F.2d at 173-74.

Stripping Plaintiffs of a remedy would abdicate the judicial responsibility to provide a check against the Executive branch, conflict with D.C. Circuit precedent recognizing the viability of *Bivens* claims to vindicate demonstrators' constitutional rights in the nation's capital, and authorize brutality with impunity.

1. Defendants' presidential-security argument depends on factual assertions that contravene the complaint.

Defendants argue at length that national/presidential security is, in the abstract, an interest of great weight. But Plaintiffs dispute neither the importance of this interest nor that it can constitute a special factor for *Bivens* purposes in some circumstances. This is simply not such a circumstance. Baldly asserting that the unprovoked attack on peaceful demonstrators was required by "presidential security" does not make it true. And on a motion to dismiss, a defendant's assertion that his actions were necessary because of facts contrary to the complaint is entitled to no weight. That dispute is for trial, not a motion to dismiss.

Heeding *Abbasi*'s warning not to permit "national-security concerns" to "become a talisman used to ward off inconvenient claims," 137 S. Ct. at 1862, and emulating *Abbasi*'s focus on the facts at issue rather than broad generalities, *see id.* at 1860 (considering "confinement conditions imposed on illegal aliens pursuant to a high-level executive policy created in the wake of a major terrorist attack" rather than prison context generally), courts have not accepted security arguments blindly but rather assessed their relevance to the case at hand. *See Graber v. Dales*, 2019 WL 4805241, at *4 (E.D. Pa. Sept. 30, 2019) (allowing *Bivens* claim against Secret Service agent in connection with arrest outside 2016 Democratic National Convention because under the circumstances "the connection to national security is tenuous"); *Linlor v. Polson*, 263 F. Supp. 3d 613, 623 (E.D. Va. 2017) (allowing *Bivens* remedy where TSA officer used excessive force during

security screening: "The question is not whether airports present special security concerns—they do—but whether those concerns have any particular bearing on the context at issue in this case.").[9]

Here, Defendants' security justification for the actions they took is, simply, a canard. Their claims that they acted "in the midst of unrest," Line Ofcrs. MTD 12, and against "a large gathering of unscreened demonstrators across from the White House *as the former President walked into* Lafayette Square to give remarks," *id.* at 15 (emphasis added), for instance, are squarely contradicted by the complaint—as are the rest of Defendants' insinuations of a threat. *See* Part II.A.1, above. As the complaint details, there was no threat to the President posed by the protesters at Lafayette Square on June 1. The protesters were law abiding and peaceful. TAC ¶¶ 65-66. They were at Lafayette Square, not on the White House Lawn. The President was not nearby when Defendants' attack occurred; he was in the Rose Garden making a speech. *See* TAC ¶ 61; *accord* Line Ofcrs. MTD 7-8 (acknowledging that the attack occurred "before the President's appearance"). There were no split-second decisions to be made. On the contrary, the *Defendants* were the aggressors who initiated the entire confrontation. TAC ¶¶ 77-88.

Lacking a factual basis in the complaint for the security concern on which they wish to rely, Defendants float the alarmingly broad theory that because "any large crowd poses a security threat to the President due to the inherent and foreseeable risk of infiltration by bad actors," Line Ofcrs. MTD 16, any use of force—no matter how aggressive and unprovoked—is immune from

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[9] In dicta, *Graber* stated that "[t]he potential for chilling decisive action in the course of protecting Presidents would indeed give the Court pause"—as Defendants Barr and Adamchik note. *See* ECF 127, at 9; ECF 138, at 10 (both quoting 2019 WL 4805241, at *5). But as the preceding sentence of *Graber* makes clear, the "decisive action" referred to there was "the life-or-death snap judgments that Secret Service agents must sometimes make while protecting high-level government officials." *Id*. No such snap judgments were involved here. At the time of Defendants' actions, the President was still on the White House grounds. *See* TAC ¶ 61 (noting that the President was in the Rose Garden during the attack on the demonstrators).

judicial review. But this Circuit in *Quaker Action IV* considered an assertion akin to Defendants', *see* 516 F.2d at 730 (summarizing testimony of Secret Service officials to the effect that "any demonstration, especially a large one, would pose an unreasonable danger to the security of the President and of the White House"), and nevertheless held that 3,000 people was the *minimum* number of demonstrators that must be permitted in Lafayette Park, and that waivers must be available for larger numbers. *See id.* at 732-33. Thus, at the heart of Defendants' presidential security contention is a theory this Circuit has rejected. More generally, Defendants' approach would obliterate the Circuit's instruction regarding Lafayette Square demonstrations to balance "First Amendment freedoms against safety requirements," *id.* at 722, and replace it with the rule that every group of demonstrators on a public street or park in proximity to the White House is subject to being viciously beaten and tear-gassed at the whim of federal officers. Defendants offer no limiting principle for *when* a presidential security interest legitimately counsels hesitation in applying *Bivens*. Under their theory, the President could demand to go anywhere, at any time, and send officers ahead to beat up anyone along the way. That is clearly wrong.

"Whatever power the United States Constitution envisions for the Executive in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion); *see also Quaker Action I*, 421 F.2d at 1117 (noting that courts must make independent judgments regarding security threats asserted by the government). Moreover, sufficient deference to decisions made based on presidential security is embodied in the substantive First and Fourth Amendment standards themselves. *See, e.g.*, *Wood v. Moss*, 572 U.S. 744, 758-59 (2014); *Saucier v. Katz*, 533 U.S. 194, 208-09 (2001), *abrogated on other grounds, Pearson v. Callahan*, 555 U.S. 223 (2009). These standards provide ample latitude for federal officials to make security decisions and protect the

President without the need for an extreme rule that federal officers can immunize their misconduct from judicial review merely by *invoking* a presidential security interest no matter the facts.

2. Supposed congressional inaction does not "counsel hesitation" here.

Line Officer Defendants' argument that congressional inaction in a heavily regulated field counsels hesitation, Line Ofcrs. MTD 18-21, is misguided because Defendants are seeking congressional guidance in the wrong place and ignoring what Congress has actually said about the cause of action Plaintiffs are asserting here. Defendants focus on what Congress has said regarding presidential security—which, as noted in the previous section, is a concern that Defendants themselves are attempting to inject into the case notwithstanding the contrary allegations of the complaint. At the same time, Defendants ignore what Congress *has* said about the indisputably relevant subject of demonstrators' rights, particularly vis-à-vis federal actors. On that subject, Congress has *not* been silent, but instead has strongly signaled its endorsement of a *Bivens* remedy in these circumstances via the Westfall Act and the FTCA amendments. *See Tanzin*, 141 S. Ct. at 491; *Carlson*, 446 U.S. at 19-20 & n.5. The subject matter of this case—excessive force by government officers, crackdown on First Amendment-protected activity, and the need to apply constitutional rights in the face of official claims regarding security interests—is hardly novel. When Congress adopted the Westfall Act, leaving *Bivens* "where it found it," *Hernandez*, 140 S. Ct. at 748 n.9, the D.C. Circuit had already held that *Bivens* applies to demonstrators' rights claims, and specifically to a demonstration right in front of the seat of a branch of the federal government. *See* Part III.A, above. Accordingly, Congress's attitude toward the cause of action asserted here is not silence but approval.

In interpreting legislation, the Supreme Court has noted that "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important

precedents from . . . federal courts and that it expected its enactment to be interpreted in conformity with them," because an "evaluation of congressional action . . . must take into account its contemporary legal context." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 698-99 (1979); *accord Atl. Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 422 (2009) ("'We assume that Congress is aware of existing law when it passes legislation.'" (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990)). Accordingly, the Court has repeatedly held that Congress legislates against the backdrop of relevant precedent and incorporates the understandings of those cases it does not overrule. *See, e.g., Tanzin*, 141 S. Ct. at 490-91 (reading phrase "under color of law" in Religious Freedom Restoration Act to incorporate the meaning of that concept from 42 U.S.C. § 1983, as "this Court has long interpreted it"); *Miles*, 498 U.S. at 32 ("When Congress passed the Jones Act, the [*Michigan Cent. R. Co. v.*] *Vreeland* [, 227 U.S. 59 (1913)] gloss on [the Federal Employers' Liability Act], and the hoary tradition behind it, were well established. Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well."); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 419 (1986) ("[T]he fact that Congress specifically addressed this area and left *Keogh* [*v. Chi. & N.W. Ry. Co.*, 260 U.S. 156 (1922)] undisturbed lends powerful support to *Keogh*'s continued viability."); *Albernaz v. United States*, 450 U.S. 333, 341-42 (1981) ("[I]f anything is to be assumed from the congressional silence on this point, it is that Congress was aware of the *Blockburger* [*v. United States*, 284 U.S. 299 (1932)] rule and legislated with it in mind. It is not a function of this Court to presume that Congress was unaware of what it accomplished." (cleaned up)).

The D.C. Circuit has followed this approach, including regarding congressional knowledge of the decisions of the courts of appeals. *See Beethoven.com LLC v. Librarian of Cong.*, 394 F.3d

939, 945-46 (D.C. Cir. 2005) (holding that 1976 federal legislation using the phrase "any aggrieved party" incorporated the understanding of that language reflected in earlier D.C. Circuit cases); *Wash. Legal Found. v. U.S. Sentencing Comm'n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994) (adopting construction of Sentencing Reform Act based on Congress's likely understanding that its statutory language would be interpreted "based on the prevailing caselaw"); *see also Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 195 (D.C. Cir. 1993) (noting that "Congress was presumptively aware of . . . lower court decisions" when it enacted legislation); *Blitz v. Donovan*, 740 F.2d 1241, 1245 (D.C. Cir. 1984) ("Congress is deemed to know the judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning." (cleaned up)).

The presumption that Congress intended to incorporate the established body of precedent rather than overruling it is particularly strong when "the legislative history reveals clear congressional awareness of" the relevant precedent. *Square D Co.*, 476 U.S. at 419. That is the case here: the committee report on the Westfall Act contains a paragraph-long discussion of *Bivens* that leaves no doubt that Congress sought to retain that remedy as it existed:

> [A] major feature of section 5 is that the exclusive remedy expressly does not extend to so-called constitutional torts. See *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). . . . Since the Supreme Court's decision in *Bivens*, supra, the courts have identified this type of tort as a more serious intrusion of the rights of an individual that merits special attention. Consequently, H.R. 4612 would not affect the ability of victims of constitutional torts to seek personal redress from Federal employees who allegedly violate their Constitutional rights.

H.R. Rep. 100-700, at *6, 1988 U.S.C.C.A.N. 5945, 5949-50; *accord Hernandez*, 140 S. Ct. at 748 n.9 ("Congress made clear that it was not attempting to abrogate *Bivens*[.]"). Thus, when Congress "left open claims for constitutional violations," *Tanzin*, 141 S. Ct. at 491, through the explicit statutory text of the Westfall Act, *see* 28 U.S.C. § 2679(b)(2)(A) (stating that the new statutory provision rendering the FTCA remedy "exclusive" "does not extend or apply to a civil action

against an employee of the Government[] which is brought for a violation of the Constitution of the United States"), *cited in Tanzin*, 141 S. Ct. at 491, the result was that Congress "left *Bivens* where it found it," *Hernandez*, 140 S. Ct. at 748 n.9.

Of course, Congress might have chosen to speak more explicitly in 1988 had it anticipated the language of the Supreme Court's 2017 decision in *Abbasi*. But the Supreme Court has rejected the view that Congress can be charged with foreknowledge of interpretive principles or presumptions that arise from cases after it legislates: "Although background presumptions can inform the understanding of a word or phrase, those presumptions must exist at the time of enactment. We cannot manufacture a new presumption now and retroactively impose it on a Congress that acted 27 years ago." *Tanzin*, 141 S. Ct. at 493.

Thus, in assessing the significance of the Westfall Act, courts must not "presume that Congress was unaware of what it accomplished." *Albernaz*, 450 U.S. at 342 (cleaned up). Instead, the proper presumption is that Congress passed the Westfall Act in 1988 with the jurisprudence of *Bivens* in mind—including this Circuit's decisions in *Dellums* and *Hobson*. Accordingly, the absence of more explicit legislation about demonstrators' rights does not provide any basis to assume Congress disapproved the application of *Bivens* to this case. Instead, the history of *Bivens* decisions from 1971 to 1988 reveals that the far more likely reason for the absence of such legislation is that Congress believed the cause of action recognized in *Bivens* already covered demonstrators' rights when Congress acted in 1988.[10]

[10] Defendants' reliance on the absence of demonstrators' rights legislation following the 1964 Warren Commission Report, *see* Line Ofcrs. MTD 19, is similarly unavailing, as Congress would at that time have been aware of the long tradition of holding federal officers liable for constitutional violations via common-law suits—a tradition that lasted from the Founding to the Westfall Act in 1988, and included cases implicating national security. *See* ECF 120 (Br. of Fed. Courts Scholars as Amici Curiae), at 8-16. Thus, when the Warren Commission Report was published, Congress *(footnote continues)*

3. The possibility of an alternative remedy does not "counsel hesitation" here.

Line Officer Defendants are also wrong that the possibility of injunctive relief or an FTCA remedy counsels against applying *Bivens* here. If the mere ability to sue for injunctive relief foreclosed *Bivens*, then the alternative-remedies exception to *Bivens* would swallow the rule. One can always *seek* an injunction against threatened future conduct. *Abbasi*'s recognition that injunctive relief could provide an alternative remedy sufficient to foreclose *Bivens* was limited to a particular context: where "large-scale policy decisions" are being challenged. 137 S. Ct. at 1862. Here, Plaintiffs do not challenge a large-scale policy—or any policy at all. Rather, Plaintiffs challenge the acts taken on this specific day against this specific group of protesters (the damages claims) and the implied threat to take similar actions in the future at the President's whim (the injunctive relief claims). Further, *Abbasi*'s brief discussion of alternative remedies for challenges to policies does not purport to supplant the thorough treatment of the alternative remedies question in *Minneci v. Pollard*, 565 U.S. 118, 129-30 (2012), which is cited in *Abbasi* and remains good law. *Minneci* instructs that in general, "alternative remedies" must "provide roughly similar incentives for potential defendants to comply with the [Constitution] while also providing roughly similar compensation to victims of violations." 565 U.S. at 130. That standard is not remotely met here. Given the difficulty of obtaining injunctive relief in many cases because of the absence of demonstrable future harm (a point that federal official-capacity Defendants argue here, ECF 79-1, at 11-14), injunctive relief alone will often be insufficient to deter officials from unconstitutional acts. Additionally, injunctive relief would not provide "roughly similar compensation to victims," because it would provide no compensation at all. *See Aref v. Lynch*, 833 F.3d 242, 265 n.17 (D.C.

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would have understood that demonstrators whose rights were violated by federal officials did not lack a cause of action, and so its failure to create an additional one is unremarkable.

Cir. 2016) ("Injunctive relief ... cannot provide relief for past harms."). While an alternative remedy need not be "perfectly congruent" with *Bivens*, *Minneci*, 565 U.S. at 129, injunctive relief here falls so short as not to counsel hesitation.

Line Officer Defendants' claim that the APA forecloses relief under *Bivens*, Line Ofcrs. MTD 29, is misplaced. Defendants' authorities all held that the APA was part of, or was itself, an alternative remedial scheme for *challenges to administrative action*.[11] Here, by contrast, the APA does not provide any remedy, because Plaintiffs do not complain about "agency action" of the sort reviewable under the APA, *see* 5 U.S.C. § 702, i.e., "an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13), *incorporated by reference*, 5 U.S.C. § 701(b)(2). And in *Mejia-Mejia v. ICE*, 2019 WL 4707150 (D.D.C. Sept. 26, 2019), the availability of alternative remedies was one of three reasons for denying a *Bivens* remedy and only briefly discussed; the focus of the analysis was the fact that the case challenged a governmental policy and the special authority of Congress over immigration. *Id.* at *4-5.

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[11] *Western Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1118, 1123 (9th Cir. 2009) (rejecting *Bivens* challenge to denial of application to place radio antennae in a national forest and failure to take certain administrative actions—which were reviewable under the APA); *Neb. Beef, Ltd. v. Greening*, 398 F.3d 1080, 1084-85 (8th Cir. 2005) (rejecting *Bivens* claim for agency's citation of food company for regulatory violations, in light of "comprehensive regulatory scheme pursuant to the [Federal Meat Inspection Act] that includes the right to judicial review under the APA"); *Miller v. U.S. Dep't of Agr. Farm Servs. Agency*, 143 F.3d 1413, 1416-17 (11th Cir. 1998) (rejecting *Bivens* action for employee of county, rather than of the federal government, involved in carrying out Department of Agriculture programs, because Congress "recognized such staffers' unique position and has specifically granted them employment rights as it has thought appropriate" subject to APA review); *LKQ Corp. v. United States*, 2019 WL 3304708, at *2, *11 (D.D.C. July 23, 2019) (rejecting *Bivens* challenge to seizure of certain imported merchandise by Customs and Border Protection, because of the "presence of a comprehensive statutory scheme governing customs regulations"); *Lillemoe v. U.S. Dep't of Agric.*, 344 F. Supp. 3d 215, 220, 232 (D.D.C. 2018) (in case challenging unfair application of the rules of an agency program to finance agricultural exports, "availability of APA review—perhaps alone, but certainly in combination with substantive program regulations" defeats *Bivens* claim).

As for potential recovery under the FTCA, Supreme Court precedent squarely holds that the FTCA is not an "alternative remedy" foreclosing *Bivens*. *Carlson*, 446 U.S. at 18-23. Defendants' out-of-circuit cases suggesting that *Abbasi* implicitly overruled *Carlson*, Line Ofcrs. MTD 30, violate a cardinal rule of judicial restraint: lower courts "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). This Court should therefore follow the many other courts that have recognized that the FTCA does not preclude a *Bivens* remedy, even after *Abbasi*. *See, e.g. K.O. v. ICE*, 468 F. Supp. 3d 350, 367 n.3 (D.D.C. 2020), *appeal filed*, No. 20-5255 (Aug. 26, 2020); *Bueno Diaz v. Mercucio*, 442 F. Supp. 3d 701, 710-11 (S.D.N.Y. 2020); *Linlor v. Polson*, 263 F. Supp. 3d 613, 620-21 (E.D. Va. 2017).

The Supreme Court has held that state tort law constitutes an "alternative remedy" for this purpose only where the defendants were private entities. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72-73 (2001) (private prison company); *Minneci*, 565 U.S. at 120 (private prison guard).[12] Here, because the *Bivens* Defendants are federal officers, the Westfall Act precludes tort claims against them arising under state law. *See Osborn v. Haley*, 549 U.S. 225, 229 (2007).

4. Defendants' novel claim that they are too low-ranking to be liable under *Bivens* finds no support in logic or precedent, and they cannot dodge accountability based on other Defendants' high rank.

Unlike their co-defendants Barr and Adamchik, who insist that they are too high-ranking to be liable under *Bivens*, Line Officer Defendants argue that they cannot be sued under *Bivens* because their rank is too *low*. *See* Line Ofcrs. MTD 22-28. They offer no case law supporting the

[12] Defendants also cite *Abbasi* and *Wilkie v. Robbins*, 551 U.S. 537 (2007), on this point, but those cases merely mentioned the holdings of *Malesko* and/or *Minneci*. *See Abbasi*, 137 S. Ct. at 1858 (citing both); *Wilkie*, 551 U.S. at 550 (citing *Malesko*). Neither case held that state tort law foreclosed the use of *Bivens*; in fact, *Wilkie* specifically disclaimed such a holding, finding the result of the alternative-remedy inquiry inconclusive. 551 U.S. at 554.

notion that line officers are exempt from *Bivens* claims, which is unsurprising: *Bivens* itself was a case about "line officers." *Loumiet*, 948 F.3d at 377. Defendants plead that *Bivens* actions may deter them from performing their duties, but deterring misconduct by individual officers is the primary function of *Bivens*. *See Abbasi*, 137 S. Ct. at 1860; *Malesko*, 534 U.S. at 69-70. Defendants' fear that line officers will be overdeterred (or put in a "catch-22"), Line Ofcrs. MTD 27, is fully addressed by the availability of qualified immunity, which protects officers who (unlike Defendants here) act in the "hazy border between excessive and acceptable force." *Mullenix v. Luna*, 577 U.S. 7, 18 (2015) (cleaned up). If the structure of *Bivens* litigation is to be upended in the dramatic fashion Defendants urge—ruling out liability for the line-level officers who are the traditional *Bivens* defendants—that change must come from Congress or the Supreme Court.

Given the limitations Line Officer Defendants also invoke on suits against high-level officials, *see* Line Ofcrs. MTD 24-25, it seems that the real implication of their attempt to exempt line officers from *Bivens* is that *no one* is a *Bivens* proper defendant. But the Court has declined to overrule *Bivens*. *See Abbasi*, 137 S. Ct. at 1856-57. This Court should not accept Defendants' invitation to accomplish by necessary implication a result the Supreme Court has rejected directly.

Switching gears, Defendants attempt to borrow their co-defendant Barr's *high* rank to avoid accountability. *See* Line Ofcrs. MTD 21-27. That argument is misplaced even as to Defendant Barr himself, as Plaintiffs explain in their response to the Barr motion to dismiss, ECF 98, at 53-54. First, where a high-ranking official participates personally in a violation, *Bivens* liability can attach. *See Davis v. Passman*, 442 U.S. 228, 230, 248-49 (1979) (Member of Congress); *Dellums*, 566 F.2d at 173 n.1, 194-95 (Attorney General and Deputy Attorney General). Defendants' attempt to derogate Plaintiffs' suit as a "backdoor attempt to challenge . . . high-level decisions," Line Ofcrs. MTD 24, thus falls flat: Plaintiffs are not trying to do anything through the "backdoor,"

having sued Defendant Barr personally, and they do so on the precise basis permitted by *Bivens*—Defendant Barr's personal participation in the constitutional violations that caused Plaintiffs' injuries. Second, an official's rank can counsel hesitation where a suit "would call into question the formulation and implementation of a general policy," *Abbasi*, 137 S. Ct. at 1860-61—which this suit does not, as neither the Plaintiffs nor any of the Defendants suggests that the U.S. government has a policy of attacking peaceful demonstrators. This point distinguishes the main cases on which Defendants rely, as they involved challenges to government policies, not discrete actions. *See Mejia-Mejia*, 2019 WL 4707150, at *4-*5; *K.O.*, 468 F. Supp. 3d at 365-66.[13]

Finally, Line Officer Defendants raise the specter of invasive discovery against other, higher-ranking officials. Line Ofcrs. MTD 24-26. This argument is flawed for four distinct reasons. First, executive officials do not have blanket immunity from discovery; even the highest executive official—the President—cannot categorically shield himself from the duty to provide "every man's evidence." *United States v. Nixon*, 418 U.S. 683, 710 (1974); *accord Trump v. Vance*, 140 S. Ct. 2412, 2431 (2020). Second, the Court has noted that careful judicial supervision of the timing and scope of discovery can make litigation against high-ranking officials, even Presidents, manageable. *See Clinton v. Jones*, 520 U.S. 681, 691-92, 707 (1997); *accord Vance*, 140 S. Ct. at 2430-31; *Crawford-El v. Britton*, 523 U.S. 574, 598-600 (1998). Third, dismissing the *Bivens* claims is neither necessary nor sufficient to prevent discovery into anyone's motives. Plaintiffs' *Bivens* claims rely on First and Fourth Amendment theories that (unlike, say, retaliation) do *not* require investigation of anyone's motives. *See* Part II, above. What might require discovery into

[13] Defendants also cite *Lillemoe*, but that decision focused on the availability of alternative remedies and mentioned "high-level policy determinations" only as one example of the many types of decisions to which the *Bivens* action proposed there would have extended. *See* 344 F. Supp. 3d at 232.

Defendants motives are not the *Bivens* claims but Plaintiffs' distinct conspiracy claims—which are statutory and not subject to being defeated by any "special factors." Fourth, any applicable privileges would at most limit the scope of discovery, not require dismissal of entire claims.

Thus, Defendants' own low rank is no bar to *Bivens*, and their effort to hide behind the high rank of their co-defendants does not withstand scrutiny.

* * *

In sum, as Chief Justice Marshall recognized two centuries ago, it is the essence of the rule of law that rights be paired with remedies. *Marbury*, 5 U.S. at 163. Abdicating judicial responsibility for enforcing the Constitution here would leave unremedied a grave constitutional wrong that implicates both the core of *Bivens* and the core of our democracy—unchecked governmental violence unleashed on those exercising their First Amendment right "peaceably to assemble, and to petition the Government for a redress of grievances."

IV. Defendants Are Not Entitled To Qualified Immunity As To Plaintiffs' Claims Under 42 U.S.C. §§ 1985 & 1986 (Claims 5 & 6).

A § 1985(3) claim requires "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, … and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured ... or deprived of any right or privilege of a citizen of the United States." *Martin v. Malhoyt*, 830 F.2d 237, 258 (D.C. Cir. 1987) (citation omitted). Line Officer Defendants claim qualified immunity by disputing the presence of a conspiracy (the first element) and discriminatory intent (a component of the second element). They do not, however, dispute that Plaintiffs are protected by § 1985, that the rights violated are protected by § 1985, that Plaintiffs have alleged acts in furtherance of the conspiracy, or that Plaintiffs have alleged injury.

The only argument Line Officer Defendants make against Plaintiffs' § 1986 claim is that it fails if Plaintiffs' § 1985 claim fails. Line Ofcrs. MTD 60. Because Plaintiffs have stated a § 1985 claim, as explained below, Line Officer Defendants' argument to dismiss the § 1986 claim must be rejected, too.

A. Plaintiffs adequately pleaded a conspiracy that includes officers of the United States, the District of Columbia, and Arlington County.

A conspiracy requires "agreement between two or more persons." *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983); *see Barr v. Clinton*, 370 F.3d 1196, 1200 (D.C. Cir. 2004) (same conspiracy standard under § 1985(3) as civil conspiracy). Line Officer Defendants argue that the § 1985 claim fails (1) because Plaintiffs' allegations do not show an agreement and (2) because of the "intracorporate conspiracy" doctrine. Line Ofcrs. MTD 57, 59-60. In fact, Plaintiffs have adequately alleged both an agreement and an *inter*corporate conspiracy.

1. Plaintiffs adequately pleaded an "agreement between two or more persons."

Plaintiffs "need not allege … an express or formal agreement." *United States v. Comput. Scis. Corp.*, 53 F. Supp. 3d 104, 134 (D.D.C. 2014); *accord Lagayan v. Odeh*, 199 F. Supp. 3d 21, 30 (D.D.C. 2016). Instead, "courts have to infer an agreement from indirect evidence in most civil conspiracy cases." *Halberstam*, 705 F.2d at 486; *accord Fisher v. Shamburg*, 624 F.2d 156, 162 (10th Cir. 1980). Plaintiffs need only allege facts that allow an "infer[ence] from the circumstances that the [conspirators] had a 'meeting of the minds,'" *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-58 (1970), based on "[f]actors like the relationship between the parties' acts, the time and place of their execution, and the duration of the joint activity." *Halberstam*, 705 F.2d at 486.

Agreement can be shown through circumstantial evidence, such as "the joint appearance of defendants at transactions and negotiations in furtherance of the conspiracy; the relationship among codefendants; ... and other evidence suggesting unity of purpose or common design and

understanding' among conspirators to accomplish the objects of the conspiracy." *United States v. Wardell*, 591 F.3d 1279, 1287-88 (10th Cir. 2009) (cleaned up); *see also United States v. Wood*, 879 F.2d 927, 938 (D.C. Cir. 1989) (in criminal context, "[c]ircumstantial evidence, including inferences from a 'development and a collocation of circumstances,' suffices to prove participation in a conspiracy"). For instance, in *Lagayan*, this Court considered a § 1985 claim for human trafficking. 199 F. Supp. 3d at 24, 30-32. Like Line Officer Defendants, defendants there asserted that plaintiff had "failed to allege any particulars ... showing that there was an agreement." *Id.* at 30 (internal quotation marks omitted). The court rejected this argument, as a plaintiff is not required to allege "the existence of an event, conversation, or document" in which an agreement was reached. And even if such a requirement existed, the plaintiff there satisfied it because the court could infer the existence of a conspiracy from the mere fact that defendants had "coordinated Plaintiff's international travel to Defendants' home in the United States." *Id*. at 31. Here, likewise, there is ample circumstantial evidence that Defendants agreed to enter the conspiracy.

Even the barest description of the June 1 attack supports a reasonable inference "suggesting unity of purpose or common design and understanding among conspirators." *Wardell*, 591 F.3d at 1287-88 (cleaned up). Line Officer Defendants suggest that the allegations fail to identify any particular "events, conversations, or documents," reflecting an agreement. Line Ofcrs. MTD 57. But Plaintiffs have alleged that Defendant Adamchik "gave the immediate order for the law enforcement officers at the Square to attack the peaceably assembled protesters." TAC ¶ 20; *see also* TAC ¶¶ 82, 86, 87. In doing so, Adamchik necessarily communicated and coordinated with the other Defendants. The result, of course, was a coordinated charge and attack by the Arlington and federal Defendants, TAC ¶¶ 83, 88, 99, including Line Officer Defendants, TAC ¶ 97—which can be explained only by coordination among all the Defendants who acted together. Likewise,

Plaintiffs have alleged that the various Defendants communicated and "coordinated" with each other, TAC ¶¶ 45, 76, 99, 107; that the federal and Arlington Defendants had a "command center" from which the attack was directed, TAC ¶¶ 45, 76, 99, 107; that the District and the United States "regularly act[] in coordination" with each other, TAC ¶ 105; and that an MPD officer met with U.S. military officers in close proximity to and shortly prior to the attack, TAC ¶ 106. It is immaterial whether any *particular* Defendants interacted with each other, because members of a conspiracy do not all need to meet each other to be co-conspirators. *See United States v. Jenkins*, 928 F.2d 1175, 1178 (D.C. Cir. 1991). The coordinated nature of the attack is further supported by the fact that tear gas was deployed ahead of officers advancing on foot and the fact that federal, D.C., and Arlington officers used the same type of force against protesters throughout the incident. TAC ¶¶ 141-43, 151, 160-63, 170-74, 186-90, 193. The level of specificity that Line Officer Defendants demand from the complaint is simply not required in conspiracy cases. The complaint provides ample basis to infer the necessary agreement, and that is enough.

Independently, these Defendants' actions in attacking the crowd in concert with other officers is sufficient to show a conspiracy even without an explicit agreement, because the necessary agreement for a conspiracy can be made implicitly and in an instant. *United States v. Scott*, 979 F.3d 986 (2d Cir. 2020), affirmed convictions under § 1985's criminal analogue, 18 U.S.C. § 241. *See Griffin v. Breckenridge*, 403 U.S. 88, 98 (1971) (describing relationship between § 241 and § 1985(3)). In *Scott*, prison guards were charged under § 241 for a group beating of an inmate. They claimed that there was no conspiracy because "the assault was spontaneous" and "there was insufficient evidence of an agreement." 979 F.3d at 990. The Second Circuit rejected this position, noting that there is no requirement of "an extended period of meditation or a distinct verbal agreement"; rather, "proof the parties had a tacit understanding to engage in the offense" is

enough. *Id.* (citation and internal quotation marks omitted). Although one officer's "initial punch may have been spontaneous," the conspiracy could be established by evidence showing that "the other officers acted in concert and purposefully joined the assault." *Id*. Likewise, here, even if the various Defendants acted without any explicit agreement, their decision to act in a coordinated manner to attack the protesters is sufficient to establish a conspiracy.

2. Plaintiffs have alleged an *inter*corporate conspiracy, not an intracorporate one.

Defendants contend there was no "agreement between two or more persons" because of the "intracorporate conspiracy doctrine," under which there can be no conspiracy between a corporation and its own employees (or among its employees). But Plaintiffs have plausibly pleaded the existence of an *inter*corporate conspiracy between employees of the District of Columbia,[14] of Arlington County, and of the United States—three distinct "corporations." *E.g.*, TAC ¶¶ 3, 67, 76, 99; *see* Part IV.A.1. Line Officer Defendants assert qualified immunity on the ground that the applicability of the intracorporate conspiracy doctrine to § 1985(3) claims is not settled in this Circuit. Line Ofcrs. MTD 59-60. But that dispute is irrelevant here, because even assuming the doctrine does apply, Plaintiffs have alleged an *inter*corporate conspiracy as explained above.

B. Plaintiffs adequately pleaded discriminatory intent.

Plaintiffs have pleaded facts sufficient to establish that all Defendants, including Line Officer Defendants, participated in a discriminatory conspiracy. Under § 1985(3), discriminatory intent exists if the conspiracy was targeted at plaintiffs because of their membership in a protected group. For example, in *Griffin*, plaintiffs stated a claim where they alleged defendants conspired

[14] Although the President commands the D.C. National Guard, D.C. Code § 49-409, MPD reports to the independently-elected Mayor of the District of Columbia. D.C. Code § 5-101.03.

to "prevent [the] plaintiffs and other Negro-Americans ... from seeking the equal protection of the laws and from enjoying ... equal rights" because of their race. 403 U.S. at 103.[15]

Plaintiffs are Black Americans and civil rights activists. TAC ¶¶ 65, 67, 94, 128, 138, 167, 246, 248. Those who, like Plaintiffs, advocate equal rights for Black Americans, regardless of their own racial identity, are a protected class under 42 U.S.C. § 1985(3). *Hobson v. Wilson*, 737 F.2d 1, 21 (D.C. Cir. 1984) (holding that "*[a]t a minimum* ... section 1985(3) reaches conspiracies motivated by animus against Blacks and those who support them"), *partially abrogated on other grounds, Leatherman v. Tarrant Cty. Narcotics Intel. & Coord. Unit*, 507 U.S. 163 (1993).

Line Officer Defendants argue that Plaintiffs' claims fail for lack of an allegation that they shared President Trump's "animus" against Plaintiffs, Line Ofcrs. MTD 58-59, but it is the *conspiracy*, not each individual *conspirator*, that must be "motivated" by a "discriminatory purpose." *Lagayan v. Odeh*, 199 F. Supp. 3d 21, 31 (D.D.C. 2016) (concluding that a § 1985(3) claim requires proof "that the *conspiracy* was 'motivated by some class-based, invidiously discriminatory animus'" (emphasis added) (quoting *Martin*, 830 F.2d at 258)); *see also Hobson*, 737 F.2d at 14 (explaining that "the alleged *conspiracy* in *Griffin* was motivated by racial basis" (emphasis added)); *Bedford v. City of Hayward*, 2012 WL 4901434, at *14 (N.D. Cal. Oct. 15, 2012) (finding "no authority that Plaintiff must allege racial animus on behalf of each individual conspirator, rather than merely alleging 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action" (quoting *Griffin*, 403 U.S. at 102)). "The

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[15] *See also*, *e.g.*, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 272 (1993) (the conspiracy must have "selected or reaffirmed a particular course of action at least in part 'because of' ... its adverse effects upon an identifiable group"); *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743, 746 (10th Cir. 1980) ("In order to support a section 1985(3) claim, the plaintiff must be a member of a statutorily protected class, and the *actions taken by defendant must stem from plaintiff's membership in the class*." (emphasis added)).

conspirators must share the general conspiratorial objective, but they need not know all of the details of the plan … or possess the same motives .... [I]t simply must be shown that there was a single plan, the essential nature and general scope of which [were] known to each person who is to be held responsible for its consequences." *Hobson*, 737 F.2d at 51-52 (cleaned up).

Line Officer Defendants do not deny that Plaintiffs have amply alleged facts from which a discriminatory purpose on the part of President Trump can be inferred.[16] In the "days and hours leading up" to the attack in Lafayette Square, President Trump "repeatedly advocated the use of force against Black demonstrators and civil rights activists," TAC ¶ 53; he invoked violent and racist slogans from the civil rights era, TAC ¶ 54; and he called for violence against "the bad guys" (referring to civil rights protesters), TAC ¶ 56. On June 2, he praised the law enforcement attack: "Great job done by all. Overwhelming force. Domination," TAC ¶ 205. Tellingly, President Trump spoke quite differently about demonstrators not advocating for racial justice. He urged his own supporters to gather at the White House. TAC ¶ 64. He expressed support for heavily armed and predominantly white demonstrators who threatened lawmakers and stormed statehouses to protest coronavirus restrictions, encouraging them to "LIBERATE MICHIGAN!"; "LIBERATE MINNESOTA!"; and "LIBERATE VIRGINIA." TAC ¶ 63. As discussed above, *see* Part IV.A.1, Plaintiffs have adequately alleged that Line Officer Defendants joined this conspiracy, the object of which was President Trump's unlawful discriminatory purpose.[17]

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[16] Although Plaintiffs need not allege that each Defendant had animus, Line Officer Defendants implicitly admit that they shared the intent of the Executive Branch by arguing that they are part of the federal "corporation" for purposes of the intracorporate conspiracy doctrine. If the Executive Branch speaks with one voice, it is the President's.

[17] If the Court deems these allegations insufficient, it should grant leave to amend, as Plaintiffs have unearthed additional information since filing the last amended complaint that further buttresses the claim of discriminatory intent. Specifically, undersigned counsel have been in contact with a former White House staffer who has personal knowledge that other senior *(footnote continues)*

Finally, Defendants' argument that "*everyone* [in the park] was cleared" not just "Black people and their supporters," Line Ofcrs. MTD 59, is beside the point. What matters is the intent of the conspiracy, not whether the conspirators incidentally harmed others along the way. In *Griffin*, for example, white conspirators attacked a car driven by a nonparty, with a number of Black passengers, on the misimpression that the driver was a civil rights worker. 403 U.S. at 106. The Court held that the passengers stated valid § 1985(3) claims regardless of whether the nonparty driver was the intended target. *See id.* at 103. Just because Line Officer Defendants may have *also* violated the rights of other people in the vicinity does not mean they did not intentionally violate Plaintiffs' rights.

CONCLUSION

The Line Officer Defendants' motion to dismiss should be denied. Because of the number and complexity of the arguments raised in their motion and the motions to dismiss filed by the other defendants, Plaintiffs respectfully request oral argument on all of the motions to dismiss.

Administration officials were involved with planning the Lafayette Square attack; that there was a discussion of the need to "mow down" the protesters and "show" them who is in charge; and that White House officials made discriminatory comments in relation to the death of George Floyd and subsequent racial justice protests. Plaintiffs are not attempting to amend the complaint via briefing; because these allegations are not a part of the complaint, Plaintiffs do not contend that they should be a basis to determine whether to dismiss the complaint. However, they do counsel in favor in granting leave to amend *if* any claims *are* dismissed.

March 16, 2021

Respectfully submitted,

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