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INTRODUCTION

The public policy and political rhetoric of the last several decades has reflected a societal interest in efficient government and streamlined state action.[1] Partly as a result of such concerns, the Supreme Court developed the doctrine of qualified immunity.[2] Because constant litigation could significantly burden public officials, qualified immunity was developed to give lower-level public officials a line of defense against lawsuits stemming from their official actions.[3] Over time, this doctrine has evolved through judicial efforts to balance public efficiency with the right to private recompense.[4]

Qualified immunity is a recently developed product of judicial reasoning; freedom of expression, on the contrary, has been a foundational element of constitutional democracy in the United States. As legal and political authorities have routinely noted, the First Amendment's guarantee of free speech has been a treasured and revered cornerstone of America's public discourse.[5] Whereas courts have added a litany of exceptions and caveats to other constitutional guarantees,[6] the First Amendment's Free Speech Clause has remained sacrosanct and largely untouched.[7]

Complications arise, however, when public officials claim qualified immunity for acts that seemingly run contrary to constitutional guaran-

1. *See, e.g.*, Ronald Reagan, A Time for Choosing (Oct. 27, 1964), *available at* http://www.nationalcenter.org/ReaganChoosing1964.html; REPUBLICAN CONTRACT WITH AMERICA, http://www.house.gov/house/Contract/CONTRACT.html (last visited Mar. 5, 2011).

2. *See* Scheuer v. Rhodes, 416 U.S. 232, 241 (1974) ("[I]t is important to note, even at the outset, that one policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public."); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (noting that actions for damages against public officers involve social costs including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office"); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (warning that unfettered litigation against public officials "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties").

3. *Harlow*, 457 U.S. at 807 (emphasizing the importance of "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority" (quoting Butz v. Economou, 438 U.S. 478, 506 (1978))).

4. *See id.* at 813–14.

5. *See, e.g.*, Wilson Huhn, *Compelling Lessons in the First Amendment*, 19 CONST. COMMENT. 795, 798–809 (2002) (reviewing MICHAEL KENT CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000)).

6. *See, e.g.*, 68 AM. JUR. 2D *Searches and Seizures* § 49 (2010) (listing numerous exceptions to the Fourth Amendment's prohibition on search and seizure in absence of a warrant).

7. *See* David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1701–02 (1991) (tracing the developments in First Amendment interpretation).

tees.[8] In *Weise v. Casper*,[9] the Tenth Circuit Court of Appeals considered a unique factual scenario featuring a clash between First Amendment rights and executive volunteers' claims of qualified immunity.[10] Utilizing an abridged legal analysis, the *Weise* court held that executive officials could eject a citizen from a public speech solely on the basis of that citizen's prior expression on an issue of public concern.[11]

This Comment argues that the Tenth Circuit employed incomplete legal analyses in deciding the qualified immunity and viewpoint discrimination questions in *Weise*. As a result of this incomplete approach, the Tenth Circuit's decision raises troubling concerns for public accountability, active citizenship, and constitutional development. Part I examines the evolution of the qualified immunity standard and describes the modern test used to evaluate immunity claims by public officials. Part II analyzes federal law controlling free speech and viewpoint discrimination issues. Part III outlines the Tenth Circuit's decision in *Weise* and focuses on the majority's legal approach to the qualified immunity and viewpoint discrimination issues present in the dispute. Part IV argues that the *Weise* court used an incomplete approach in evaluating the defendants' qualified immunity claims, and employed a similarly incomplete approach in evaluating the plaintiffs' freedom of expression arguments. Ultimately, the Tenth Circuit issued a ruling with troubling implications for civil rights litigants, politically expressive citizens, and constitutional development.

I. THE QUALIFIED IMMUNITY STANDARD

A. The Origins of Qualified Immunity

A public official's immunity from suit is a concept that finds roots in English common law.[12] The King originally held absolute immunity because English society widely accepted that a citizen could not bring an action against the crown in a court licensed by the King.[13] Eventually, English law evolved to allow suits against the King by royal consent.[14] Absolute immunity for English judges was similarly a feature of English

8. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389–90 (1971); *see also Harlow*, 457 U.S. at 819.

9. 593 F.3d 1163 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 7.

10. *Id.* at 1165–66.

11. *Id.* at 1170.

12. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2–4 (1963); Adam L. Littman, *A Second Line of Defense for Public Officials Asserting Qualified Immunity: What "Extraordinary Circumstances" Prevent Officials from Knowing the Law Governing their Conduct?*, 41 SUFFOLK U. L. REV. 645, 648 (2008); Gilbert Sison, *A King No More: The Impact of the Pinochet Decision on the Doctrine of Head of State Immunity*, 78 WASH. U. L. Q. 1583, 1584–1588 (2000).

13. *See* Scheuer v. Rhodes, 416 U.S. 232, 240 (1974); Jaffe, *supra* note 12, at 2, 4.

14. *See* Jaffe, *supra* note 12, at 3 (noting that petitions of right requiring the King's consent allowed English citizens to seek relief against the Crown); *see also* Littman, *supra* note 12, at 648.

common law.[15] Finally—though it involved a long and protracted struggle—the English Bill of Rights of 1689 granted members of Parliament absolute immunity from criminal or civil action related to their official speech and actions.[16]

Such were the norms that dwelled within the minds of America's founding fathers. In the United States, absolute immunity for Congressmen and Senators has constitutional roots in the Speech or Debate Clause, which protects all members of Congress from official reprisal for their political acts.[17] American common law also recognizes absolute civil immunity for the President when the suit stems from official actions.[18] Similarly, common law has granted judges and prosecutors absolute immunity for actions taken in the discharge of their duties.[19]

Apart from the President, judges, and prosecutors, there are countless other public officials. Consequently, qualified immunity developed as a defense for these officials who could not claim the broad protections of absolute immunity.[20] Typically, this defense applies when a state or local official faces individual liability for a constitutional tort in a 42 U.S.C. § 1983 action, or when a federal official faces individual liability for a constitutional tort through a *Bivens* action.[21] Absolute and qualified immunity differ in important ways. While absolute immunity grants high-ranking officials complete immunity from any civil action involving their official duties,[22] qualified immunity shields other officials carrying out their duties only under certain circumstances.[23]

The Supreme Court's first discussion of qualified immunity came in *Pierson v. Ray*,[24] a case where civil rights protestors sued individual po-

15. *Scheuer*, 416 U.S. at 240 n.4 (describing the civil and criminal immunity for English judges for "abuse of his jurisdiction").

16. *Id.* at 240–41.

17. *See* U.S. CONST. art. I, § 6, cl. 1.

18. Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) ("[W]e hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts."); *see also* Clinton v. Jones, 520 U.S. 681, 705–06 (1997) (holding that private actions against the President are not precluded by the separation of powers doctrine, even while the President is still in office).

19. *See* Bradley v. Fisher, 80 U.S. 335, 350 (1871) (declaring that judges are held accountable through the possibility of legislative impeachment rather than the possibility of private legal action); *see also* Imbler v. Pachtman, 424 U.S. 409, 427–29 (1976) (holding that prosecutors are completely immune from common law tort and 42 U.S.C. § 1983 actions, and that criminal law is the appropriate remedy for prosecutorial misconduct).

20. *See* Littman, *supra* note 12, at 648–49.

21. 42 U.S.C. § 1983 (2006) (conferring a cause of action against state or local officials acting under color of state law who deprive a person of his or her constitutional rights); *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396–97 (1971) (granting an identical cause of action against federal officials who act under color of federal law and commit constitutional torts).

22. *See Nixon*, 457 U.S. at 749–52.

23. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (holding that public officials are entitled to qualified immunity only in circumstances where their conduct does not violate a clearly established constitutional right).

24. 386 U.S. 547 (1967).

lice officers in a § 1983 action.[25] At the time, the common law allowed a defense of good faith for law enforcement officers facing damages actions for torts.[26] The defense gave officers immunity from suit if they believed in good faith and with probable cause that their duty required the actions in question,[27] and in *Pierson* the Supreme Court extended this defense to public officials facing § 1983 damage actions.[28] Seven years after *Pierson*, the Court again confronted the qualified immunity issue in *Scheuer v. Rhodes*,[29] a case involving civil damages stemming from the actions of National Guard officers during the famous anti-war protests of 1970 at Kent State University.[30] In *Scheuer*, the Court referred to the affirmative defense outlined in *Pierson* as "qualified immunity" and explicitly added an objective element to the good-faith defense.[31] Describing the new standard, the Court stated that "[i]t is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."[32] By coupling an official's subjective good-faith belief with an objective requirement of reasonableness, the Supreme Court forged the elements of the modern qualified immunity standard.

B. The Modern Qualified Immunity Standard

The modern standard for the qualified immunity defense first appeared in *Harlow v. Fitzgerald*.[33] Featuring some of the same actors as the landmark executive immunity case, *Nixon v. Fitzgerald*,[34] *Harlow* involved a damages action against presidential aides.[35] The Court rejected the aides' argument of derivative absolute immunity and held that only qualified immunity applied to executive personnel.[36] Moreover, the

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25. *Id.* at 551–52 (1967). The plaintiffs in *Pierson* alleged that, while trying to desegregate a bus terminal, they were unconstitutionally arrested by three Mississippi police officers. *Id.* at 548–50.

26. *Id.* at 555 (citing RESTATEMENT (SECOND) OF TORTS § 121 (1965)).

27. *Pierson*, 386 U.S. at 555 (describing the defendants' claim that an arrest made in good faith should not make defendants liable under § 1983).

28. *Id.* at 557 ("We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983.").

29. 416 U.S. 232 (1974).

30. *Id.* at 234–35 (1974).

31. *Id.* at 247 ("These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.").

32. *Id.* at 247–48.

33. 457 U.S. 800, 813–17 (1982).

34. 457 U.S. 731 (1982).

35. *Harlow*, 457 U.S. at 802. Plaintiff Fitzgerald claimed that defendants conspired to terminate his employment in a manner that violated his constitutional and statutory rights. *Id.*

36. *Id.* at 810–11 ("Petitioners' argument is not without force. Ultimately, however, it sweeps too far. . . . The undifferentiated extension of absolute 'derivative' immunity to the President's aides therefore could not be reconciled with the 'functional' approach that has characterized the immunity decisions of this Court . . . .").

Court expressed concern over the subjective good-faith element of the qualified immunity defense; because many courts regarded a public official's subjective belief as a question of fact, it was therefore conceivable that many insubstantial claims could thwart early dismissal attempts and proceed to trial.[37] Consequently, the Court eliminated the subjective element of the qualified immunity defense and imposed a purely objective standard: "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[38]

Since *Harlow*, the Supreme Court has made notable structural alterations to the qualified immunity standard. *Saucier v. Katz*,[39] a Supreme Court decision addressing qualified immunity in the face of alleged Fourth Amendment violations, crafted a two-pronged test for determining qualified immunity using the elements identified in *Harlow*.[40] First, *Saucier* required that lower courts must examine whether the actions alleged by the plaintiff show an actual constitutional violation.[41] If a court found that a violation had occurred, only then could it consider the second prong of the standard: whether the right was clearly established at the time of the violation.[42] The Court recently modified the ordinal nature of this test in *Pearson v. Callahan*.[43] Acknowledging that the ordered nature of the *Saucier* procedure contradicted an interest in preserving judicial resources, the *Pearson* Court removed the sequential aspect of the qualified immunity standard and allowed courts to address the two prongs in the order of their choosing.[44] Since the *Pearson* decision, courts have thus been free to exercise one of two options: quickly dispose of "close call" cases by addressing the clearly established prong, or examine whether the alleged facts establish a constitutional tort by addressing the violation prong.

While an alleged violation is nearly always a matter of fact and circumstance, the "clearly established" prong presents a more muddled inquiry of law and reasonableness. The essential question, as stated by the Supreme Court, is whether a reasonable public official would have "fair

37. *Id.* at 815–16 (noting the procedural difficulties imposed by FED. R. CIV. P. 56 and a factual finding of good faith).

38. *Id.* at 818.

39. 533 U.S. 194 (2001).

40. *Id.* at 201.

41. *Id.* ("A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry.").

42. *Id.* ("[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established.").

43. 129 S. Ct. 808 (2009).

44. *Id.* at 818 ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

notice that her conduct was unlawful."[45] Other cases, both before and after *Pearson*, provide important considerations when considering the question of fair notice.

The most notable consideration in "clearly established" inquiries involves the idea of factual novelty. On one hand, the Court has stated that inquiries regarding whether a constitutional right was clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition."[46] However, the Court has also cautioned that qualified immunity inquiries cannot become an exercise in circumstantial repetition. In *United States v. Lanier*,[47] the Court addressed unique facts involving a state judge accused of sexually assaulting several litigants.[48] The appeals court overturned the ruling against the judge on the grounds that no controlling authority clearly established the rights of the plaintiffs.[49] Despite the novel facts of *Lanier*, the Court reversed the Sixth Circuit and stated that the establishment of a right did not require "fundamentally similar" factual precedent.[50] The Court formalized this concept in *Hope v. Pelzer*,[51] a case where Alabama prison officials handcuffed prisoners to outdoor "hitching posts" for hours at a time.[52] In finding that an Eighth Amendment right existed for the prisoners, the Court stated that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[53] Thus, *Lanier* and *Hope* stand for the idea that the existence of a right can be sufficiently clear even if the exact actions in question need not have been previously declared unlawful.[54]

Ultimately, all qualified immunity inquiries involving the clear establishment of a right must include two components: (1) an examination of whether a public official has "fair notice" that her conduct is unlawful,

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45. Brosseau v. Haugen, 543 U.S. 194, 198 (2004).

46. *Saucier*, 533 U.S. at 201.

47. 520 U.S. 259 (1997).

48. *Id.* at 261. Though *Lanier* involved a criminal action under 18 U.S.C. § 242 and not a civil action under 42 U.S.C. § 1983 or *Bivens*, the Supreme Court later used the *Lanier* analysis in formulating novelty jurisprudence for qualified immunity claims in § 1983 and *Bivens* actions. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 731 (2002).

49. *Lanier*, 520 U.S. at 263.

50. *Id.* at 269 ("Nor have our decisions demanded precedents that applied the right at issue to a factual situation that is 'fundamentally similar' at the level of specificity meant by the Sixth Circuit in using that phrase. To the contrary, we have upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.").

51. 536 U.S. 730 (2002).

52. *Id.* at 733–34, 741.

53. *Id.* at 741.

54. *See Hope*, 536 U.S. at 741; *Lanier*, 520 U.S. at 269; *see also* Anderson v. Creighton, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . .").

and (2) an examination of whether that conduct manifests itself in novel fact patterns. In balancing fair notice concerns with this novelty inquiry, the modern qualified immunity standard features a refined yet flexible analysis for complicated questions of law and fact.

II. VIEWPOINT DISCRIMINATION UNDER THE FIRST AMENDMENT

It would be fair to characterize the body of law surrounding qualified immunity as complex and nuanced. By contrast, the law concerning viewpoint discrimination under the First Amendment is a veritable model of clarity and consistency. The First Amendment guarantees, in relevant part, that state actors shall not abridge "freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[55] As evidenced by the country's speedy ratification of the Bill of Rights, the new Americans—suddenly free from restrictive British rule—saw these freedoms as essential to a functioning republic.[56] By the mid-Twentieth Century, the judicial system began consistently referring to these freedoms as the singular right to "freedom of expression."[57]

Numerous types of speech are protected under the First Amendment's guarantee of freedom of expression.[58] However, the right to express unpopular views on matters of social concern is perhaps the most well recognized of all First Amendment protections. Born of colonial discontent with England's practice of quashing American cries for political reform, the First Amendment's most invariant and revered feature has been the protection of political and social dissent.[59] In a case protecting the right of Jehovah's Witness students to remain silent during their public school's recitation of the Pledge of Allegiance, Justice Jackson eloquently stated, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or

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55. U.S. CONST. amend. I.

56. *See* Brian J. Buchanan, *About the First Amendment,* FIRST AMENDMENT CENTER (Mar. 7, 2011, 2:47:17 AM), http://www.firstamendmentcenter.org/about.aspx?item=about_firstamd.

57. *See* Poe v. Ullman, 367 U.S. 497, 544 (1961) (holding that freedom of expression is "derived from the explicit guarantees of the First Amendment against federal encroachment upon freedom of speech and belief"); *see also* Byrne v. Karalexis, 396 U.S. 976, 980 (1969) ("[T]he First Amendment did not build on existing law; it broke with tradition, set a new standard, and exalted freedom of expression."); Bridges v. California, 314 U.S. 252, 268 (1941) ("[T]he same standards of Freedom of expression as, under the First Amendment, are applicable to the federal government.").

58. *See* United States v. Stevens, 130 S. Ct. 1577, 1591–92 (2010) (declaring that the First Amendment protects unseemly depictions of animal cruelty from overbroad government censorship); Branzburg v. Hayes, 408 U.S. 665, 681–82 (1972) (holding that reporters are entitled to question public officials and seek the news under the First Amendment); Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (protecting speech that promoted violence as a means of accomplishing social reform).

59. *See* Yassky, *supra* note 7, at 1701–02 (arguing that the First Amendment's protections have evolved in response to various historical challenges, such as the Civil War and Great Depression).

force citizens to confess by word or act their faith therein."[60] Over thirty years ago, a circuit judge bluntly noted that a citizen's views on policy and politics is "entitled to the greatest constitutional protection."[61] As the Tenth Circuit recently stated, "[V]iewpoint discrimination is almost universally condemned and rarely passes constitutional scrutiny."[62]

Such statements accurately reflect the judiciary's approach to affirmatively protecting the right to express or disavow a certain point of view. Accordingly, the Supreme Court has shown little reluctance in ruling against state actors that retaliate on the basis of viewpoint. Direct retaliation for viewpoint expression is explicitly prohibited in nearly all circumstances. An example came in *Rankin v. McPherson*.[63] McPherson, a public employee, was dismissed for remarking during a political conversation that she hoped a future assassination attempt against President Reagan would be successful.[64] The Court characterized the employee's speech as a viewpoint on a matter of public concern and held that a citizen's interest in making such statements outweighed any State interest in controlling such remarks.[65] Even actions that merely deprive, rather than retaliate, are often impermissible. The Court held in *Good News Club v. Milford Central School*[66] that a public school's prohibition of a Christian children's club use of school facilities for its after-hours meetings was unconstitutional viewpoint discrimination.[67] Similarly, Congress cannot bar government-sponsored attorneys in welfare proceedings from taking cases that directly challenge certain welfare law provisions.[68]

A review of Supreme Court holdings reveals that viewpoint discrimination is only permissible in a handful of special circumstances. One example of such circumstances involves speech made by public employees during the discharge of their duties; these matters often result in litigation against a public employer, and courts have held that dismissal of a public employee is appropriate if the employee's speech is related to ordinary matters of duty rather than matters of public concern.[69] Another special circumstance involves the expression of public

60. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

61. Glasson v. City of Louisville, 518 F.2d 899, 904 (6th Cir. 1975).

62. Mesa v. White, 197 F.3d 1041, 1047 (10th Cir. 1999).

63. 483 U.S. 378 (1987).

64. *Id.* at 380–81.

65. *Id.* at 391–92. The Court made this determination because McPherson's statement did not disrupt the normal functioning of the office, and because the statement was not public and in no way discredited the office. In the absence of these mitigating circumstances, the Court ruled that a dismissal essentially based on political opinion cannot be maintained. *Id.*

66. 533 U.S. 98 (2001).

67. *Id.* at 120 ("When Milford denied the Good News Club access to the school's limited public forum on the ground that the Club was religious in nature, it discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause of the First Amendment.").

68. Legal Services Corp. v. Velazquez, 531 U.S. 533, 548 (2001) ("The Constitution does not permit the Government to confine litigants and their attorneys in this manner.").

69. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 154 (1983) (upholding the dismissal of a former deputy prosecutor for distributing an insubordinate questionnaire to fellow employees).

school students.[70] In such matters, the Court again recognized a narrow exception to the general prohibition on viewpoint discrimination, stating that the First Amendment does not require school officials to permit speech reasonably seen as promoting drug use.[71] Absent any special circumstances—such as employment-related or student speech—the First Amendment completely and thoroughly bars viewpoint discrimination of any kind.

III. *WEISE V. CASPER*

A. Facts and Procedural Posture

On March 21, 2005, President George W. Bush delivered a speech at a museum in Denver, Colorado.[72] Tickets were available to the public.[73] Plaintiffs Leslie Weise and Alex Young obtained tickets through a congressman's office and arrived at the event in a personal vehicle with a bumper sticker reading "No More Blood for Oil."[74] Upon approaching the venue, an executive volunteer who had noticed the bumper sticker stopped Weise and warned her against any sort of disruption.[75] The staff and volunteers at the event allowed Weise and Young to enter, but then conferred to discuss a policy set by a White House official that prohibited the presence of political dissenters at Presidential events.[76] After conferring, one of the defendants then ejected Weise and Young from the event.[77] The plaintiffs were not permitted to re-enter the museum, and the executive staff later confirmed that the plaintiffs were ejected due to their bumper sticker.[78] Neither plaintiff disrupted the event at any time, and both claimed that they never had an intention to do so.[79]

Weise and Young brought a *Bivens* action against each of the executive staff volunteers involved in their dismissal from the President's

70. *See* Pleasant Grove City v. Summum, 129 S. Ct. 1125, 1132 (2009) (noting that government entities can impose reasonable time, place, and manner restrictions on public speech).

71. *See* Morse v. Frederick, 551 U.S. 393, 397, 409–10 (2007) (holding that a principal's confiscation of a student's banner reading "BONG HiTS 4 JESUS" was permissible given the time and setting of a school function).

72. Weise v. Casper, 593 F.3d 1163, 1165 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 7.

73. *Id.* The procedure for obtaining tickets involved claiming the tickets through a U.S. Representative's office by producing identification and signing one's name onto a ticket list. *Id.*

74. *Id.*

75. *Id.* ("[Defendant] Casper told [Plaintiff] Weise that 'she had been ID'd' . . . and 'that if she had any ill intentions' or 'tried any funny stuff that [she] would be arrested, but that he was going to let [her] in.'") (fourth and fifth alterations in original) (internal quotation marks omitted).

76. *Id.* ("Sometime before the President's speech, the White House Advance Office established a policy of excluding those who disagree with the President from the President's official public appearances.").

77. *Id.*

78. *Id.*

79. *Id.* According to the record, Young would have asked President Bush a question "if given the opportunity." *Id.* at 1165–66.

speech.[80] All defendants named in the action asserted the defense of qualified immunity.[81] In the first series of proceedings, the United States District Court for the District of Colorado granted qualified immunity to the defendants.[82] Plaintiffs made an interlocutory appeal to the Tenth Circuit on the qualified immunity issue, and the appellate court dismissed the appeal due to insufficient facts regarding the defendants' statuses as executive branch officials.[83] Upon remand and after further discovery, the district court found that all defendants named in the plaintiffs' complaint were either executive staff members or volunteers "acting under close government supervision."[84] Based on this finding, the court granted the defendants' motion to dismiss on grounds of qualified immunity, and the plaintiffs appealed the dismissal to the Tenth Circuit.[85]

B. Majority Opinion

A three-judge panel of the Tenth Circuit Court of Appeals reviewed the district court's grant of qualified immunity *de novo*.[86] The majority, in an opinion authored by Judge Kelly, upheld the district court's ruling and declared that the defendants were entitled to the protection of qualified immunity.[87]

The court identified the two-part qualified immunity test as controlling in the matter.[88] Pursuant to the elective approach outlined in *Pearson*, the majority chose to begin its analysis by addressing the "clearly established" prong of the qualified immunity test.[89] At the outset, the court declared that a clearly established right required a "Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains."[90] The court also noted that, per the Supreme Court's reasoning in *Hope*, the specific actions at issue in a case need not have been

80. *Id.* at 1165; *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (establishing a cause of action against federal officials who, acting under color of federal law, commit a constitutional tort).

81. *Weise*, 593 F.3d at 1166.

82. *Id.*

83. *Id.*

84. *See id.* As a result of the district court's enhanced inquiry, the record in the instant case characterized the defendants as executive actors carrying out executive instructive policies. *Id.* at 1165.

85. *Id.* at 1166.

86. *Id.* at 1165–66.

87. *Id.* at 1165, 1170.

88. *Id.* at 1166–67; *see also* Saucier v. Katz, 533 U.S. 194, 201 (2001) (discussing the "clearly established" and "violation" prongs of the qualified immunity test first articulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).

89. *Weise*, 593 F.3d at 1166; *see also* Pearson v. Callahan, 129 S. Ct. 808, 818 (2009) ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

90. *Weise*, 593 F.3d at 1167 (quoting Cortez v. McCauley, 478 F.3d 1108, 1114–15 (10th Cir. 2007) (en banc)) (internal quotation marks omitted).

previously held unlawful by controlling precedent.[91] However, "in the light of pre-existing law the unlawfulness must be apparent."[92]

The majority then shifted its analysis toward the question of apparent unlawfulness. With little equivocation, the court stated that broad propositions of law alone cannot defeat a claim of qualified immunity; only in exceptional circumstances will such propositions suffice.[93] While the court acknowledged that the plaintiffs were correct in their argument that the government usually cannot discriminate on the basis of viewpoint,[94] its opinion made clear that a more precise inquiry was appropriate. Instead of focusing on the broader context of the First Amendment, the court addressed the narrower question of whether a reasonable public official would know that ejecting the plaintiffs on the basis of their bumper sticker—or, previous expression—was unlawful.[95]

The court concluded that no First Amendment doctrine (1) prohibited the government from excluding the plaintiffs from an official speech open to the public and (2) protected the plaintiffs' presence at the President's speech.[96] Because the speech itself—the plaintiff's bumper sticker—occurred outside the event, the majority found that the plaintiffs were not speakers for the purposes of a First Amendment inquiry.[97] Though acknowledging that a bumper sticker is a protected form of expression, the court held that the plaintiff's past expression was legally unrelated to the plaintiff's actual ejection.[98] The court explored several cases involving the ejection of attendees from Presidential events, but deemed that none of the cases were instructive on the issue of an attendee's previously expressed viewpoint.[99] Because no authority gave the Tenth Circuit direct guidance in considering exclusion based on prior expression, the court concluded that the plaintiffs' attendance was not a clearly established constitutional right.[100] Therefore, the majority granted

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91. *Weise*, 593 F.3d at 1167; *see also* Hope v. Pelzer, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.").

92. *Weise*, 593 F.3d at 1167 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

93. *Id.* ("[E]xcept in the most obvious cases, broad, general propositions of law are insufficient to suggest clearly established law.").

94. *Id.*

95. *Id.* at 1168 ("Plaintiffs simply have not identified any First Amendment doctrine that prohibits the government from excluding them from an official speech on private property . . . .").

96. *Id.* at 1168–69.

97. *Id.* ("At the event itself, Plaintiffs were 'not speakers at all,' as their counsel conceded at oral argument, but rather attendees.").

98. *Id.* The majority stated that, while some precedential authority speaks to the issue of political dissenters being excluded from Presidential events, the critical distinction in the instant case is that Weise and Young did not attempt to express themselves in a public forum. *Id.* at 1169–70. Rather, Weise and Young were excluded on the basis of past expression outside of the public forum in question. *Id.*

99. *Id.* at 1169–70.

100. *Id.* at 1170 (noting that, because the cases cited by Weise and Young dealt with expression in the public forum rather than previously expressed viewpoint, these cases could not constitute clearly established law).

qualified immunity to the executive volunteers and dismissed the plaintiffs' claims.[101]

C. Dissenting Opinion

Judge Holloway dissented from the majority's finding of qualified immunity.[102] In a sharply worded opinion, the judge took issue with the majority's reasoning on both qualified immunity and First Amendment grounds.[103]

First, Judge Holloway's dissent noted that the plaintiffs' bumper sticker "expressed an opinion on a matter of great public concern."[104] In the context of First Amendment precedent, the dissent thus saw this as speech entitled to the maximum level of constitutional protection.[105] As Judge Holloway noted, discrimination between those supporting government policies and those who do not is flatly impermissible.[106] Furthermore, expression on matters of public concern is shielded from official reprisal of any kind.[107]

Judge Holloway's finding of protected expression strongly influenced the remainder of his analysis. Because First Amendment precedent weighed strongly in favor of the plaintiffs' right to express their opinion on a matter of public concern, the dissent argued that the plaintiffs had a "clearly established" constitutional right under the applicable prong of the qualified immunity test.[108] Moreover, the dissent also noted that the Supreme Court's warnings of novelty in *Hope v. Pelzer* made it unnecessary for the plaintiffs to present factually analogous precedent; rather, general statements of the law that apply in obvious ways can fulfill the "clearly established" requirement.[109]

In addressing the second prong of whether a violation actually occurred, Judge Holloway stated that Casper and the other executive volunteers ran directly afoul of the First Amendment.[110] The dissent concluded that the ejection clearly violated the plaintiffs' rights.[111] Weise and Young gave no indication of trouble and made no attempt to disrupt the

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101. *Id.*
102. *Id.* (Holloway, J., dissenting).
103. *Id.* at 1171–72.
104. *Id.* at 1170.
105. *Id.* at 1171 (citing Glasson v. City of Louisville, 518 F.2d 899, 904 (6th Cir. 1975)).
106. *Weise*, 593 F.3d at 1175 (citing *Glasson*, 518 F.2d at 912).
107. *See Weise*, 593 F.3d at 1174–75 (citing Hartman v. Moore, 547 U.S. 250, 256 (2006)).
108. *Weise*, 593 F.3d at 1171 ("I would hold that the rights so violated were clearly established because of the fundamental importance of the right of free speech on topics of public concern . . . .").
109. *Id.* at 1177 (citing Hope v. Pelzer, 536 U.S. 730, 739, 741 (2002)).
110. *Weise*, 593 F.3d at 1171 ("[N]o reasonable officer could have believed that it was permissible under the Constitution to humiliate these Plaintiffs solely because one of them had legitimately exercised her right of free speech at another time and place.").
111. *Id.* at 1172 ("Defendants violated Plaintiffs' rights on a pretext so flimsy that the violation was obvious.").

President's speech.[112] Furthermore, Judge Holloway argued that the plaintiffs were not speakers at the public event, so the defendants' argument—that the President has a right to control his own message—is inapplicable in this instance.[113] Rather, Judge Holloway concluded that the plaintiffs were ejected solely on the basis of Weise's protected expression; therefore, such an ejection, therefore, contrasted starkly with any reasonable application of the First Amendment.[114] Judge Holloway wrote:

> It is simply astounding, that any member of the executive branch could have believed that our Constitution justified this egregious violation of Plaintiff's rights. "*The right of an American citizen to criticize public officials and policies and to advocate peacefully ideas for change is the central meaning of the First Amendment.*"[115]

IV. *WEISE V. CASPER*: A CRITICAL ANALYSIS

In deciding *Weise v. Casper*, the Tenth Circuit made two questionable jurisprudential decisions. First, when considered in light of the novelty concerns in *Hope v. Pelzer*, the court took an incomplete approach to the "clearly established" prong of qualified immunity. Second, the court also took an incomplete approach to the issue of viewpoint discrimination in the context of First Amendment precedent. The Tenth Circuit's incomplete approach to these legal questions ultimately led to an incorrect decision in *Weise v. Casper*. The court set qualified immunity precedent that imposed a higher burden on civil rights plaintiffs. Moreover, the court missed an opportunity to construe the First Amendment in favor of active citizens, and instead offered a precedent that offers increased protections for the questionable actions of government officials. Consequently, the *Weise* decision makes the Tenth Circuit a potential outlier and raises concerns of muted citizenship in light of expanded governmental discretion.

A. An Incomplete Qualified Immunity Analysis

As detailed above, qualified immunity inquiries involve nuanced questions of law and fact. Courts considering a defense of qualified immunity must evaluate the facts in light of two criteria: whether a right was clearly established, and whether a violation of that right occurred.[116] In light of the facts, courts must decide which criterion should be ad-

112. *Id.* at 1171.
113. *Id.* at 1175–76.
114. *Id.* at 1171.
115. *Id.* (quoting New York Times v. Sullivan, 376 U.S. 254, 273 (1964)) (internal quotation marks omitted).
116. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)).

dressed first.[117] When considering facts related to clearly established rights, courts must also balance concerns of precedential notice with factual novelty.[118]

Following *Harlow* and *Pearson*, the majority in *Weise* employed the two-pronged qualified immunity test and elected to first address the issue of a clearly established right.[119] Relying on precedent, the court noted that a clearly established right exists when the law would put "a reasonable official on notice that his conduct was unlawful."[120] The remainder of the "clearly established" analysis focused on the dispute's factual eccentricities in light of precedential authority. The majority stated that no First Amendment doctrine prohibited executive officials from excluding the plaintiffs from a speech on private property.[121] They further held that no authority spoke to the specific issue of ejection based on non-contemporaneous expression.[122] While the plaintiffs did offer factually similar cases upholding the right of expression at public forums, the court held that these cases were distinguishable because each involved speech within the actual forum. Based on this lack of analogous precedent, the majority concluded that "no specific authority instructs this court (let alone a reasonable public official) how to treat the ejection of a silent attendee from an official speech based on the attendee's protected expression outside the speech area."[123]

While accurate in its conclusions on precedent, the court's full analysis is incomplete because it neglects the novelty considerations outlined by the Supreme Court in *Lanier* and *Hope*. As the Court reasoned in *Lanier*, general statements of law are capable of giving public officials fair warning of unlawful action.[124] The Court then formalized this idea in *Hope* by stating that unlawful conduct can be apparent "even in novel factual circumstances."[125] The *Weise* court briefly noted these concerns when describing the qualified immunity inquiry.[126] However, the court never considered the idea of novelty in the factual context of *Weise*. Af-

117. *See* Pearson v. Callahan, 129 S. Ct. 808, 815 (2009) (referencing Groh v. Ramirez, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)).

118. *See* Hope v. Pelzer, 536 U.S. 730, 753–54 (2002).

119. *See* Weise v. Casper, 593 F.3d 1163, 1166–67 (2010), *cert. denied*, 131 S. Ct. 7.

120. *Id.* at 1167–68 (citing Brousseau v. Haugen, 543 U.S. 194, 198–199 (2004) (per curiam)).

121. *Weise*, 593 F.3d at 1168 ("Plaintiffs simply have not identified any First Amendment doctrine that prohibits the government from excluding them from an official speech on private property on the basis of their viewpoint.").

122. *Id.* at 1169–70 (discussing federal cases that upheld expressive activity in public forums absent actual disruptive activity).

123. *Id.* at 1170.

124. United States v. Lanier, 520 U.S. 259, 271 (1997) ("[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful . . . .'" (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987))).

125. Hope v. Pelzer, 536 U.S. 730, 741 (2002).

126. *See Weise*, 593 F.3d at 1169 (noting the controlling concerns of novelty as expressed in *Anderson*, 483 U.S. at 640, and *Hope*, 536 U.S. at 741).

ter concluding that no authority spoke to the facts of the case, the court ruled in favor of the defendants and never examined whether the plaintiffs' ejection from a public speech by the President constituted novel factual circumstances.[127]

This incomplete inquiry ultimately led to an incorrect result on the qualified immunity issue. By failing to examine the novelty question, the *Weise* court overlooked the possibility that First Amendment precedent gave Casper and other volunteers notice as to the unlawfulness of their actions. As the court correctly concluded, no precedent fully encapsulates the factual circumstances of *Weise*; however, the court's analysis never progressed to considerations of novelty. A reasonable observer would likely conclude that absence of fully analogous precedent is itself a strong indicator of novelty. Additionally, the unique facts of Weise and Young's ejection also signal that novelty should be a relevant consideration. However, the majority did not consider whether *Weise* implicates the novelty concerns of *Lanier* and *Hope*. In failing to address this issue, the court employed an incomplete approach to the qualified immunity issue: the court enforced the reasonableness requirement protecting public officials, yet omitted an analysis of the novelty considerations that protect plaintiffs pleading unique factual scenarios. Consequently, the court dismissed the plaintiff's legitimate argument of novelty and issued a ruling that lacks the foundation of a complete qualified immunity analysis.

B. An Incomplete First Amendment Analysis

The First Amendment flatly prohibits government discrimination on the basis of viewpoint.[128] Political opinion is particularly shielded from retaliatory state action,[129] and the body of law surrounding this idea is clear, consistent, and robust.[130] As Judge Holloway accurately remarked in his dissenting opinion in *Weise*, "The prohibition against viewpoint discrimination is unquestionably well established."[131]

The majority in *Weise* acknowledges that viewpoint discrimination is generally prohibited.[132] However, the majority did little else to examine the plaintiffs' claim as a broad question of viewpoint discrimination, even going so far as to say that a general discussion of viewpoint dis-

127. *See Weise*, 593 F.3d at 1168–70.

128. *See, e.g.*, Perry v. Sinderman, 408 U.S. 593, 598 (1972); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

129. *See* Glasson v. City of Louisville, 518 F.2d 899, 904 (1975) ("The right of an American citizen to criticize public officials and policies and to advocate peacefully ideas for change is 'the central meaning of the First Amendment.'" (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273 (1964))); *see also id.* at 912 ("A more invidious classification than that between persons who support government officials and their policies and those who are critical of them is difficult to imagine.").

130. *See supra* Part II.

131. *See Weise*, 593 F.3d at 1177 (10th Cir. 2010) (Holloway, J., dissenting).

132. *Id.* at 1167 (majority opinion) ("At the most general level, Plaintiffs are correct that the government usually cannot discriminate against a speaker based upon that speaker's viewpoint.").

crimination was unwarranted.[133] Instead, the court examined the narrow question of whether the plaintiffs' attendance at a president's public speech was protected from retaliation based on prior speech.[134] The majority found no instructive authority on the issue.[135] Ultimately, the court ruled in favor of the defendants without discussing the ejection in terms of discrimination on the basis of political viewpoint.[136]

As with the district court's qualified immunity analysis, the Tenth Circuit's analysis of the viewpoint discrimination issue was incomplete. In this instance, the incompleteness led to an unsound decision on the First Amendment issues in *Weise*. First Amendment jurisprudence, particularly in the context of viewpoint discrimination, is clear in its prohibition of government reprisal against dissenting citizens. Weise's bumper sticker expressed a dissenting opinion with respect to American foreign policy. As the defendants admitted, the plaintiffs were ejected solely on the basis of Weise's bumper sticker; there was no indication of present or future disruptive activity on the part of either plaintiff.[137] Moreover, the decision to remove the plaintiffs from the museum was made in conjunction with an executive policy designed to bar attendance by political dissenters.[138] Given the circumstances, this ejection can only be described as a retaliatory action against those who held a viewpoint contrary to that of the executive branch. In light of the strong body of law that prohibits such retaliation, obvious problems with the Tenth Circuit's ruling arise. Such a narrow holding that focuses on the mere time an opinion is expressed forsakes the larger demands of the First Amendment. By employing this incomplete approach, the court incorrectly analyzed the case's freedom of expression issues and consequently dismissed a meritorious civil rights claim.

C. Effects of the Tenth Circuit's Ruling

On October 12, 2010, the Supreme Court denied Weise and Young's petition for certiorari.[139] The *Weise* case would likely have produced an interesting result at the Supreme Court, especially given the Roberts Court's expansive interpretation of the First Amendment.[140] The

133. *Id.* at 1169 ("[The] discussion of impermissible viewpoint discrimination does not amount to clearly established law that provides guidance in these circumstances.").

134. *Id.*

135. *Id.* at 1169–70.

136. *Id.* at 1170.

137. *Id.* at 1165 (noting that the Secret Service told Weise and Young that the bumper sticker prompted their ejection and that Mr. Young would only have spoken at the event if given the opportunity to ask the President a question).

138. *Id.*

139. Weise v. Casper, 131 S. Ct. 7, 7–8 (2010) (Ginsburg, J., dissenting from denial of certiorari).

140. *See, e.g.*, United States v. Stevens, 130 S. Ct. 1577, 1588 (2010) (holding that a statutory ban of animal cruelty videos is overly broad under the First Amendment); Citizens United v. FEC 130 S. Ct. 876, 913 (2010) (holding that the First Amendment bars statutory limits on corporate

fact remains, however, that the Tenth Circuit's decision in *Weise* is realistically the final word on the matter. As such, the decision will leave a major legacy for legal actors in the Tenth Circuit. By employing a narrow approach to the issues in *Weise*, the majority's decision represents a shift in Circuit jurisprudence with respect to qualified immunity and viewpoint discrimination questions. Although the true depth of this shift remain unclear, some conclusions still present themselves: if given the weight of controlling precedent, *Weise* will substantially affect the fortunes of future civil rights litigants, chill the mechanisms of an active citizenry, and stunt the growth of new Constitutional norms.

1. A Shift in Circuit Law

As discussed above, the *Weise* court approached the questions of qualified immunity and viewpoint discrimination in an incomplete manner.[141] If applied to future litigants, this incomplete approach will have a powerful effect on claims of qualified immunity and First Amendment rights within the Tenth Circuit.

First, litigants seeking the enforcement of civil rights against state or federal officials may find that defeating a claim of qualified immunity requires a higher reliance on factual precedent than prior to *Weise*. This heightened burden results from the Tenth Circuit's strict comparison of Weise and Young's claim to previous qualified immunity cases. This stringent analysis represents a genuine departure from the typical consideration of novelty concerns. It is reasonable to see the novelty factor as a balancing component of qualified immunity law rather than a narrow and inconsequential exception.[142] However, the Tenth Circuit's approach in *Weise* treats the idea of novel circumstances with token mention rather than careful balancing. As a result, the court imposes the tremendous burden on Weise and Young to find precedent establishing the right to be present at a public Presidential speech regardless of previously expressed political viewpoint.[143]

If the incomplete qualified immunity approach in *Weise* becomes controlling authority in the Tenth Circuit, future civil rights litigants in the Tenth Circuit will now shoulder the burden of finding factually identical precedent. Courts within the Circuit will, by default, be more per-

electioneering expenditures); *see generally* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1250–73 (2010).

141. *See supra* Part IV.

142. *See* 15 AM. JUR. 2D *Civil Rights* § 111 (2010) (including novel factual circumstances as a preliminary rather than secondary inquiry in qualified immunity cases); Jacob Heller, *Abominable Acts*, 34 VT. L. REV. 311, 316–337 (2009) (arguing for reform of the "clearly established" test because knowledge of wrongfulness can be presumed even in novel circumstances); Paul W. Hughes, *Not a Failed Experiment: Wilson-Saucier Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 418–29 (2009) (urging the re-implementation of a subjective qualified immunity inquiry, in part because courts are now less likely to find constitutional violations unless the factual scenario has been clearly established).

143. *Weise*, 593 F.3d at 1169–70.

suaded by factual circumstance rather than Constitutional claim. Consequently, *Bivens* and § 1983 plaintiffs will find that their fortunes are increasingly tied to whether the facts of their claim have been previously litigated. On the other hand, defendants asserting qualified immunity will have the stringent novelty analysis of the *Weise* court as an extra arrow in their litigious quiver.

The second circuit-wide effect of the *Weise* decision relates to the now-diminished protections for expressive citizens from government reprisal. The court's narrow reading of the facts obscured the reality of retaliatory action by government officials on the basis of political viewpoint.[144] Because Weise's expressive activity was not within the confines of the Presidential event, the majority held that it was not protected speech and thus not subject to immediate protection from reprisal.[145] Should this minutiae-driven approach become the circuit norm, it would redraw the traditional battle lines of viewpoint discrimination jurisprudence; the flat prohibition on government reprisal for political expression may become a malleable concept in the Tenth Circuit. What Justice Jackson once called a "fixed star in our constitutional constellation"[146] would become more akin to a traveling comet, drifting in and out of relevance depending on present circumstances.

If claims of viewpoint discrimination become a more fact-specific inquiry, parties to future disputes will encounter altered legal terrain. Public officials who exclude or deprive on the basis of viewpoint will receive greater protections, so long as their actions do not exactly mirror the previous actions of officials who were denied qualified immunity. Where defendants can identify a factual peculiarity involving contemporaneity, proximity, or manner, their actions are much less likely to be considered retaliatory. Conversely, plaintiffs claiming viewpoint discrimination must again plead their case on the basis of factual similarity. If the expressive activity in question presents unique questions of circumstance, future plaintiffs will face an uphill battle in convincing a Tenth Circuit court that their expression should be shielded from governmental retaliation.

2. Cause for Concern

A shift in circuit approach is not in itself a reason for alarm. The *Weise* decision, however, should give pause to practitioners and scholars alike. When courts apply incomplete legal approaches and neglect a complete legal analysis, there is a high risk of contravening well-established legal and societal norms. Judicial tunnel vision, therefore, can carry unfortunate consequences. In *Weise*, the Tenth Circuit falls prey to

144. *See supra* Part IV.B.
145. *Weise*, 593 F.3d at 1168–70.
146. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

this hazard. The court's incomplete qualified immunity inquiry raises troubling issues of accountability for public officials. By narrowing its First Amendment analysis, the court also eroded judicial protection for active citizenship. Additionally, both of these narrow approaches stymie the development of civil rights within the Tenth Circuit. Ultimately, the *Weise* decision represents a missed opportunity for the court to properly balance legal considerations and move the circuit in a progressive direction on civil rights matters.

First, the qualified immunity approach of the court leads to a troubling situation where public officials can erect an insurmountable wall against a plaintiff's civil rights claim. While the doctrine of qualified immunity exists to protect reasonable public officials from frivolous claims,[147] the defense is not meant to serve as an impenetrable shield against all civil rights claims. If plaintiffs are required to find factually identical precedent, however, qualified immunity remains qualified in name only. The main purpose of *Bivens* and § 1983 claims is to remedy a violation of a plaintiff's civil rights at the hands of state or federal officials.[148] Giving these officials a virtually impenetrable defense does little to serve the purpose of the claim. The absence of meaningful novelty analysis in *Weise*, if used as a template for future cases, gives public officials higher levels of protection by imposing a higher burden of factual persuasion on civil rights plaintiffs; only factual scenarios that have been previously litigated stand a realistic chance of succeeding in court. Consequently, *Bivens* and § 1983 actions become empty remedies for the victims of constitutional torts.

The *Weise* decision is also troubling because it chills the mechanisms of an active citizenry. The majority departed from First Amendment precedent and engaged in a fact-specific analysis that never identified Weise's bumper sticker as expressive of a protected viewpoint.[149] The consequences of this narrow approach are notable. The right to express dissenting viewpoints is central to the purpose and meaning of the First Amendment.[150] In practice, this right assures that citizens are able to speak out on matters of public concern without fear of government repri-

147. *See* Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974) ("It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."); Littman, *supra* note 12, at 648–49 ("The qualified immunity defense balances the public's interest in effectively vindicating constitutional guarantees with the state's equally strong countervailing interest in protecting officials from the threat of liability when performing official duties.").

148. *See supra* note 21.

149. *Weise*, 593 F.3d at 1168–70.

150. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273–74 (1964); Glasson v. City of Louisville, 518 F.2d 899, 904 (6th Cir. 1975); Buchanan, *supra* note 56.

sal.[151] If the incomplete First Amendment inquiry in *Weise* becomes the circuit norm, political dissent becomes a more loosely protected form of expression. Unless the dissenting expression is clearly made at the time of the alleged retaliatory acts, or unless the expression is made in a traditional manner, plaintiffs will have greater difficulties in proving impermissible viewpoint discrimination. Essentially, this creates a form of second-class citizenship for citizens whose beliefs run contrary to orthodox political thought. These citizens will find the judiciary less able to protect their expression from retaliatory state action, and government officials will in turn have wider latitude to discriminate against those with dissenting beliefs.

Last, there are concerns in the area of legal development. If the Tenth Circuit employs narrow approaches to questions of qualified immunity and viewpoint discrimination, it will be more difficult for new Constitutional rules to emerge. When the novelty factor of *Lanier* and *Hope* is largely bypassed, qualified immunity becomes the default ruling for novel factual situations. If unique facts of time and manner control viewpoint discrimination inquiries, only the most obvious situations of expression and retaliation will warrant constitutional protection. Such circumstances effectively halt the development of legal precedent—only previously litigated disputes involving qualified immunity or viewpoint discrimination will be controlling in the future. Essentially, this means that the constitutional articulation of new rights is suppressed. If every nuance of qualified immunity or viewpoint discrimination law had been explored, this suppression would scarcely be cause for worry. However, the idea that all possible scenarios or substantive rights have been explored in any area of the law is fundamentally unsound. Justice O'Connor, writing for the plurality in *Teague v. Lane*[152] stated that it was unlikely that new due process rights would emerge for criminal defendants.[153] The development of criminal procedure has proven this statement false.[154] In situations of qualified immunity and viewpoint discrimination, it would be similarly unwise to assume that new circumstances warranting a denial of qualified immunity or First Amendment protection will not present themselves. The *Weise* decision, however, is concerning because it precludes new developments in the law and thereby runs contrary to the idea of common law adjudication within the Tenth Circuit.

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151. *See* Yassky, *supra* note 7, at 1710–13 (noting that, while originally crafted to guarantee states' independence, the First Amendment evolved into a source of personal rights following the national controversy over the Alien and Sedition Acts of 1797 and 1798).

152. 489 U.S. 288 (1989).

153. *Id.* at 313.

154. *See, e.g.*, Simmons v. South Carolina, 512 U.S. 154, 161–162 (1994) (finding post-*Teague* that a capital defendant's due process rights were violated when a jury considering the death penalty was not instructed that life imprisonment carried no possibility of parole); *see generally* Linda Meyer, *"Nothing We Say Matters": Teague and New Rules*, 61 U. CHI. L. REV. 423, 459–92 (1994) (arguing that the logic of *Teague* was flawed because new due process rights are inevitable).

CONCLUSION

Weise v. Casper is a case that will affect Tenth Circuit jurisprudence in many ways. Unfortunately, the decision's effects are cause for concern rather than celebration. In foregoing a thorough novelty analysis, the majority diminished the precedential value of *Lanier* and *Hope* within the Circuit. Also, the *Weise* court narrowed its viewpoint discrimination analysis by focusing exclusively on facts of time and manner. If the reasoning in *Weise* is applied in future cases, the effect of these narrow approaches is three-fold. First, plaintiffs seeking to defeat a claim of qualified immunity will now be largely bound by the facts of their claim. This implicates concerns of official accountability for unconstitutional acts. Second, claims of viewpoint discrimination will be handicapped by factual discrepancies from previous cases. This altered legal landscape risks the creation of second-class citizenship for political dissenters. Third, both of these narrow approaches threaten the development of future constitutional law; if litigants are bound to bring claims that are completely identical to previous cases, it is unlikely that new rules and rights will develop when necessary. Overall, *Weise v. Casper* is a case that could mark the beginning of troubling constitutional developments in the Tenth Circuit.

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