No.

In the Supreme Court of the United States

KARINA GARCIA, YARI OSORIO, BENJAMIN BECKER, CASSANDRA REGAN, YAREIDIS PEREZ, STEPHANIE JEAN UMOH, TYLER SOVA, MICHAEL CRICKMORE, AND BROOKE FEINSTEIN,
Petitioners,

v.

MICHAEL R. BLOOMBERG, RAYMOND W. KELLY, CITY OF NEW YORK, AND JANE AND JOHN DOES 1-40,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Cox* v. *Louisiana*, 379 U.S. 559, 574 (1965), the Court observed that, because the First Amendment's "command of free speech and assembly is basic and fundamental and encompasses peaceful social protest"—conduct which is "so important to the preservation of the freedoms treasured in a democratic society"—the Constitution imposes "appropriate limitations on the discretion of public officials where speech and assembly are intertwined with regulated conduct." Police can nonetheless enforce reasonable time, place, and manner restrictions, like ordinances that "regulate traffic." *Ibid.* The touchstone, the Court held, is that citizens must have "fair warning as to what is illegal." *Ibid.*

Following *Cox*, the Seventh, Tenth, and D.C. Circuits have held that, when police officers permit individuals to exercise First Amendment speech and peaceful assembly rights, officers must provide demonstrators fair warning prior to arresting them for violating time, place, or manner restrictions. The Second Circuit, however, holds that officers may arrest demonstrators at any time, without provision of fair warning, unless officers conveyed affirmative, direct, and unambiguous consent to demonstrate in a particular location.

The question presented is:

Whether, when officers permit individuals to exercise First Amendment rights to speech and peaceful assembly, officers must provide fair warning prior to arresting demonstrators for participation in the demonstration.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Karina Garcia, Yari Osorio, Benjamin Becker, Cassandra Regan, Yareidis Perez, Stephanie Jean Umoh, Tyler Sova, Michael Crickmore, and Brooke Feinstein respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals are available at 662 F. App'x 50 (App., *infra*, 1a-9a), 779 F.3d 84 (App., *infra*, 18a-41a), and 764 F.3d 170 (App., *infra*, 42a-98a). The opinions of the district court are available at 2015 WL 300488 (App., *infra*, 10a-17a) and 865 F. Supp. 2d 478 (App., *infra*, 99a-125a).

JURISDICTION

The judgment of the court of appeals was entered on October 13, 2016. On December 30, 2016, Justice Ginsburg extended the time for the filing of this petition until March 10, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble * * *.

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall

> not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

The First Amendment protects both "freedom of speech" and "the right of the people peaceably to assemble." Together, these establish a right to engage in "peaceful social protest"—conduct which is vital "to the preservation of the freedoms treasured in a democratic society." *Cox* v. *Louisiana*, 379 U.S. 559, 574 (1965). And "[w]hat a huge debt this nation owes to its 'troublemakers'" who spark such protest. App., *infra*, 99a. "From Thomas Paine to Martin Luther King, Jr., they have forced us to focus on problems we would prefer to downplay or ignore"—but it is "often only with hindsight" that we identify "those troublemakers who brought us to our senses." *Ibid*.

While the right to engage in peaceful social protest is fundamental, there is likewise little doubt that states and municipalities may impose reasonable restrictions on the time, place, and manner of such demonstrations. Police may bar protests from impeding traffic, and they can enforce lawful permitting regulations. *Cox*, 379 U.S. at 574.

This case concerns *how* police may enforce those duly enacted ordinances. Three circuits have held that, when police allow demonstrators to conduct an unpermitted march and thus exercise speech and peaceful assembly rights protected by the First Amendment, police may arrest demonstrators for violations of time, place, and manner restrictions only *after* first providing fair warning. See *Vodak* v.

City of Chicago, 639 F.3d 738 (7th Cir. 2011); *Buck* v. *City of Albuquerque*, 549 F.3d 1269 (10th Cir. 2008); *Dellums* v. *Powell*, 566 F.2d 167 (D.C. Cir. 1977).

Here, however, the Second Circuit reached the opposite result. In its view, even after police officers convey implicit permission to engage in a demonstration, police remain free to arrest participants for violation of time, place, or manner ordinances *without* first providing fair warning. In so holding, the Second Circuit acknowledged that its conclusion departs from the law governing other circuits.

On October 1, 2011, police accompanied an Occupy Wall Street march that departed lower Manhattan for an organized rally in the Brooklyn Bridge Park. Although there was no parade permit, police escorted the march, flanking it from all sides. Officers directed marchers to cross streets against the lights, and they blocked traffic to facilitate the march. Police guided the marchers for an extended period, ultimately leading the parade to the Brooklyn Bridge.

Once at the Bridge, police closed the Bridge's roadway to traffic. A line of officers blocked the entrance to the Bridge's roadway, and the marchers began to enter the narrow pedestrian walkway. The narrowness of the walkway created a bottleneck that caused congestion, extending multiple blocks. At this point, one officer announced to those in the very front of the massive march that they were not permitted to walk onto the Bridge roadway. But the vast majority of marchers (including all petitioners) never heard any such warning.

The line of police officers blocking the Bridge's roadway then turned and began walking onto the

Bridge. The marchers jubilantly followed in an orderly fashion. The police officers, who had flanked the march all along, escorted and guided the marchers onto the Bridge, without issuing any warning or telling the marchers to disperse. But, once on the Bridge, police trapped more than 700 marchers and arrested them for disorderly conduct.

The Seventh, Tenth, and D.C. Circuits have held arrests in materially indistinguishable circumstances unlawful. The Second Circuit disagreed. The Court should grant review to resolve this conflict.

This question is substantially important. Speech and assembly rights are fundamental to our democracy—they have been since the Founding, and they are so today. But the decision below imposes immense practical burdens on peaceful social protest. Sympathetic bystanders often join political marches, to add their voices. Now, in the Second Circuit, joining a peaceful, police-escorted march risks arrest without warning. The clear effect is the chilling of First Amendment rights.

This case, moreover, is a uniquely appropriate vehicle to resolve this issue. Because the claims before the Court assert *Monell* municipal liability, qualified immunity poses no obstacle to the Court's resolution of the constitutional rights at stake.

Finally, review is warranted because the lower court's holding is plainly wrong. In light of the essential First Amendment rights at stake, police must provide those participating in a peaceful march fair warning prior to arresting them for traffic infractions and similar violations.

A. Legal background.

This case concerns the intersection of the First, Fourth, and Fourteenth Amendments.

Under the Fourth Amendment, to effect a valid arrest, an officer must have "probable cause," which is "defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense.'" *Gerstein* v. *Pugh*, 420 U.S. 103, 111 (1975) (alteration omitted). See also *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949) ("'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.'").

Meanwhile, the First Amendment's "command of free speech and assembly is basic and fundamental and encompasses peaceful social protest, so important to the preservation of the freedoms treasured in a democratic society." *Cox*, 379 U.S. at 574 (1965). As a result, the "regulation of conduct that involves freedom of speech and assembly" cannot be "so broad in scope as to stifle First Amendment freedoms, which 'need breathing space to survive.'" *Ibid*. This requires "appropriate limitations on the discretion of public officials where speech and assembly are intertwined with regulated conduct." *Ibid*.

Cox considered a Louisiana statute that rendered it unlawful to parade or picket "in or near" a state courthouse. *Id*. at 560. Cox was convicted for demonstrating across the street from the courthouse (*id*. at 569), 101 feet from the courthouse steps (*id*. at 568). At the time, officials had sanctioned Cox's conduct: "the officials present gave permission for the demonstration to take place" there. *Id*. at 569. Indeed, when Cox and other demonstrators met with police, "not

only was it not suggested that they hold their assembly elsewhere, or disband, but they were affirmatively told that they could hold the demonstration" where they did. *Id*. at 571.

The Court found Cox's conviction unlawful. *Ibid*. The Court reasoned that holding otherwise "would be to sanction an indefensible sort of entrapment by the State"; a State may not "convict[] a citizen for exercising a privilege which the State had clearly told him was available to him." *Ibid*. "The Due Process Clause does not permit convictions to be obtained under such circumstances." *Ibid*.

The Court observed that this holding was consistent with the principle that police may "call a halt to a meeting which though originally peaceful, becomes violent." *Id*. at 573. Additionally, authorities may provide "reasonable time limits for assemblies" and "then *order them dispersed* when these time limits are exceeded." *Ibid*. (emphasis added).[1] The touchstone inquiry is whether police supplied demonstrators "fair warning as to what is illegal." *Id*. at 574.

B. Factual background.

On October 1, 2011, "thousands of demonstrators marched from Zuccotti Park in downtown Manhattan to the Brooklyn Bridge in order to show support for the Occupy Wall Street movement." App., *infra*,

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[1] "[R]easonable restrictions" must be "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989).

101a.[2] The marchers were headed to a rally in Brooklyn. As it proceeded through the streets of Manhattan, sympathetic observers joined the march. See Third Am. Compl. ¶ 152, D. Ct. Dkt. No. 38.

"Although no permit for the march had been sought, the New York City Police Department ('NYPD') was aware of the planned event in advance." App., *infra*, 21a-22a. Throughout, the NYPD "blocked vehicular traffic in order to accommodate the march" and "directed" "marchers to violate traffic regulations." App., *infra*, 113a. The demonstrators "relied on the police officers' commands in order to determine how they could legally proceed." *Ibid*. Police "flank[ed] the marchers with officers on motor-scooters or motorcycles." *Id*. at 45a. "The officers blocked vehicular traffic at some intersections and on occasion directed marchers to cross streets against traffic signals." *Id*. at 45a-46a. Ultimately, the police "guided the marchers toward the Brooklyn Bridge." *Id*. at 101a.

When the lead of the march reached the Bridge, individuals began entering the Bridge's narrow pedestrian walkway. App., *infra*, 101a. This bottleneck created significant congestion, causing the march to temporarily halt. "Police officers initially blocked the eastbound vehicular roadway, preventing marchers from proceeding onto that portion of the bridge." *Ibid*.

There are multiple videos of what transpired next. Respondents provide a video showing one police

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[2] Because petitioners' claims were dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim, the lower courts assumed the veracity of petitioners' well-pleaded, plausible allegations. App., *infra*, 105a-106a.

officer speaking through a bullhorn, warning protestors that they would be arrested if they marched on the Bridge's roadway. App., *infra*, 105a. While some protestors near the officer could have heard him, the video demonstrates that "[o]thers standing farther away, however, appear not to hear the officer or even notice that he ha[d] addressed them." *Id.* at 103a. A video shot by one marcher just feet away at the front of the march reveals that, from that marcher's perspective, no audible message was communicated. *Id.* at 102a-103a.[3] For their part, petitioners "did not hear any warnings or orders not to proceed on the roadway." *Id.* at 50a. At that point, the march included thousands of individuals, and it stretched for blocks. *Id.* at 103a.

After this pause, "the officers and city officials in the lead group turned around and began walking unhurriedly onto the Bridge roadway with their backs to the protesters." App., *infra*, 47a. "The protesters began cheering and followed the officers onto the roadway in an orderly fashion about twenty feet behind the last officer." *Ibid.*

Officers escorted the marchers onto the Bridge as they had throughout lower Manhattan. App., *infra*, 48a. "Officers at the roadway entrance did not instruct the ongoing flow of marchers not to proceed onto the roadway." *Ibid.* "Other officers walked calmly alongside the protesters in the roadway and did not direct any protesters to leave the roadway." *Ibid.*

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[3] The New York Police Department had technology available to broadcast an order to a large crowd over several blocks—but officers did not use it here. App., *infra*, 104a.

"After approximately 700 of the marchers had entered the Bridge's vehicular roadway, the police restricted the marchers' ability to move forward or backward and arrested them." *Id.* at 102a. Officers used "orange netting to trap the marchers," and then "arrested the marchers who had entered the vehicular roadway." *Id.* at 105a.

Chief of Department Joseph A. Esposito, who headed the Civil Disorder Unit, was the ranking officer on the scene. App., *infra*, 11a-12a. He was among the officers at the vanguard of the march that led the demonstration onto the Bridge. *Id.* at 11a. He "knew that many of the marchers did not hear the instructions to disperse" (*id.* at 6a), and, further, that police actions "conveyed implicit permission to march on the roadway" (*id.* at 6a-7a).

Esposito was himself a policymaker: "[h]e did not need to check with Kelly before exercising control over the Civil Disorder Unit," and he "issued 'Chief of Department memos' that established department-wide policy and were not required to be approved by Kelly." App., *infra*, 12a. And, prior to arresting the marchers, Esposito "called Commissioner Kelly and advised him that the NYPD would probably arrest the marchers." *Id.* at 11a. "Kelly approved the mass arrest, and Esposito later gave the order to arrest the marchers." *Ibid.*

Petitioners are nine of the arrestees—they include a public high school teacher, a neuroscientist, a tourist from Iowa, a social worker, and an aspiring actress. See Third Am. Compl. ¶¶ 30-37. All allege that they never heard police orders or warnings not to proceed onto the Bridge's roadway. *Id.* ¶ 39. See also App., *infra*, 104a-105a.

C. Proceedings below.

Petitioners filed suit against the City of New York ("City"), Mayor Michael R. Bloomberg, Police Commissioner Raymond W. Kelly, and individual arresting officers on behalf of a putative class of the approximately 700 demonstrators who were arrested. Petitioners brought claims under 42 U.S.C. § 1983, alleging that their arrests violated the First, Fourth, and Fourteenth Amendments. App., *infra*, 100a-101a. Plaintiffs also asserted *Monell* claims against the City as well as individuals with policymaking authority.

Although we provide the complete, relevant procedural history, the claim before the Court is discrete: this petition presents a *Monell* claim against the City and individual policymakers, asserting that the City's policy of arresting demonstrators without first providing fair notice infringed petitioners' rights.[4]

1. Respondents moved to dismiss the Second Amended Complaint pursuant to qualified immunity. The district court (Rakoff, J.) denied the motion as to the individual officers. App., *infra*, 99a-125a.

In the "context of peaceful demonstration," "[t]he Supreme Court has long held that * * * laws and regulations must 'give citizens fair warning as to what is illegal.'" App., *infra*, 108a-109a (quoting *Cox*, 379 U.S. at 574). In these circumstances, this "fair warning" "often comes not from the legislative bodies

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[4] This petition does not therefore implicate qualified immunity. See *Owen* v. *City of Independence*, 445 U.S. 622, 657 (1980) ("[M]unicipalities have no immunity from damages liability flowing from their constitutional violations.").

that draft the potentially relevant laws, but instead from the executive officials who enforce them." *Id*. at 109a.

Relying on *Cox*, as well as holdings of the Seventh and Tenth Circuits (*Vodak* v. *City of Chicago*, 639 F.3d 738, 745-746 (7th Cir. 2011); *Buck* v. *City of Albuquerque*, 549 F.3d 1269, 1283-1284 (10th Cir. 2008)), the court concluded that, "before peaceful demonstrators can be arrested for violating a statutory limitation on the exercise of their First Amendment rights, the demonstrators must receive 'fair warning' of that limitation, most commonly from the very officers policing the demonstration." App., *infra*, 110a-111a.

In the district court's view, the critical question was "whether a *reasonable* officer could have *believed*, based on the facts known to *defendants*, that the plaintiffs received fair warning." App., *infra*, 112a. Here, "the defendants cannot reasonably contend, given plaintiffs' allegations, that they did not knowingly allow the march to proceed even in the absence of a permit." *Ibid*. And, as to the warning issued by police, "no reasonable officer could imagine, in these circumstances, that this warning was heard by more than a small fraction of the gathered multitude." *Id*. at 114a.

The petitioners' allegations, "if true, establish that the officers did not give fair warning to the overwhelming majority of the 700 demonstrators who were arrested in this case." App., *infra*, 117a. This stated a constitutional claim. *Id*. at 117a-119a.

The court dismissed the *Monell* theories advanced at that time. First, the court found that petitioners had not adequately asserted a pattern of mis-

conduct. App., *infra*, 119a-122a. Second, petitioners had not shown that respondents Bloomberg or Kelly "either ratified or directly participated in the alleged constitutional violations." *Id*. at 122a.[5] And, finally, the failure to train claim was defective, the court found, because petitioners had not identified a pattern of past misconduct. *Id*. at 123a-124a.

2. The individual defendants sought an interlocutory appeal of the denial of their motion to dismiss based on qualified immunity. The Second Circuit initially affirmed the district court. App., *infra*, 42a-68a.

As a legal matter, the court held that *Cox* "established that when officials grant permission to demonstrate in a certain way, then seek to revoke that permission and arrest demonstrators, they must first give 'fair warning.'" App., *infra*, 54a. That is, "when demonstrators have been given police permission to be where they are, they cannot be found guilty of a crime absent clear warning that permission has been revoked." *Id*. at 67a. And, citing *Vodak* and *Buck*, the court observed that "[t]he Seventh and Tenth Circuits have applied *Cox*'s requirement of fair warning before revoking permission to protest to situations similar to the protest here." *Id*. at 55a.

The court recognized that it could not "resolve at this early stage the ultimate factual issue of whether

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[5] The court's observation about the limited nature of the allegations as to Bloomberg and Kelly relate to the Second Amended Complaint. Since then, Chief Esposito has been deposed, during which he provided testimony detailing his personal involvement, as well as that of Commissioner Kelly. App., *infra*, 4a-5a. The allegations of the Third Amended Complaint are drawn from these depositions. See *supra*, pages 8-9.

certain defendants implicitly invited the demonstrators to walk onto the roadway of the Brooklyn Bridge, which would otherwise have been prohibited by New York law." App., *infra*, 44a. But the petitioners' allegations, if true, demonstrated that the police "retreated back onto the Bridge in a way that would reasonably have been understood, and was understood, by the bulk of the demonstrators to be a continuation of the earlier practice of allowing the march to proceed in violation of normal traffic rules." *Id*. at 62a. Assuming these facts true, officers lacked probable cause to arrest the marchers, absent provision of fair warning. *Id.* at 62a-63a.

Judge Livingston dissented. App., *infra*, 69a-98a. In particular, Judge Livingston disputed whether the operative right—that police must provide fair notice prior to arresting demonstrators—was clearly established. *Id*. at 82a-89a.

3. The court of appeals granted a petition for rehearing *en banc*. App., *infra*, 129a-132a. But, prior to *en banc* consideration of the matter, the panel issued a revised opinion on panel rehearing. *Id*. at 18a-41a. In its new opinion, the same panel reversed the district court, focusing on the clearly-established prong of qualified immunity. *Ibid*.

The court distinguished *Cox*, in light of the "explicit conversation with police officials" at issue there. App., *infra*, 35a. Here, by contrast, "there was no *explicit* consultation between the leaders of the demonstration and the police about what conduct would be permitted," and there was no "*express* statement from any police official authorizing the protesters to cross the Bridge on the vehicular roadway, opining that doing so would be lawful, or waiving the enforcement of any traffic regulation." *Id*. at

36a (emphasis added). Whether officers had conveyed permission to proceed onto the Bridge was "ambiguous." *Id.* at 39a. Instead, objectively reasonable officers would not be aware that the conduct of marchers had been "*affirmatively* authorized by the police." *Id.* at 37a (emphasis added). Absent such express authorization, the court concluded that officers have "probable cause to arrest," and they are "certainly * * * entitled to qualified immunity." *Id.* at 38a-39a.

The court recognized contrary holdings by the Seventh and Tenth Circuits, but concluded that they "do not foreshadow the law of which a reasonable officer in *this* circuit should be aware." App., *infra*, 37a-38a n.12 (emphasis added). The court therefore remanded the matter to the district court. *Id.* at 41.

The Second Circuit subsequently dissolved the *en banc* court. App., *infra*, 126a-128a.

4. On remand, petitioners sought leave to file a Third Amended Complaint to add new facts with respect to their *Monell* claims. Petitioners' amended allegations were drawn from new depositions of Chief Esposito. App., *infra*, 11a. See also *id.* at 4a-5a. In particular, petitioners alleged that Chief Esposito was at the scene and directed the arrests; that he was himself a policymaker; and that he called Commissioner Kelly, who approved (in real time) the arrests. *Id.* at 11a-12a. Additionally, plaintiffs alleged that NYPD had established a policy of sanctioning and escorting unpermitted Occupy Wall Street protests; at the same time, NYPD authorized subsequent mass arrest without fair notice that it had revoked sanction of the march. *Id.* at 7a.

The district court denied the motion as futile. App., *infra*, 10a-17a. It concluded that, although the court of appeals had focused on the clearly-established prong of qualified immunity, it had *also* held that "the officers did not behave unlawfully." *Id.* at 15a. In sum, "the police had 'sufficient evidence to establish probable cause on each of the elements of a disorderly conduct violation,'" and "the interactions between the police and the marchers, including any alleged grant of permission to march on the Bridge, were so ambiguous as to not displace this finding of probable cause." *Id.* at 14a-15a.

The court therefore did "not reach the question of whether the [Third Amended Complaint's] new material would change" its earlier holding that petitioners "failed to adequately plead municipal liability under *Monell*." App., *infra*, 16a n.4.

5. The court of appeals affirmed. App., *infra*, 1a-9a. It reviewed the district court's denial of leave to amend for reasons of futility *de novo*. *Id.* at 4a-5a.

The court confirmed its holding—officers need not give fair warning in order to have probable cause to arrest marchers. App., *infra*, 6a. The individual officers had, "from their personal observations, sufficient evidence to establish probable cause on each of the elements of a disorderly conduct violation." *Id.* at 5a. The court reasoned that only "a *direct* communication from police to marchers that the marchers were permitted to occupy the road" would render arrests in these circumstances unlawful. *Id.* at 8a-9a (emphasis added).

In sum, the Court concluded that whether the conduct of the police conveyed to demonstrators that "they were participating in a sanctioned, First-

Amendment-protected roadway march" is "irrelevant to the question of probable cause." *Id*. at 7a-8a.

REASONS FOR GRANTING THE PETITION

The courts of appeals have squarely divided as to how police officers may enforce valid time, place, and manner restrictions when citizens exercise their First Amendment rights to speech and peaceful assembly. The Seventh, Tenth, and D.C. Circuits hold that, when police officers permit citizens to engage in a peaceful demonstration, officers must provide fair warning prior to arresting demonstrators for violating these restrictions. In this case, the Second Circuit disagreed.

This question is of the utmost practical importance: free assembly rights are vital to democracy; the Second Circuit's rule creates enormous practical burdens on individuals wishing to participate in peaceful assembly; and unclear rules chill First Amendment freedoms. Because this case arises in the context of *Monell*, it does not implicate qualified immunity, making it a uniquely appropriate vehicle to consider the question presented.

Review is also warranted because the decision below is plainly wrong: when citizens exercise First Amendment speech and assembly rights, officers must provide fair warning prior to arresting peaceful demonstrators for violations of time, place, and manner restrictions. That is especially so in circumstances where, like here, police conveyed permission to participate in First Amendment activity; absent issuance of fair warning that revokes such permission, police lack probable cause to arrest.

I. The Circuits Are Divided.

The Second Circuit's holding below is in plain conflict with the decisions of three other circuits. Indeed, that court recognized its departure from the law of other circuits. App., *infra*, 37a n.12. Likewise, a commentator notes that the decision below "has generated a circuit split," which "[o]nly the Supreme Court can conclusively resolve." Caleb Hayes-Deats, *Revisiting the Right to Fair Warning After* Garcia v. Does, 14 First Amend. L. Rev. 182, 197-198 (2015).

1. Three circuits hold that, when police allow demonstrators to exercise protected First Amendment rights of speech and assembly, police may not arrest those demonstrators for violating ordinances restricting time, place, or manner without first providing fair warning.

Vodak v. *City of Chicago*, 639 F.3d 738 (7th Cir. 2011) (Posner, J.), is factually indistinguishable from the circumstances here—but the **Seventh Circuit** reached the opposite result.

Following the initiation of the Iraq War in 2003, several thousand individuals demonstrated in Chicago. *Id.* at 740-743. The organizers did not obtain a permit or reach advance agreement with police as to the parade route. *Id.* at 741. While the police offered no express permission, the "police made no objections." *Ibid.* Indeed, the police's conduct caused some of the marchers to believe that "the police were directing them." *Id.* at 744.

During the march, police became concerned that, if it continued onto a main thoroughfare (Michigan Avenue), it would unduly impede traffic. *Id.* at 743. The police asserted that they had issued earlier orders to some marchers, but the plaintiffs alleged that

"they did not hear or otherwise learn of any command to disperse." *Id.* at 745. Ultimately, police trapped several hundred individuals on a city block, arresting about 900 people. *Id.* at 740, 744.

At the outset, the court noted that "the authority of the police to order the crowd to disperse and return to its starting point cannot be questioned." *Id.* at 743. "But before the police could start arresting peaceable demonstrators for defying their orders they had to communicate the orders to the demonstrators." *Id.* at 745.

Citing *Cox*, the Seventh Circuit observed that this Court "held decades earlier that police must give notice of revocation of permission to demonstrate before they can begin arresting demonstrators." *Id.* at 746. In Judge Posner's view, "[n]o precedent should be necessary * * * to establish that the Fourth Amendment does not permit the police to say to a person go ahead and march and then, five minutes later, having revoked the permission for the march without notice to anyone, arrest the person for having marched without police permission." *Id.* at 746-747.

The Seventh Circuit thus found that the demonstrators asserted cognizable Fourth Amendment claims. *Id.* at 750-751. It relied expressly on the Tenth Circuit's decision in *Buck* and the D.C. Circuit's decision in *Dellums*.

The **Tenth Circuit**, in *Buck* v. *City of Albuquerque*, 549 F.3d 1269 (10th Cir. 2008), reached the same result.

As in *Vodak*, although protestors did not obtain a permit, police closed several streets when the protest began, on which the protestors marched. *Id.* at 1283.

Viewing the facts in the light most favorable to the plaintiffs, the "street closures and direction of the procession sanctioned the protestors walking along the road and waived the permit requirement." *Id.* at 1284. Demonstrators were nonetheless arrested, without prior warning. *Id.* at 1283.

The court of appeals found that the officers lacked probable cause to arrest: "the historical facts seen in the light most favorable to the plaintiffs would not amount to probable cause because the officers' conduct essentially amounted to the grant of a *de facto* parade permit." *Id.* at 1283. Nor was there any reasonable basis for officers to arrest based on asserted "lawful commands." *Id.* at 1284.

And in *Dellums* v. *Powell*, 566 F.2d 167 (D.C. Cir. 1977), the **D.C. Circuit** applied the same rule.

There, individuals assembled on the grounds of the U.S. Capitol to attend an anti-Vietnam War rally. Having initially stopped marchers from approaching, police stepped aside and made no further efforts to prevent protesters from assembling. *Id.* at 182 n.31. During the rally, police trapped the demonstrators and arrested them. *Id.* at 173-174.

Relying on *Cox*, the court held that the nonverbal conduct of police "in effect" conveyed permission. *Id.* at 183. "In these circumstances, no constitutionally valid arrest could have been made until an order to disperse had been given which was itself based on permissible considerations." *Id.* at 182-183.

2. In this case, the Second Circuit reached the opposite result. It held that, although Chief "Esposito and other officers conveyed implicit permission to march on the roadway," this did not "defeat[] probable cause for the arrests." App., *infra*, 6a-7a. Wheth-

er the demonstrators "were participating in a sanctioned, First-Amendment-protected roadway march" was, in the court's view, irrelevant to the probable cause inquiry. *Id.* at 7a-8a. The court concluded that only "a *direct* communication from police to marchers that the marchers were permitted to occupy the road" would render arrests in these circumstances unlawful. *Id.* at 8a-9a (emphasis added). As a result, it was permissible to arrest the demonstrators without first providing them fair warning.

Earlier, the court of appeals recognized that *Vodak* and *Buck* "den[ied] qualified immunity to officers who arrested protesters after arguably sanctioning their traffic violations through their own directives." App., *infra*, 37a n.12. And, in its now-vacated decision, it acknowledged that, in *Vodak* and *Buck*, "[t]he Seventh and Tenth Circuits have applied *Cox*'s requirement of fair warning before revoking permission to protest to situations similar to the protest here." *Id.* at 55a.

II. This Is An Attractive Vehicle To Resolve A Question Of Exceptional Importance.

The question presented warrants review. Since the Founding, the rights to speech and peaceful assembly have proven vital to American democracy. The Second Circuit's holding, however, places immense practical obstacles to the free exercise of speech and assembly rights. These restrictions, along with the general legal uncertainty now surrounding peaceful demonstrations, will chill core First Amendment freedoms. Review is thus urgently needed—and this case is a uniquely appropriate vehicle.

A. The right to peaceful assembly is vital to democracy.

The Constitution's "command of free speech and assembly is basic and fundamental and encompasses peaceful social protest"; these rights are essential "to the preservation of the freedoms treasured in a democratic society." *Cox*, 379 U.S. at 574. Indeed, "[t]he right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States"; "it is, and always has been, one of the attributes of citizenship under a free government." *United States* v. *Cruikshank*, 92 U.S. 542, 551 (1875). This right "is found wherever civilization exists." *Ibid.*

At the time of the Founding, the right to peaceful assembly was viewed as the fount of all other First Amendment freedoms. See Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. Rev. 543 (2009); John D. Inazu, *The Forgotten Freedom of Assembly*, 84 Tul. L. Rev. 565 (2010). During the House debates on the Bill of Rights, Virginia's John Page argued "[i]f the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause." 1 Annals of Cong. 732 (Joseph Gales ed., 1834).

Thus, it has long been understood that "[t]he right of the people to assemble peaceably for the purpose of considering and discussing the measures of government, is an axiom of political liberty." *Riots, Routs, and Unlawful Assemblies*, 3 Am. L. Mag. 350, 353 (1844). Indeed, Abraham Lincoln referred to the right to assembly as "the Constitutional substitute for revolution." Letter from Abraham Lincoln to Alexander H. Stephens (Jan. 19, 1860), *in Uncollected*

Letters of Abraham Lincoln 127 (Gilbert A. Tracy ed., 1917).

Peaceful demonstrations have factored into nearly every major social change in American history. The abolition movement relied on public assembly. See *The Abolitionist Sisterhood: Women's Political Culture in Antebellum America* 38-39 (Jean Fagan Yellin & John C. VanHorne eds., 1994). Assembly rights were crucial to suffrage. Linda J. Lumsden, *Rampant Women: Suffragists and the Right of Assembly* (1997). Labor movements likewise depended upon demonstrations. See *Thomas* v. *Collins*, 323 U.S. 516, 530-531 (1945). And assembly rights were the cornerstone of the civil rights movement—"But somewhere I read of the freedom of assembly. Somewhere I read of the freedom of speech. * * * Somewhere I read that the greatness of America is the right to protest for right." Martin Luther King, Jr., I've Been to the Mountaintop, Address at Bishop Charles Mason Temple, Memphis, Tenn. (Apr. 3, 1968).

In sum, peaceful "mass protests" have "played a major role" in the "success[]" of "the United States in harmonizing so ethnically, racially and politically diverse a population with so little violence." Ralph Temple, *The Policing of Demonstrations in the Nation's Capital*, 8 U.D.C. L. Rev. 3, 4 (2004).

Peaceful protests remain an integral aspect of our democracy. On January 21, Washington, D.C. hosted the Women's March; on January 28, it hosted the March for Life 2017. The Black Lives Matter movement conducts peaceful demonstrations; so too do gun-rights advocates.

"[P]arades and processions are a unique and cherished form of political expression, serving as a symbol of our democratic tradition." *Am.-Arab Anti-Discrimination Comm.* v. *City of Dearborn*, 418 F.3d 600, 611 (6th Cir. 2005). "There is scarcely a more powerful form of expression than the political march." *Ibid*.

B. The decision below imposes significant practical restrictions on free assembly.

The Second Circuit's holding below permits officers to arrest individuals who join or participate in peaceful unpermitted demonstrations at any time, unless police officers convey affirmative, express permission to demonstrate. This rule severely limits demonstration rights in two overlapping ways.

First, it significantly restricts spontaneous demonstrations, especially those that respond to recent events, as such protests will typically lack proper permits. Yet the right to spontaneous demonstration in response to news events lies at the heart of the First Amendment.

In the context of political rallies, "[a] delay of even a day or two may be of crucial importance in some instances." *Carrol* v. *President & Comm'rs of Princess Anne*, 393 U.S. 175, 182 (1968). Indeed, "when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring).

"[S]imple delay may permanently vitiate the expressive content of a demonstration." *NAACP* v. *City of Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984). "A spontaneous parade expressing a viewpoint on a topical issue will almost inevitably attract more partici-

pants and more press attention, and generate more emotion, than the 'same' parade 20 days later. The later parade can never be the same." *Ibid.* In short, "[w]here spontaneity is part of the message, dissemination delayed is dissemination denied." *Ibid.*

Spontaneous marches in response to current events are thus core First Amendment speech. But the rule adopted below renders any participant in a spontaneous march *immediately* subject to arrest for violation of duly enacted time, place, and manner restrictions. "Automatically criminalizing participation in a permitless march" would "destroy[] the spontaneity and enthusiasm which public demonstrations of this nature are meant to engender." *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 612.

***Second*,** the essence of a peaceful social protest is that it invites sympathetic observers to participate, joining their voices and exercising their own individual rights. But such passers-by have no meaningful way to ascertain whether the ongoing protest is properly sanctioned.

"Unlike stationary demonstrations or other forms of pure speech, the political march is capable of reaching and mobilizing the larger community of citizens." *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 611. Indeed, the march "is intended to provoke emotive and spontaneous action, and this is where its virtue lies." *Ibid.* "As it progresses, it may stir the sentiments and sympathies of those it passes, causing fellow citizens to join in the procession as a statement of solidarity." *Id.* at 611-612. That is what happened here. Petitioner Feinstein, for example, was a tourist from Iowa (Third Am. Compl. ¶ 33); she saw the demonstration and joined in (*id.* ¶ 152).

The holdings of the Seventh, Tenth, and D.C. Circuits allow such individuals—who will often make up the majority of a march—to rely on the behavior of police. See Caleb Hayes-Deats, *Demonstrators' Right to Fair Warning*, 13 First Amend. L. Rev. 140, 141 (2014). A bystander may join a peaceful, in-progress march *without* risking arrest. Only if the police issue an order—and the individual fails to comply—may he or she be subject to arrest.

The decision below, however, renders one who joins a march at immediate risk of arrest. This would "place[] the onus upon every participant to be aware of whether the march has a permit, and would hold any participant liable for its violation." *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 612. It is hard to overstate the consequences of such a rule: "[r]equiring potential march participants to seek authorization from city officials before joining a public procession or risk being jailed is antithetical to our traditions, and constitutes a burden on free expression that is more than the First Amendment can bear." *Ibid.*

Now, anyone who joins a peaceful march anywhere in the Second Circuit may be subject to automatic arrest, without any warning at all.

C. The split among the circuits chills speech and assembly rights.

These practical effects demonstrate that the decision below will have a massive chilling effect on the exercise of speech and peaceful assembly rights in the Second Circuit. And that chilling effect is compounded by the circuit split that now exists, as individuals across the country lack certainty as to the governing legal rules.

The Court has long "insist[ed] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). "[E]xplicit standards" for the enforcement of laws is necessary to prevent "arbitrary and discriminatory enforcement." *Ibid*. This need for clarity is particularly essential in the "sensitive areas of basic First Amendment freedoms," because uncertain law "operates to inhibit the exercise of those freedoms." *Id*. at 109. Indeed, "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Id*. at 109 (alterations and quotations omitted).

A lack of clarity also creates improper, unfettered discretion in the officials who enforce the law. As the Court said decades ago, "a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade." *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 153 (1969). Particularly where that unfettered discretion implicates the threat of arrest, would-be protestors are likely to be deterred from exercising their vital First Amendment rights. See *Virginia* v. *Black*, 538 U.S. 343, 365 (2003) (plurality) (finding that a statute creating a heightened possibility that a State could "arrest, prosecute, and convict" someone for engaging in "lawful political speech" impermissibly chilled speech).

Absent "fair warning as to what is illegal," laws "stifle First Amendment freedoms" by denying those rights the "breathing space" that they need "to survive." *Cox*, 379 U.S. at 574. Certiorari is thus imper-

ative to provide clear guidance to demonstrators and police officers alike, to ensure that First Amendment speech and assembly rights are not improperly chilled by the specter of arrest.

D. This is a uniquely attractive vehicle.

Certiorari is additionally warranted because the *Monell* claim at issue provides a uniquely appropriate vehicle to address the question presented.

The merits of this issue are unlikely to be resolved in the context of a claim against an individual officer. Given the present division among the circuits, police officers who arrest demonstrators in these circumstances will invariably assert a qualified immunity defense, contending that the right at issue is not clearly established. Following *Pearson* v. *Callahan*, 555 U.S. 223 (2009), courts can—and often will—resolve the "clearly-established" prong of immunity without first addressing the underlying constitutional obligations. In its earlier decision, the court of appeals in this case rested heavily on the clearly-established prong of qualified immunity to resolve the claims against the individual officers. See App., *infra*, 37a-38a & n.12. Such cases present poor vehicles for review.

Nor is a case suitable for review likely to arise from the Seventh, Tenth, and D.C. Circuits. Given the clarity of existing circuit law, officers in those jurisdictions are unlikely to effect arrests without first supplying fair warning. For these reasons, Section 1983 or *Bivens* claims against individual officers are unlikely to provide this Court with an appropriate opportunity to articulate the underlying constitutional rule.

In *Pearson*, the Court recognized "misgivings" regarding whether qualified immunity hinders "the development of constitutional law." 555 U.S. at 242. But most "constitutional issues," the Court observed, can be articulated in "criminal cases," in cases where "injunctive relief is sought," and in "cases against a municipality"—because qualified immunity does not apply in those contexts. *Id.* at 242-243.

This question, however, cannot arise in a criminal proceeding. The Second Circuit viewed the arrests as supported by probable cause and thus lawful, but nonetheless observed that the First Amendment was "a potential defense to the underlying criminal charge." App., *infra*, 7a. Thus, according to the court of appeals, the question here—whether an officer has probable cause to effect an arrest—is materially different than whether the First Amendment bars a criminal conviction.

Nor can this issue be resolved in a claim for injunctive relief: because an officer's decision to arrest is discretionary, based on the particular circumstances, and because recurrence of facts that would give rise to such a future arrest is speculative, litigants lack standing to seek injunctive relief forbidding a *future* arrest. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105-108 (1983).

A municipal-liability claim is therefore the best—and perhaps only—context for the Court to resolve the question presented. And this is a particularly attractive case: here, the lower courts did not decide whether the allegations of the Third Amended Complaint properly allege *Monell* liability. See App., *infra*, 8a, 16a n.4. Thus, the *sole* question before the Court is the constitutional issue—making this a

uniquely appropriate vehicle for resolution of this issue of exceptional importance.[6]

III. The Second Circuit's Decision Is Wrong.

The clear division among the circuits on a question of substantial practical importance is reason enough to warrant a grant of certiorari. Review is additionally warranted because the decision below is wrong.

The Seventh, Tenth, and D.C. Circuits have reached the correct result—when police allow an unpermitted demonstration to proceed, officers have probable cause to arrest peaceful participants for violation of time, place, and manner restrictions only after supplying them fair warning to cease their conduct. The Second Circuit's contrary rule—which holds that police may allow a demonstration to proceed, yet retain discretionary authority to arrest any participant at any time without warning—is incorrect.

Police have "probable cause" to effect an arrest when, in the circumstances, a "prudent man" would believe that the individual "had committed or was

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[6] On remand, respondents may, if they wish, contest whether the petitioners' allegations satisfy the requirements of *Monell* liability. See, *e.g.*, *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 260 (2009) (subsequent questions are matters for remand). But petitioners present an exceedingly strong municipal liability claim. Petitioners allege that Chief Esposito, himself a policymaker, directed the arrests. App., *infra*, 11a-12a. Additionally, Police Commissioner Kelly approved the mass arrests during a phone call with Esposito. *Id.* at 11a. Petitioners thus allege that "the official or officials responsible for establishing final policy" made "a deliberate choice to follow a course of action." *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 483 (1986).

committing an offense." *Gerstein*, 420 U.S. at 111. For several reasons, a reasonable officer could not conclude that an individual exercising First Amendment speech and peaceful assembly rights had committed an offense, unless the officer had a reasonable basis to believe that individuals had disregarded police orders to disperse.[7]

***First*,** officers in these circumstances lack probable cause because the First Amendment requires officers to supply fair warning prior to exercising their discretionary authority to arrest demonstrators for violations of time, place, and manner restrictions.

There is no doubt that a political "march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment." *Gregory* v. *City of Chicago*, 394 U.S. 111, 112 (1969). The rights underlying such marches are essential: "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and thus there is a "close nexus between the freedoms of speech and assembly." *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

At the same time, there is no disputing the legitimacy of "properly drawn statutes and ordinances designed to promote law and order, protect the community against disorder, regulate traffic, safeguard legitimate interests in private and public property, or

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[7] Police retain authority in all circumstances to arrest, without warning, any individual who threatens "the safety of the police or other people." *Vodak*, 639 F.3d at 746. "Of course, where demonstrations turn violent, they lose their protected quality as expression under the First Amendment." *Grayned*, 408 U.S. at 116.

protect the administration of justice and other essential governmental functions." *Cox*, 379 U.S. at 574. Police may generally enforce time, place, and manner ordinances, compelling demonstrators to comply, so long as the restrictions are content-neutral and narrowly tailored to advance a government interest. See *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989); *Clark* v. *Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984).

The enforcement of these restrictions generally turns on police discretion. While police discretion is often broad, First Amendment freedoms "need breathing space to survive." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). The Court has thus held that there must be "appropriate limitations on the discretion of public officials where speech and assembly are intertwined with regulated conduct." *Cox*, 379 U.S. at 574. The fundamental limitation on discretion is "fair warning"—police may regulate the conduct of demonstrators by providing them "fair warning as to what is illegal." *Ibid.*[8]

As Judge Rakoff explained below, "before peaceful demonstrators can be arrested for violating a statutory limitation on the exercise of their First Amendment rights, the demonstrators must receive 'fair warning' of that limitation, most commonly from

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[8] Indeed, it has long been understood that for police to lawfully disperse peaceful assemblies, fair warning is requisite. "Most of the States have laws of their own by which riotous assemblies can be dispersed. The proper officer *orders such a crowd to go to their homes quietly*, and if they do not comply, they remain at their own risk." Anna Laurens Dawes, *How We Are Governed: An Explanation of the Constitution and Government of the United States* 309 (1885) (emphasis added).

the very officers policing the demonstration." App., *infra*, 110a-111a.

The Seventh, Tenth, and D.C. Circuits have thus struck the appropriate balance. Prior to arresting peaceful demonstrators exercising First Amendment speech and assembly rights for violations of time, place, and manner restrictions, police officers must first inform the crowd, in an effective manner, to disperse. If individuals fail to conform to such a lawful police order, then officers may arrest.

***Second*,** due process principles further confirm that officers lack probable cause to arrest in these circumstances.

When police allow a peaceful assembly to proceed, they implicitly—if not explicitly—sanction the conduct at issue. After sanctioning this First Amendment exercise, officers cannot reasonably assert that participants in the demonstration are committing a crime *unless* the officers expressly revoke their permission.

As Judge Posner put it, "[n]o precedent should be necessary * * * to establish that the Fourth Amendment does not permit the police to say to a person go ahead and march and then, five minutes later, having revoked the permission for the march without notice to anyone, arrest the person for having marched without police permission." *Vodak*, 639 F.3d at 746-747. This would "be 'an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him.'" *Id.* at 747 (quoting *Cox*, 379 U.S. at 571).

Yet that is just what happened here. Police "flank[ed] the marchers with officers on motor-

scooters or motorcycles." App. *infra*, 45a. That same conduct continued at and on the Bridge roadway. "Officers at the roadway entrance did not instruct the ongoing flow of marchers not to proceed onto the roadway." *Id*. at 48a-49a. "Other officers walked calmly alongside the protesters in the roadway and did not direct any protesters to leave the roadway." *Id*. at 49a. None of the petitioners ever heard any order to disperse. *Id*. at 50a.

In light of these allegations, no reasonable officer could conclude that participants committed an offense by walking onto the Bridge. Petitioners allege that Chief Esposito in fact knew the protestors had not heard or been issued any warning. Petitioners thus properly allege that there was no "fair notice to the citizen" that their conduct was unlawful. *City of Chicago* v. *Morales*, 527 U.S. 41, 56 (1999) (plurality). Such conduct cannot be rendered criminal, consistent with constitutional protections. *Id*. at 57. Police therefore lacked probable cause to arrest.

Indeed, police could not conclude that the protestors had the intent required to commit disorderly conduct. New York Penal Law § 240.20(5)—the statute on which the demonstrators were ostensibly arrested—renders it unlawful to "obstruct[] vehicular or pedestrian traffic" "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof." When police *lead* demonstrators onto a roadway, no reasonable officer could view demonstrators as satisfying this intent requirement.

The court of appeals attempted to draw a distinction between explicit sanction (which it characterized as the facts of *Cox*) and implicit sanction. See, *e.g.*, App., *infra*, 6a-9a, 34a-36a. But the court offered no constitutional basis to erect such an artificial divide.

None exists. In the context of a peaceful assembly, protected by the First Amendment, the rights of participants are not altered by whether an officer supplied express approval to a march organizer or whether the approval is implicit in the police's accompaniment and guidance of the march. See *Buck*, 549 F.3d at 1284 ("[T]he APD's street closures and direction of the procession sanctioned the protestors walking along the road and waived the permit requirement.").

Third, the lower court's unduly broad understanding of probable cause in this context improperly chills the exercise of First Amendment speech and assembly rights. The chilling doctrine is thus additional reason why, for officers to have probable cause to arrest, they must first supply "fair warning."

Per the decision below, whenever police permit—and indeed, direct—a peaceful assembly to proceed, police nonetheless retain discretion to arrest any participant, at any time, without provision of any advance warning. The "dangers of arbitrary and discriminatory application" inherent in this scheme are manifest. *Grayned*, 408 U.S. at 109. Individuals have no way to understand whether joining an in-progress march will subject them to arrest.

This "uncertainty" will "necessarily chill speech in contravention of the First Amendment's dictates." *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 794 (1988). This broad police discretion would "inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (alteration and quotations omitted).

The Court has long held that "a measure of strategic protection" is necessary to preserve First Amendment freedoms. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). See also *Black*, 538 U.S. at 365 (plurality). The Court will, for example, interpret statutes to avoid the "mere potential" of "cast[ing] a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *United States* v. *Alvarez*, 132 S. Ct. 2537, 2548 (2012) (plurality).

So too here. *Cox*'s "fair warning" requirement provides the necessary strategic protection, ensuring that citizens are not chilled from robustly exercising their First Amendment freedoms.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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MARCH 2017

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of October, two thousand sixteen.

PRESENT: GERARD E. LYNCH,
CHRISTOPHER F. DRONEY,
Circuit Judges,
CHRISTINA REISS,
Chief District Judge.[*]

KARINA GARCIA, AS CLASS REPRESENTATIVE ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, YARI OSORIO, AS CLASS REPRESENTATIVE ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED,

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[*] Chief Judge Christina Reiss, United States District Court for the District of Vermont, sitting by designation.

BENJAMIN BECKER, AS CLASS REPRESENTATIVE ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED, CASSANDRA REGAN, AS CLASS REPRESENTATIVE ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, YAREIDIS PEREZ, AS CLASS REPRESENTATIVE ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, STEPHANIE JEAN UMOH, AS CLASS REPRESENTATIVE ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, TYLER SOVA, AS CLASS REPRESENTATIVE ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED, MICHAEL CRICKMORE, AS CLASS REPRESENTATIVE ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED, BROOKE FEINSTEIN, AS CLASS REPRESENTATIVE ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

MARCEL CARTIER, AS CLASS REPRESENTATIVE ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED,

Plaintiff.

v. No. 15-3113-cv

MICHAEL R. BLOOMBERG, IN HIS OFFICIAL CAPACITY AND INDIVIDUALLY, RAYMOND W. KELLY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, CITY OF NEW YORK, JANE AND JOHN DOES 1-40, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES,

Defendants-Appellees.

FOR PLAINTIFFS-APPELLANTS:	CARL MESSINEO (Mara Verheyden-Hilliard, *on the brief*), Partnership for Civil Justice Fund, Washington, D.C.
FOR DEFENDANTS-APPELLEES:	RICHARD DEARING, Assistant Corporation Counsel

(Melanie T. West, Deborah A. Brenner, *on the brief*), *for* Zachary W. Carter, Corporation Counsel of the City of New York, New York City Law Department, New York, New York.

Appeal from a September 10, 2015 judgment of the United States District Court for the Southern District of New York (Rakoff, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiffs-Appellants ("Plaintiffs") appeal from an order of the district court denying their request for leave to file a proposed Third Amended Complaint.[1] Plaintiffs' proposed Third Amended Complaint asserts claims of false arrest against Defendants Michael Bloomberg, City of New York, Raymond Kelly (Commissioner of the New York Police Department (NYPD)), Joseph Esposito (Chief of the Department for the New York Police Department), Thomas Purtell (Assistant Chief of the Department), as well as other named and unnamed individual officers who were present at or participated in the mass arrest of marchers who blocked the Brooklyn Bridge roadway during an October 2011 Occupy Wall Street protest march. Plaintiffs participated in that march and

[1] This Court previously reversed and remanded the District Court's denial of defendants' motion to dismiss with instructions to dismiss the Second Amended Complaint. See *Garcia* v. *Does*, 779 F.3d 84 (2d Cir. 2015) (as amended).

were arrested by the NYPD. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review a district court's denial of leave to amend for abuse of discretion. See *United States ex rel. Ladas* v. *Exelis, Inc.*, 824 F.3d 16, 28 (2d Cir. 2016). Leave to amend should be "freely give[n] . . . when justice so requires," Fed. R. Civ. P. 15(a)(2), but "'should generally be denied in instances of futility, undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice to the non-moving party.'" *Ladas*, 824 F.3d at 28 (quoting *Burch* v. *Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 126 (2d Cir. 2008)). "[W]hen denial of leave to file a revised pleading is based on a legal interpretation, such as futility, a reviewing court conducts a *de novo* review." *Balintulo* v. *Ford Motor Co.*, 796 F.3d 160, 164 (2d Cir. 2015). Plaintiffs sought to amend their complaint to add additional allegations in support of their state and federal law claims of false arrest against the individual officers as well as City and NYPD officials under the *Monell* doctrine. The plaintiffs newly allege, based largely on testimony from police depositions in other cases, that defendants Purtell and Esposito did not deploy appropriate police tactics to prevent marchers from following the line of officers down the roadway portion of the Bridge. Plaintiffs further allege that Chief Esposito directly participated in the false arrests of the marchers and that Raymond Kelly, Commissioner of the NYPD, failed to supervise him. Plaintiffs additionally allege *de facto* policies of the City and the NYPD allowing and even facilitating unpermitted marches and then, without warning, performing mass arrests of marchers.

Vicarious liability is not applicable in § 1983 suits. *Littlejohn* v. *City of New York*, 795 F.3d 297, 314 (2d Cir. 2015). Thus, "to impose liability on a municipality under § 1983, a plaintiff must identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." *Newtown* v. *City of New York*, 779 F.3d 140, 152 (2d Cir. 2015) (citing *Monell* v. *Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978)). The "City cannot be liable under *Monell* where [a plaintiff] cannot establish a violation of his constitutional rights." *Askins* v. *Doe No. 1*, 727 F.3d 248, 253 (2d Cir. 2013) (internal quotation marks omitted).

Plaintiffs here assert false arrest as their underlying cause of action for the *Monell* claim. Probable cause is a complete defense to a claim of false arrest under New York law. See *Ackerson* v. *City of White Plains*, 702 F.3d 15, 19 (2d Cir. 2012). This Court previously held, *Garcia* v. *Does*, 779 F.3d 84 (2d Cir. 2015) (as amended) ("*Garcia III*"), that the arresting officers were entitled to qualified immunity for the claim of false arrest because the officers had probable cause to effect the seven hundred arrests. See *id.* at 92, 96.

We determined in *Garcia III* that "defendants in this case had, from their personal observations, sufficient evidence to establish probable cause on each of the elements of a disorderly conduct violation," and noted that "the law of probable cause" does not "require[] police officers to engage in an essentially speculative inquiry into the potential state of mind of (at least some) of the demonstrators." *Id.* at 96. Therefore, the question before us now is whether the proposed additions to the Third Amended Complaint plausibly allege facts that vitiates probable cause for

the arrests of the marchers for violating N.Y. Penal Law § 240.20(5).

Plaintiffs have not added sufficient allegations in the proposed Third Amended Complaint to show lack of probable cause for the underlying arrests. Taking Plaintiffs' new allegations as true, Plaintiffs' main contentions are (1) that Chief Esposito was on the scene and knew that many of the marchers did not hear the instructions to disperse, yet made the decision to arrest anyway, (2) that actions of Esposito and other officers conveyed implicit permission to march on the roadway, (3) that Esposito, the City, and the NYPD had other methods to prevent Plaintiffs from proceeding on the bridge and chose not to use them, and (4) that the City and NYPD had policy of escorting unpermitted protests but then arresting the participants without notice. But none of these allegations defeats probable cause for the arrests.

"An officer has probable cause to arrest when he or she has knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed . . . a crime." *Stansbury* v. *Wertman*, 721 F.3d 84, 89 (2d Cir. 2013) (internal quotation marks omitted). The demonstrators were arrested for disorderly conduct under N.Y. Penal Law § 240.20(5), which prohibits "obstruct[ing] vehicular or pedestrian traffic." *Id*. As we previously noted, "[t]he essential flaw in plaintiffs' logic . . . is the extent to which it requires police officers to engage in an essentially speculative inquiry into the potential state of mind of (at least some of) the demonstrators. Neither the law of probable cause nor the law of qualified immunity requires such speculation." *Garcia III*, 779 F.3d at 96.

The proposed Third Amended Complaint does not alter our conclusions in *Garcia III*. Rather, it only asserts that Esposito had better knowledge of the state of mind of the demonstrators than the other individual officers had, namely that Plaintiffs lacked the intent to violate the law.[2] But the state of mind of the demonstrators—whether they thought that they were participating in a sanctioned, First-Amendment-protected roadway march or whether they were intentionally or recklessly blocking traffic—is irrelevant to the question of probable cause, although it is a potential defense to the underlying criminal charge. See *Curley* v. *Vill. of Suffern*, 268 F.3d 65, 70 (2d Cir. 2001) ("[T]he arresting officer does not have to prove plaintiff's version wrong before arresting him.").

While an officer may not "deliberately disregard facts known to him which establish justification," *Jocks* v. *Tavernier*, 316 F.3d 128, 136 (2d Cir. 2003), even the facts alleged in the Third Amended Complaint, if true, do not plausibly plead that Esposito deliberately ignored facts known to him that justified the marchers' takeover of the roadway. As this Court has already explained, the scene was chaotic, the retreat of police officers on the Bridge was not an unambiguous invitation to follow, and many marchers continued to funnel onto the sidewalk path. See *Garcia III*, 779 F.3d at 93–94.

The Third Amended Complaint alleges that there were no unambiguous instructions given to the marchers *not* to follow the officers, but does not as-

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[2] It is relevant to note that Esposito was one of the named individual officer defendants at the time we considered defendants' previous appeal.

sert any facts in support of instructions to follow the officers beyond the conclusory claim that "the clear communicative message of the ongoing police lead and escort was that it was permissible for marchers to continue in the police escorted march" onto the roadway. Joint App'x at 103. But the video evidence considered by this panel and by the previous panel incontrovertibly shows the absence of a clear message that their conduct was lawful. Absent the allegation of specific facts to support a direct communication from police to marchers that the marchers were permitted to occupy the road, the Third Amended Complaint fails to change our prior conclusion that the defendants had probable cause to arrest Plaintiffs for violating N.Y. Penal Law § 240.20(5).

Because Plaintiffs' constitutional rights were not violated by the arrests, the plaintiffs' *Monell* claims are also barred. "Liability under section 1983 is imposed on the municipality when it has promulgated a custom or policy that violates federal law and, pursuant to that policy, a municipal actor has tortiously injured the plaintiff." *Askins*, 727 F.3d at 253. Thus, the simple existence of a policy, without the corresponding violation, may not be challenged under § 1983.

Insofar as Plaintiffs allege that Esposito acted as a policymaker who failed to use sound police tactics (such as deploying scooters or installing orange mesh) to prevent the demonstrators from entering the bridge roadway, mere negligence is insufficient to establish a *Monell* claim. See *Amnesty Am.* v. *Town of W. Hartford*, 361 F.3d 113, 128 (2d Cir. 2004). Furthermore, the allegation that Kelly failed to supervise Esposito similarly fails, as Esposito did not vio-

late Plaintiffs' constitutional rights for the reasons stated above.

We have considered Garcia's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KARINA GARCIA, ET AL.,
Plaintiffs,
-v-
MICHAEL BLOOMBERG, et al.,
Defendants.
11-cv-6957(JSR)

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

Plaintiffs filed this purported class action against the City of New York, former Mayor Michael R. Bloomberg, former Commissioner of the New York City Police Department ("NYPD") Raymond W. Kelly, former NYPD Chief Joseph A. Esposito and several NYPD officers. Plaintiffs alleged that defendants are liable under 42 U.S.C. §1983 and New York state law for falsely arresting them for marching on the vehicular roadway of the Brooklyn Bridge (the "Bridge"). Plaintiffs now seek leave to file a proposed Third Amended Complaint ("TAC"). Because plaintiffs' proposed new allegations do not cure the defects of their Second Amended Complaint, the Court denies this request.

By way of background, plaintiffs were arrested on October 1, 2011, during an unpermitted march from Zuccotti Park in Manhattan over the Bridge to Brooklyn. Because the Bridge's pedestrian walkway could not fit enough people, marchers began walking over the Bridge's vehicular roadway. Some believed

that the police had tacitly given them permission to do so: although the police initially blocked the roadway, the police later began walking along it in front of the marchers. Once the police and the marchers had gone midway across the Bridge, the police halted the marchers' progress, blocked egress from the Bridge, and arrested the marchers on the roadway.

Against these facts, this Court denied, in part, defendants' motion to dismiss plaintiffs' Second Amended Complaint, holding that the individual NYPD officers were not entitled to qualified immunity. See *Garcia* v. *Bloomberg*, 865 F. Supp. 2d 478 (S.D.N.Y. 2012) ("*Garcia* I"). On appeal, a panel of the United States Court of Appeals for the Second Circuit initially affirmed; but then, after the Court as a whole had decided to hear the matter in banc, the panel withdrew its initial affirmance, and reversed and remanded, with instructions to dismiss the Second Amended Complaint. See *Garcia* v. *Does*, 774 F.3d 168 (2d Cir. 2014) ("*Garcia* II"); *Garcia* v. *Does*, 779 F.3d 84 (2d Cir. 2014) ("*Garcia* III").

The TAC does contain some new allegations, most of which relate to Chief Esposito. Several of these new allegations concern the events of October 1, 2011. For instance, the TAC identifies Chief Esposito as the ranking police officer at the march. TAC ¶¶ 65, 149. He was also one of the officers who walked on the Bridge's roadway ahead of the marchers. *Id.* ¶ 122. On the Bridge, Esposito came to the conclusion that the police would have to arrest the marchers. *Id.* ¶ 129. He called Commissioner Kelly and advised him that the NYPD would probably arrest the marchers. *Id.* 204-06, 216. Kelly approved the mass arrest, and Esposito later gave the order to arrest the marchers. *Id.* ¶¶ 65, 208, 213. The TAC

further alleges Esposito admitted that he erred in not using police resources like scooters or mesh to block marchers from accessing the roadway. *Id.* ¶¶ 88, 93 133.

Other new allegations concern the command and decisionmaking structures of the NYPD, but again focusing on Esposito. For instance, the TAC alleges that Esposito had control over the Civil Disorder Unit, which responded to major protests such as the Occupy Wall Street movement. *Id.* ¶¶ 219-21. He did not need to check with Kelly before exercising control over the Civil Disorder Unit. *Id.* ¶¶ 222. Esposito also issued "Chief of Department memos" that established department-wide policy and were not required to be approved by Kelly. *Id.* ¶¶ 225-28. In September 2011, Kelly and Esposito discussed Occupy Wall Street marches occurring without permits. TAC ¶ 234. They determined that the NYPD would allow unpermitted Occupy Wall Street marches to occur, even if this resulted in marchers using roadways in a manner that would ordinarily be prohibited. *Id.* ¶¶ 240-42.

With the TAC's new allegations in mind, the Court considers plaintiffs' motion for leave to amend. "A party may amend its pleading . . . with the court's leave." Fed. R. Civ. P. 15(a)(2). Although a court should freely give leave to amend when justice so requires, *id*., it is proper for the court to deny leave when the amendments would be futile. *Hunt* v. *Alliance N. A. Gov't Income Trust, Inc*., 159 F.3d 723, 728 (2d Cir. 1998). In particular, "if the claims would be subject to dismissal under Fed. R. Civ. P. 12(b)(6), the court should refuse to grant leave to amend rather than assent and then await a motion to dismiss." *Bank of New York* v. *Sasson*, 786 F. Supp. 349,

352 (S.D.N.Y. 1992). Accordingly, this Court reviews the TAC, in the light most favorable to plaintiffs, to determine whether it would survive a motion to dismiss.

On a motion to dismiss under Rule 12(b)(6), a court must determine whether a complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). For the purpose of the present motion, the Court considers the TAC; the parties' briefing, as well as the attached exhibits to the extent they refer to matters referenced in the TAC, such as excerpts of Esposito's deposition testimony in *Laugier* v. *City of New York*, No. 1:13-cv-06171-JMF, 2014 WL 6655283 (S.D.N.Y. Dec. 17, 2014), and *Sterling* v. *City of New York*, No. 1:12-cv-07086-RWS (S.D.N.Y. May 14, 2015); and the photographs and videos submitted with or incorporated into plaintiff's Second Amended Complaint.[2] The Court takes as true the facts alleged in the TAC, *Almonte* v. *City of Long Beach*, 478 F.3d 100, 104 (2d Cir. 2007), so long as they are not contradicted by video evidence. *Garcia* III at 87-88.

The Court first considers plaintiffs' claims of municipal liability under 42 U.S.C. § 1983. "Local governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, or-

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[2] The Court may consider the videos and photographic evidence. *Garcia* III at 87 n.2; *Garcia* I at 483 n.1; see also Pls.' Mem. at 9 (explaining that plaintiffs intend the TAC to incorporate video and multimedia exhibits).

dinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978) (footnote omitted). A plaintiff may assert municipal liability claims under *Monell* even if individual municipal actors are entitled to qualified immunity. See *Askins* v. *Doe No. 1*, 727 F.3d 248, 254 (2d Cir. 2013). However, because *Monell* does not provide a separate cause of action but rather extends the liability of individual municipals actors to the municipality, if a plaintiff cannot show she has been a victim of a tort committed by municipal actors, the municipality cannot be held liable. *Id.* at 253. Here, if plaintiffs cannot show that they were falsely arrested, then they cannot established municipal liability.

Plaintiffs have failed to plausibly allege that they were falsely arrested. The Second Circuit generally looks to the law of the state in which the arrest occurred when analyzing § 1983 claims for false arrest. *Davis* v. *Rodriguez*, 364 F.3d 424, 433 (2d Cir. 2004). "Under New York law, the existence of probable cause is an absolute defense to a false arrest claim." *Jaegly* v. *Couch*, 439 F.3d 149, 152 (2d Cir. 2006). The Second Circuit has already held that, in this case, the police had "sufficient evidence to establish probable cause on each of the elements of a disorderly conduct violation." *Garcia* III at 92.[3] Moreover, the Second Circuit held that the interactions between the police and the marchers, including any alleged

[3] This holding forecloses plaintiffs' argument that they did not violate the disorderly conduct statute because the intent element was missing. Pls.' Reply Mem. at 3-4. Plaintiffs' argument that Esposito's knowledge of a police escort on the Bridge negates the marchers' intent lacks merit. An arresting officer's knowledge does not alter an arrestee's intent.

grant of permission to march on the Bridge, were so ambiguous as to not displace this finding of probable cause. *Id*. at 96. According to the Second Circuit, the officers did not behave unlawfully. *Id*.

These findings nip plaintiffs' municipal liability claims in the bud. None of the additional allegations in the TAC contradicts the Second Circuit's findings. The TAC's new material primarily concerns Esposito's authority, decisionmaking processes, and communications with Kelly. But the deliberations of the NYPD's command officers have no bearing on the Second Circuit's finding that the police had probable cause to arrest the marchers. It is true that the TAC does allege that police officers conveyed permission to march between Zuccotti Park and the Bridge. TAC ¶¶ 82-85. It also alleges that officers escorted marchers onto the roadway in a manner reasonably interpreted as a grant of permission to use the roadway. *Id.* ¶¶145-48. But the Second Circuit held that these circumstances, similarly alleged by the Second Amended Complaint, were insufficient to defeat qualified immunity. *Garcia* III at 96. Further allegations of limited permission earlier in the march or implied permission on the roadway are not sufficient to override this conclusion.

Plaintiffs' legal arguments that the Second Circuit's holding does not apply to their municipal liability claims also fail. Plaintiffs argue that the Second Circuit did not adjudicate whether their constitutional rights were violated but only addressed the qualified immunity issue. Pls.' Reply Mem. at 4. It is true that the ultimate issue on appeal was whether the individual NYPD officers were entitled to qualified immunity. However, to reach its conclusion, the Second Circuit repeatedly made clear that its analy-

sis applied to the law of probable cause, as well as the law of qualified immunity. *Garcia* III at 96. Plaintiffs and this Court are bound by the Second Circuit's holdings on probable cause and, consequently, its impact on municipal liability under *Monell*.[4]

The TAC's assertions of individual liability under § 1983 are futile for the same reasons. The TAC does not state new allegations that would permit the Court to hold that arguable probable cause did not exist. Plaintiffs only vaguely argue that Kelly and Esposito's conduct "could be factors that contribute to a loss of qualified immunity," Pls.' Reply Mem. at 1, but do not explain how the new allegations overcome the Second Circuit's reasoning.

The Second Circuit's holdings on probable cause also lead the court to conclude that the TAC's state law claims for false arrest, negligence, gross negligence, and negligent supervision are futile. TAC ¶ 309-13. "Under New York law, the existence of probable cause is an absolute defense to a false arrest claim." *Jaegly* v. *Couch*, 439 F.3d 149, 151-52 (2d Cir. 2006). Moreover, in New York, courts do not recognize a "negligent" false arrest claim. See *Rheingold* v. *Harrison Town Police Dep't*, 568 F. Supp. 2d 384, 395 n.3 (S.D.N.Y. 2008) (citing *Bernard* v. *United States*, 25 F.3d 98, 102 (2d Cir. 1994) ("Under New York law, a plaintiff may not recover under general negligence principles for a claim that law enforcement of-

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[4] Because *Garcia* III binds this Court on the issue of probable cause, the Court does not reach the question of whether the TAC's new material would change the holding in *Garcia* I that plaintiffs failed to adequately plead municipal liability under *Monell*.

ficers failed to exercise the appropriate degree of care in effecting an arrest or initiating a prosecution.")).

For the foregoing reasons, the Court concludes that plaintiffs' proposed amendments are futile and denies their motion for leave to amend. The Clerk of the Court is directed to enter final judgment dismissing the complaint with prejudice and to close the case in its entirety.

SO ORDERED.

Dated: New York, NY /s/

September 9, 2015 JED S. RAKOFF, U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2012

(Argued: April 22, 2013

Decided: August 21, 2014

Rehearing Filed: December 18, 2014
Amended: February 23, 2015)

Docket No. 12-2634-CV

KARINA GARCIA, as Class Representative on behalf of herself and others similarly situated, YARI OSORIO, as Class Representative on behalf of herself and others similarly situated, BENJAMIN BECKER, as Class Representative on behalf of himself and others similarly situated, CASSANDRA REGAN, as Class Representative on behalf of herself and others similarly situated, YAREIDIS PEREZ, as Class Representative on behalf of herself and others similarly situated, TYLER SOVA, as Class Representative on behalf of himself and others similarly situated, STEPHANIE JEAN UMOH, as Class Representative on behalf of herself and others similarly situated, MICHAEL CRICKMORE, as Class Representative on behalf of himself and others similarly situated, BROOKE FEINSTEIN, as Class Representative on behalf of herself and others similarly situated,

Plaintiffs-Appellees,

MARCEL CARTIER, as Class Representative on behalf of himself and others similarly situated,

Plaintiff,

v.

JANE AND JOHN DOES 1-40, individually and in their official capacities,

*Defendants-Appellant*s,

RAYMOND W. KELLY, individually and in his official capacity, CITY OF NEW YORK, MICHAEL R. BLOOMBERG, individually and in his official capacity,

Defendants.*

Before:

CALABRESI, LIVINGSTON, and LYNCH, *Circuit Judges*.

Defendants-appellants, New York Police Department officers, appeal from an order of the United States District Court for the Southern District of New York (Jed S. Rakoff, *Judge*) denying their motion pursuant to Rule 12(b)(6) to dismiss plaintiffs-appellees' complaint against them on qualified immunity grounds. Defendants argue that the district court erred in concluding that plaintiffs' complaint, and other materials that could properly be considered on a motion to dismiss for failure to state a claim, did not establish that defendants had arguable probable cause to arrest plaintiffs for disorderly conduct. On August 21, 2014, we issued an opinion affirming the district court's judgment. On December 17, 2014, this opinion was withdrawn. On appellants' petition for rehearing, we now grant the petition, re-

* The Clerk of Court is respectfully directed to amend the official caption in this case to conform with the caption above.

verse the judgment of the district court, and remand with instructions to dismiss the complaint.

REVERSED.

MARA VERHEYDEN-HILLIARD (Andrea Hope Costello and Carl Messineo, *on the brief*), Partnership for Civil Justice Fund, Washington, D.C., *for Plaintiffs-Appellees*.

RONALD E. STERNBERG, Assistant Corporation Counsel (Leonard Koerner and Arthur G. Larkin, Assistant Corporation Counsel, *on the brief*), *for* Michael A. Cardozo, Corporation Counsel of the City of New York, New York, New York, *for Defendants-Appellants*.

GERARD E. LYNCH, *Circuit Judge*:

Plaintiffs-appellees, participants in a demonstration who were arrested after a confrontation with police at the Manhattan entrance to the Brooklyn Bridge, brought this action for false arrest in violation of their First, Fourth, and Fourteenth Amendment rights. Defendant-appellant police officers appeal from a ruling of the United States District Court for the Southern District of New York (Jed S. Rakoff, *Judge*) denying their motion to dismiss the complaint pursuant to Rule 12(b)(6) on grounds of qualified immunity. By a divided vote, we initially affirmed the district court's judgment. On December 17, 2014, the Court entered an order granting appellants' petition for rehearing en banc and withdrawing our prior opinion. On appellants' petition for rehearing, we now conclude that appellants are entitled to qualified immunity. Accordingly, we GRANT the petition for rehearing, REVERSE the judgment below, and RE-

MAND the case with instructions to dismiss the complaint.

BACKGROUND

Plaintiffs brought this action for false arrest under 42 U.S.C. § 1983 following their arrests during a demonstration in support of the Occupy Wall Street movement. [1] Plaintiffs attached five video excerpts and nine still photographs as exhibits to the Second Amended Complaint (the "Complaint"), which we consider when deciding this appeal. See *DiFolco* v. *MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010). We also consider videos submitted by defendants, which plaintiffs concede are similarly incorporated into the Complaint by reference.[2] For purposes of this appeal, we take as true the facts set forth in the Complaint, see *Almonte* v. *City of Long Beach*, 478 F.3d 100, 104 (2d Cir. 2007), to the extent that they are not contradicted by the video evidence.

I. The Protest and Plaintiff's Arrest

On October 1, 2011, thousands of demonstrators marched through Lower Manhattan to show support for the Occupy Wall Street movement. The march began at Zuccotti Park in Manhattan and was to end in a rally at Brooklyn Bridge Park in Brooklyn. Al-

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[1] Although plaintiffs bring their suit as a putative class action, no class has been certified. Accordingly, we address only the claims made by the ten named plaintiffs.

[2] We have never addressed whether Fed. R. Civ. P. 10(c), which provides that a "written instrument" included as an exhibit to a pleading "is a part of the pleading for all purposes," extends to videos of the sort presented in this case. Because no party contests the inclusion of the videos in the Court's review of the Complaint, however, we have no occasion to reach that issue here.

though no permit for the march had been sought, the New York City Police Department ("NYPD") was aware of the planned event in advance, and NYPD officers escorted marchers from Zuccotti Park to the Manhattan entrance to the Brooklyn Bridge (the "Bridge"), at times flanking the marchers with officers on motorscooters or motorcycles. Those officers issued orders and directives to individual marchers, at times directing them "to proceed in ways ordinarily prohibited under traffic regulations absent police directive or permission." J. App'x at 165. The officers blocked vehicular traffic at some intersections and on occasion directed marchers to cross streets against traffic signals. As far as appears from the video excerpts, neither the demonstration nor the actions of the officers in controlling or facilitating it caused any significant disruption of ordinary traffic patterns during this stage of the march.

When the march arrived at the Manhattan entrance to the Bridge, the first marchers began funneling onto the Bridge's pedestrian walkway. Police, including command officials, and other city officials stood in the roadway entrance to the Bridge immediately south of the pedestrian walkway and, at least at first, watched as the protesters poured across Centre Street towards the Bridge. A bottleneck soon developed, creating a large crowd at the entrance to the Bridge's pedestrian walkway. While video footage suggests that the crowd waiting to enter the pedestrian walkway blocked traffic on Centre Street, defendants do not contend that they had probable cause to arrest plaintiffs for their obstruction of traffic at that point, as opposed to their later obstruction of traffic on the Bridge roadway. Indeed, plaintiffs alleged in their Complaint that the police themselves stopped vehicular traffic on Centre Street near the

entrance to the Bridge[3] before the majority of the marchers arrived at the entrance.

While a steady stream of protesters continued onto the walkway, a group of protesters stopped and stood facing the police on the ramp constituting the vehicular entrance to the Bridge at a distance of approximately twenty feet. By this time, a large crowd of demonstrators had pooled behind that lead group. Given the size and density of the crowd, it would clearly have been impossible for vehicles to enter the bridge using the ramp at that location. Some of the protesters began chanting "Take the bridge!" and "Whose streets? Our streets!" At this point, all the video evidence confirms that the march had divided; one group was proceeding across the Bridge via the pedestrian walkway, while a second group had moved onto the vehicular roadway, where they were blocked by a line of police.[4]

An officer on the vehicular ramp stepped forward with a bullhorn and made an announcement. In the video taken by the NYPD's Technical Assistance Response Unit, the officer can clearly be heard repeating several times into the bullhorn: "I am asking you to step back on the sidewalk, you are obstructing traffic." Plaintiffs allege that these statement were

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[3] There are three eastbound entry ramps to the Bridge on the Manhattan side. The ramp referred to here is the northernmost ramp.

[4] Although this division was clear at the front of the march, additional demonstrators were backed up behind the divided lead groups. The pedestrian walkway was crowded, and the group on the vehicular roadway was blocked by police, creating a bottleneck such that some demonstrators were not clearly part of either group.

"generally inaudible," J. App'x at 166, and the video excerpts they have provided are consistent with that allegation. Two minutes later the same officer announced into the bullhorn: "You are obstructing vehicular traffic. If you refuse to move, you are subject to arrest," and "If you refuse to leave, you will be placed under arrest and charged with disorderly conduct." While it is clear that at least some marchers at the front of the crowd heard this announcement, plaintiffs allege that the officers knew that their warnings or orders to disperse would not have been audible to the vast majority of those assembled. There was considerable noise and confusion at the scene.

A minute and a half after the second announcement, the officers and city officials in the lead group turned around and began walking unhurriedly onto the Bridge roadway with their backs to the protesters. The protesters began cheering and followed the officers onto the roadway in an orderly fashion about twenty feet behind the last officer. The protesters on the roadway then encouraged those on the pedestrian walkway to "come over," and the videos show several protesters jumping down from the pedestrian walkway onto the roadway, though for the most part the marchers on the pedestrian walkway continued their progress on the walkway and did not enter the vehicular lanes. Protestors initially walked up the Bridge via the first (northernmost) entry ramp, but they eventually blocked the second and third ramps as well and occupied all of the Bridge's eastbound traffic lanes, preventing any cars from moving onto the Bridge in that direction.

Midway across the Bridge, the officers in front of the line of marchers turned and stopped all forward

movement of the demonstration. An officer announced through a bullhorn that those on the roadway would be arrested for disorderly conduct. Plaintiffs allege that this announcement was also inaudible. Officers blocked movement in both directions along the Bridge roadway and "prevented dispersal through the use of orange netting and police vehicles." J. App'x at 173. The officers then methodically arrested over seven hundred people who were on the Bridge roadway. These individuals were "handcuffed, taken into custody, processed and released throughout the night into the early morning hours." J. App'x at 174.

Plaintiffs allege that the officers "led the march across the bridge," and that the marchers saw the officers' movement onto the roadway as an "actual and apparent grant of permission to follow." J. App'x at 168. They allege that the combination of those officers in front "leading" the protesters onto the roadway and the officers on the side escorting them along the roadway led them to believe that the NYPD was escorting and permitting the march to proceed onto the roadway, as it had escorted and permitted the march through Lower Manhattan earlier in the day.

Officers at the roadway entrance did not instruct the ongoing flow of marchers not to proceed onto the roadway. Other officers walked calmly alongside the protesters on the roadway and did not direct any protesters to leave the roadway. The named plaintiffs allege that they did not hear any warnings or orders not to proceed on the roadway, and understood their passage onto the Bridge roadway to have been per-

mitted by the police.[5] Nevertheless, plaintiffs do *not* allege that any officer explicitly stated that the marchers would be permitted to advance along the vehicular lanes of the Bridge. Nor does any plaintiff allege that he or she observed any officer beckon to the demonstrators or state by word or gesture that they were welcome to proceed. The Complaint's allegation that the police had given "actual and apparent permission of the march to proceed," J. App'x at 173, is a legal conclusion based entirely on inferences drawn from (a) the officers' having followed along the course of the march before the arrival at the Bridge without interfering with, and occasionally facilitating, minor breaches of traffic rules; (b) the officers' retreat from their initial location blocking the protesters' advance onto the Bridge roadway after the bullhorn announcement to disperse; and (c) the failure of officers walking in front of the demonstrators or alongside them as they progressed across the Bridge to repeat any warnings, until the ultimate commencement of the arrests.

II. District Court Proceedings

Plaintiffs sued the unidentified NYPD officers who participated in their arrests,[6] as well as Mayor Michael R. Bloomberg, Police Commissioner Ray-

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[5] While one plaintiff, Cassandra Regan, acknowledges that she was told to leave the roadway, she alleges that the warning was given only after defendants had blocked off the roadway and no exit was possible.

[6] Eleven of these 40 John and Jane Does have since been identified and their names have replaced "John/Jane Does ## 1-11" in the caption of the district court proceedings. When the Complaint was filed and the relevant district court opinion was issued, however, none of the NYPD officers who participated in the arrests had been identified.

mond W. Kelly, and the City of New York, alleging that the arrests violated plaintiffs' rights under the First, Fourth, and Fourteenth Amendments. Defendants moved to dismiss plaintiffs' Second Amended Complaint on qualified immunity grounds and pursuant to *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), arguing, in part, that the Complaint and the videos demonstrate that they had probable cause to arrest plaintiffs for disorderly conduct.[7]

The district court denied the motion to dismiss the claims against the individual officers and granted the motion to dismiss the claims against the City, Bloomberg, and Kelly.[8] *Garcia* v. *Bloomberg*, 865 F. Supp. 2d 478 (S.D.N.Y. 2012). The district court held that the allegations in the Complaint, if true, established that a reasonable officer would have known

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[7] While defendants initially arrested many of the plaintiffs for failure to obey a lawful order, the offense that an officer cites at the time of the arrest need not be the same as, or even "closely related" to, the offense that the officer later cites as probable cause for the arrest. See *Devenpeck* v. *Alford*, 543 U.S. 146, 154-55. Defendants now argue that plaintiffs engaged in disorderly conduct, defined to include the conduct of, "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof[,] . . . obstruct[ing] vehicular or pedestrian traffic." N.Y. Penal Law § 240.20(5). While defendants argued before the district court that they also had probable cause to arrest plaintiffs for marching without a permit in violation of New York City Administrative Code § 10-110(a), defendants have abandoned that argument on appeal.

[8] Plaintiffs argued that the City of New York maintains a policy, practice, and/or custom of trapping and arresting peaceful protesters without probable cause. The district court held that plaintiffs had not plausibly alleged any such policy, practice, or custom. That interlocutory ruling is not before us, and we have no occasion to address its merits.

that he did not have probable cause to arrest plaintiffs. The district court further held that while plaintiffs had clearly violated the law by entering the Bridge roadway and blocking vehicular traffic, based on the facts alleged, no reasonable police officer could believe that plaintiffs had received fair warning that their behavior was illegal, as required by law. The district court concluded that while New York's disorderly conduct statute would normally have given protesters fair warning not to march on the roadway, it did not do so here, where defendants, who had been directing the march along its entire course, seemed implicitly to sanction the protesters' movement onto the roadway.[9]

Defendants now appeal the denial of their motion to dismiss on qualified immunity grounds, arguing that under the circumstances, "an objectively reasonable police officer would not have understood that the presence of police officers on the Bridge constituted implicit permission to the demonstrators to be on the Bridge roadway in contravention of the law."[10] Appellants' Br. at 3.

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[9] The district court stressed that its conclusion did "not depend in any way on a finding that the police actually intended to lead demonstrators onto the bridge." *Garcia*, 865 F. Supp. 2d at 491 n.9. Indeed, the court considered it far more likely that defendants had decided to move the protesters to a point where they believed they could better control them than that defendants had orchestrated a "charade" to create a pretense for arrest. Id.

[10] Defendants also moved to dismiss plaintiffs' claims for failure to state a claim and for failure to properly notify the City of the claims. Defendants do not appeal the denial of those motions.

DISCUSSION

I. Appellate Jurisdiction

We have jurisdiction over an appeal from a district court's denial of qualified immunity at the motion to dismiss stage because "qualified immunity—which shields Government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights—is both a defense to liability and a limited entitlement not to stand trial or face the other burdens of litigation." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 672 (2009) (citation and internal quotation marks omitted). "Provided it turns on an issue of law," a denial of qualified immunity is a final reviewable order because it "conclusively determine[s] that the defendant must bear the burdens of discovery; is conceptually distinct from the merits of the plaintiff's claim; and would prove effectively unreviewable on appeal from a final judgment." *Id*. (internal quotation marks omitted) (alteration in original); see also *Locurto* v. *Safir*, 264 F.3d 154, 164 (2d Cir. 2001) (noting that "denials of immunity are conclusive with regard to a defendant's right to avoid *pre-trial* discovery, so long as the validity of the denial of the qualified immunity defense can be decided as a matter of law in light of the record on appeal") (emphasis in original).

II. Standard Of Review

We review a district court's denial of qualified immunity on a motion to dismiss de novo, "accepting as true the material facts alleged in the complaint and drawing all reasonable inferences in plaintiffs' favor." *Johnson* v. *Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 250 (2d Cir. 2001).

III. Qualified Immunity

"Qualified immunity protects public officials from liability for civil damages when one of two conditions is satisfied: (a) the defendant's action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe that his action did not violate such law." *Russo* v. *City of Bridgeport*, 479 F.3d 196, 211 (2d Cir. 2007) (internal quotation marks omitted); see also *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) ("The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.") (internal quotation marks omitted). Defendants bear the burden of establishing qualified immunity. *Vincent* v. *Yelich*, 718 F.3d 157, 166 (2d Cir. 2013). Although we generally "look to Supreme Court and Second Circuit precedent existing at the time of the alleged violation to determine whether the conduct violated a clearly established right," *Okin* v. *Vill. of Cornwall-On-Hudson Police Dep't*, 577 F.3d 415, 433 (2d Cir. 2009), the "absence of a decision by this Court or the Supreme Court directly addressing the right at issue will not preclude a finding that the law was clearly established" so long as preexisting law "clearly foreshadow[s] a particular ruling on the issue," *Tellier* v. *Fields*, 280 F.3d 69, 84 (2d Cir. 2000) (internal quotation marks omitted).

An officer is entitled to qualified immunity against a suit for false arrest if he can establish that he had "arguable probable cause" to arrest the plaintiff. *Zalaski* v. *City of Hartford*, 723 F.3d 382, 390 (2d Cir. 2013) (internal quotation marks omitted). "Arguable probable cause exists if either (a) it was objectively reasonable for the officer to believe that proba-

ble cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met." *Id.*, quoting *Escalera* v. *Lunn*, 361 F.3d 737, 743 (2d Cir. 2004). "In deciding whether an officer's conduct was objectively reasonable . . . , we look to the information possessed by the officer at the time of the arrest, but we do not consider the subjective intent, motives, or beliefs of the officer." *Amore* v. *Novarro*, 624 F.3d 522, 536 (2d Cir. 2010) (internal quotation marks omitted). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001).

Under both federal and New York law, an officer "has probable cause to arrest when he or she has knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." *Dickerson* v. *Napolitano*, 604 F.3d 732, 751 (2d. Cir. 2010) (internal quotation marks omitted); see also *Michigan* v. *DeFillippo*, 443 U.S. 31, 37 (1979) (holding that a police officer has probable cause to arrest when the "facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense").

IV. What Reasonable Police Officers Would Have Understood

It is not subject to serious dispute that the defendants in this case had, from their personal obser-

vations, sufficient evidence to establish probable cause on each of the elements of a disorderly conduct violation. As noted above, that offense includes the conduct of, "with intent to cause public inconvenience, . . . or recklessly creating a risk thereof[,] . . . obstruct[ing] vehicular or pedestrian traffic." N.Y. Penal Law § 240.20(5). Plaintiffs were part of a large group that had gathered on a vehicular ramp approaching the Bridge and on the street behind it, locations generally reserved for vehicular traffic, making it impossible for vehicles to proceed. They do not challenge the conclusion that it would be reasonable for a police officer to infer that plaintiffs either intended to block traffic on the Bridge as part of their protest, or at a minimum were aware of a "substantial and unjustifiable risk" that they were doing so. See N.Y. Penal Law § 15.05(3) (defining "recklessly"). Rather, they contend that reasonable officers in defendants' position would also have been aware, or should have been aware, that plaintiffs had a reasonable belief that they had been authorized to cross the Bridge on the vehicular roadway, based on the fact that police officers who had been blocking their progress subsequently retreated and "led the march across the bridge," which they construed as "an actual and apparent grant of permission to follow." J. App'x at 168.

We are not concerned with whether plaintiffs' asserted belief that the officers' behavior had given them implied permission to violate traffic laws otherwise banning pedestrians from the roadway would constitute a defense to the charge of disorderly conduct; that issue would be presented to a court adjudicating the criminal charges against plaintiffs. Instead, we are faced with the quite separate question of whether any such defense was so clearly estab-

lished as a matter of law, and whether the facts establishing that defense were so clearly apparent to the officers on the scene as a matter of fact, that any reasonable officer would have appreciated that there was no legal basis for arresting plaintiffs. See *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) (an officer is entitled to qualified immunity "if officers of reasonable competence could disagree" on the legality of the action in its particular factual context). We cannot answer that question in the affirmative.

It is well established that a police officer aware of facts creating probable cause to suspect a prima facie violation of a criminal statute is "not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest." *Curley* v. *Vill. of Suffern*, 268 F.3d 65, 70 (2d Cir. 2001) (internal quotation mark omitted); see also *Panetta* v. *Crowley*, 460 F.3d 388, 398 (2d Cir. 2006) ("Once an officer has probable cause, he or she is neither required nor allowed to continue investigating, sifting and weighing information.") (internal quotation marks omitted). At most, probable cause may be defeated if the officer "deliberately disregard[s] facts *known to him* which establish justification." *Jocks* v. *Tavernier*, 316 F.3d 128, 136 (2d Cir. 2003) (emphasis added).

It cannot be said that the officers here disregarded known facts clearly establishing a defense. In the confused and boisterous situation confronting the officers, the police were aware that the demonstrators were blocking the roadway in violation of § 240.20(5). They were also certainly aware that no official had expressly authorized the protesters to cross the Bridge via the roadway. To the contrary, the officers would have known that a police official had attempt-

ed to advise the protestors through a bullhorn that they were required to disperse. While reasonable officers might perhaps have recognized that much or most of the crowd would be unable to hear the warning due to the noise created by the chanting protesters, it was also apparent that the front rank of demonstrators who presumably *were* able to hear exhibited no signs of dispersing. The Complaint and videotapes are devoid of any evidence that any police officer made any gesture or spoke any word that unambiguously authorized the protesters to continue to block traffic, and indeed the Complaint does not allege that any of the plaintiffs observed any such gesture.

Plaintiffs rely on the Supreme Court's decision in *Cox* v. *Louisiana* to argue that, in light of their apparent earlier passivity in the face of the march, police officers had to provide the protestors with "fair warning" before changing course and effecting any arrests.[11] See 379 U.S. 559, 574 (1965). But the facts

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[11] Plaintiffs also rely on our holding in *Papineau* v. *Parmley*, 465 F.3d 46 (2d Cir. 2006), which denied qualified immunity to officers who arrested peaceful protesters without first giving them "fair warning" through an order to disperse. *Id*. at 60. *Papineau* is inapposite, however. In *Papineau*, plaintiffs were protesting on private property bordering a public highway when a handful of protesters briefly entered the highway to distribute pamphlets. Once all participants were back on the property, police officers entered and began arresting protesters indiscriminately and without advance warning. *Id*. at 53. Because the protest in *Papineau* occurred on private property and posed no danger of "imminent harm" at the time of the arrests, *id*. at 60-61, plaintiffs neither needed permission from the police to engage in that protest nor, absent clear orders to disperse, had any notice that they might be engaging in unlawful conduct. *Papineau* does not stand for the proposition that police officers

of that case differ significantly from those at issue here. In *Cox*, a large group of demonstrators protesting on the street opposite a courthouse were arrested and charged with violating a statute that prohibited "picket[ing] or parad[ing] in or *near* a building housing a court of the State of Louisiana." *Id*. at 560 (emphasis added); see also *id*. at 564. The Court noted that the statute, while not unconstitutionally vague, was sufficiently "unspecific…. with respect to the determination of how near the courthouse a particular demonstration can be, [as to] foresee[ ] a degree of on-the-spot administrative interpretation by officials charged with responsibility for administering and enforcing it." *Id*. at 568. According to the Court, the record "clearly show[ed]" that such on-the-spot interpretation had been exercised in *Cox* to authorize the demonstration. *Id*. Cox, the leader of the demonstrators, testified to an explicit conversation with police officials in which he had been given "permission" to conduct the demonstration on the far side of the street, some 101 feet from the courthouse steps. *Id*. at 569-71. The Chief of Police effectively corroborated that account, as did an independent observer. *Id*. at 570. As the Supreme Court concluded,

> the highest police officials of the city, in the presence of the Sheriff and Mayor, in effect told the demonstrators that they could meet where they did, 101 feet from the courthouse steps, but could not meet closer to the courthouse. In effect, [Cox] was advised that a demonstration at the place it was held would not be one 'near' the courthouse within the terms of the statute.

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must provide "fair warning" before effecting any arrests when individuals are clearly violating an applicable criminal statute.

Id. at 571. On those facts, the Court concluded that convicting the demonstrators of demonstrating near the courthouse violated due process, because the demonstrators were entitled to rely upon the police's interpretation of the statute, and thus lacked fair warning that they were violating the law.

The circumstances in this case are quite different. Unlike the "unspecific" statutory command in *Cox*, § 240.20(5)'s prohibition against obstructing traffic is hardly vague, and it would have been clear to any person (and certainly to a reasonable police officer) that the protesters were occupying a location where they were not ordinarily permitted to be. Also unlike *Cox*, there was no explicit consultation between the leaders of the demonstration and the police about what conduct would be permitted. Nor was there any express statement from any police official authorizing the protesters to cross the Bridge on the vehicular roadway, opining that doing so would be lawful, or waiving the enforcement of any traffic regulation. Most importantly, no plaintiff alleges in the Complaint that he or she heard any statement from any police officer authorizing the protestors to cross the Bridge via the vehicular roadway, or observed any unambiguous indication from any police officer inviting the protesters to cross the Bridge in that manner. Nor is any such statement or gesture recorded in the videotapes submitted by the parties and incorporated into the Complaint by reference. Indeed, most of the plaintiffs allege that they did not see *anything* the police officers did, and simply "followed the march" as it proceeded across the Bridge. J. App'x at 171 (quoting plaintiff Garcia). See generally J. App'x at 169-72.

Plaintiffs nevertheless insist that, by ceasing to block the demonstrators' advance and instead turning and walking toward the Brooklyn side of the Bridge, the officers implicitly gave them permission to proceed. That action, however, is inherently ambiguous. It is certainly true that, by removing themselves from the demonstrators' path, police "allowed" the protesters to advance, in the sense that they stopped physically blocking them. But such an action does not convey, implicitly or explicitly, an invitation to "go ahead." The failure of a thin line of police officers to physically impede a large group that—based on the actions of those immediately on the front line—would reasonably be understood to be intent on advancing across the Bridge even absent permission does not suggest that those officers understood that the conduct they had ceased physically blocking was lawful, or had been affirmatively authorized by the police.[12]

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[12] Plaintiffs also cite two out-of-circuit cases denying qualified immunity to officers who arrested protesters after arguably sanctioning their traffic violations through their own directives. See *Vodak* v. *City of Chicago*, 639 F.3d 738, 743-44 (7th Cir. 2011); *Buck* v. *City of Albuquerque*, 549 F.3d 1269, 1283 (10th Cir. 2008).

We have not been altogether unequivocal as to the relevance of out-of-circuit cases in our assessment of whether a right is clearly established for the purposes of qualified immunity. Compare, *e.g.*, *Scott* v. *Fischer*, 616 F.3d 100, 105 (2d Cir. 2010) ("Even if this or other circuit courts have not explicitly held a law or course of conduct to be unconstitutional, the unconstitutionality of that law or course of conduct will nonetheless be treated as clearly established if decisions by this or other courts clearly foreshadow a particular ruling on the issue, even if those decisions come from courts in other circuits.") (internal quotation marks omitted), with *Pabon* v. *Wright*, 459 F.3d 241,

Even conceding that a majority of police officers would not reasonably have understood the retreat as inviting the demonstrators to enter the roadway, plaintiffs suggest that we cannot dismiss the Complaint so long as *any* officer who participated in the arrests may reasonably have anticipated some protestors to reasonably interpret it as such. The essential flaw in plaintiffs' logic, and in that of the prior panel opinion, is the extent to which it requires police officers to engage in an essentially speculative inquiry into the potential state of mind of (at least some of) the demonstrators. Neither the law of probable cause nor the law of qualified immunity requires such speculation. Whether or not a suspect ultimately turns out to have a defense, or even whether a reasonable officer might have some idea that such a defense could exist, is not the question. See *Curley*, 268 F.3d at 70 (refusing to require officers "to explore and eliminate every theoretically plausible claim of innocence before making an arrest") (internal quotation mark omitted). An officer still has

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255 (2d Cir. 2006) ("When neither the Supreme Court nor this court has recognized a right, the law of our sister circuits and the holdings of district courts cannot act to render that right clearly established within the Second Circuit."). But we need not resolve that tension here, because the out-of-circuit precedent cited by plaintiffs has not placed the question at issue in this case "beyond debate." *Ashcroft* v. *al-Kidd*, ___ U.S. ___, 131 S. Ct. 2074, 2083 (2011) ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."). Extending *Cox* beyond its due process holding, and agreeing on neither the constitutional right at stake nor its contours, *Vodak* and *Buck*—even assuming *arguendo* that their holdings might otherwise be relevant in the specific factual context of this case—do not foreshadow the law of which a reasonable officer in this circuit should be aware.

probable cause to arrest, and certainly is entitled to qualified immunity, so long as any such defense rests on facts that are so unclear, or a legal theory that is not so clearly established, that it cannot be said that any reasonable officer would understand that an arrest under the circumstances would be unlawful. *Reichle* v. *Howards*, ___ U.S. ___, 132 S. Ct. 2088, 2093 (2012); see also *Messerschmidt* v. *Millender*, ___ U.S. ___, 132 S. Ct. 1235, 1244 (2012) (qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments") (internal quotation marks omitted).

On the face of the Complaint, the officers were confronted with ambiguities of fact and law. As a matter of fact, the *most* that is plausibly alleged by the Complaint and the supporting materials is that the police, having already permitted some minor traffic violations along the marchers' route, and after first attempting to block the protesters from obstructing the vehicular roadway, retreated before the demonstrators in a way that some of the demonstrators may have interpreted as affirmatively permitting their advance. Whether or not such an interpretation was reasonable on their part, it cannot be said that the police's behavior was anything more than—at best for plaintiffs—ambiguous, or that a reasonable officer would necessarily have understood that the demonstrators would reasonably interpret the retreat as permission to use the roadway.

As a matter of law, *Cox* establishes that, under some circumstances, demonstrators or others who have been advised by the police that their behavior is lawful may not be punished for that behavior. The extent of that principle is less than clear, and we need not decide here how far it might extend. It is

enough to say that no clearly established law would make it "clear to a reasonable officer," *Saucier*, 533 U.S. at 202, that it would be unlawful to arrest individuals who were in prima facie violation of a straightforward statutory prohibition because those individuals may have believed, based on inferences drawn from ambiguous behavior by the police, that they were authorized to violate the statute.

V. The Procedural Posture Of The Case

Finally, plaintiffs argue that the Complaint may not be dismissed on the pleadings on qualified immunity grounds. It is certainly true that motions to dismiss a plaintiff's complaint under Rule 12(b)(6) on the basis of an affirmative defense will generally face a difficult road. When addressing a motion to dismiss a complaint, we "accept[ ] as true the material facts alleged in the complaint and draw[ ] all reasonable inferences in plaintiffs' favor." *Johnson*, 239 F.3d at 250. To survive such a motion, the complaint must simply "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678, quoting *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007).

But that does not mean that qualified immunity can never be established at the pleading stage. To the contrary, every case must be assessed on the specific facts alleged in the complaint. The Supreme Court has made clear that qualified immunity *can* be established by the facts alleged in a complaint, see *Wood* v. *Moss*, ___ U.S. ___, 134 S. Ct. 2056 (2014), and indeed, because qualified immunity protects officials not merely from liability but from litigation, that the issue should be resolved when possible on a motion to dismiss, "before the commencement of discovery," *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985),

to avoid subjecting public officials to time consuming and expensive discovery procedures. In this case, the facts alleged in the Complaint, and those depicted in the videos, do not bear out plaintiffs' legal conclusion that the officers' actions constituted "an actual and apparent grant of permission" to the demonstrators to utilize the roadway. J. App'x at 168. Still less do those facts plausibly describe a situation in which reasonable officers would have clearly understood that their actions were interpreted by the demonstrators as a grant of permission, such that arresting the demonstrators would violate clearly established law. Accordingly, dismissal of the Complaint is required.

CONCLUSION

For the foregoing reasons, the defendants' petition for rehearing is GRANTED, the judgment of the district court is REVERSED, and the case is REMANDED with instructions to dismiss the Complaint.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2012
(Argued: April 22, 2013
Decided: August 21, 2014)
Docket No. 12-2634-cv

KARINA GARCIA, AS CLASS REPRESENTATIVE ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, YARI OSORIO, AS CLASS REPRESENTATIVE ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, BENJAMIN BECKER, AS CLASS REPRESENTATIVE ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED, CASSANDRA REGAN, AS CLASS REPRESENTATIVE ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, YAREIDIS PEREZ, AS CLASS REPRESENTATIVE ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, TYLER SOVA, AS CLASS REPRESENTATIVE ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED, STEPHANIE JEAN UMOH, AS CLASS REPRESENTATIVE ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, MICHAEL CRICKMORE, AS CLASS REPRESENTATIVE ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED, BROOKE FEINSTEIN, AS CLASS REPRESENTATIVE ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

MARCEL CARTIER, AS CLASS REPRESENTATIVE ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

JANE AND JOHN DOES 1-40, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES,

Defendants-Appellants,

RAYMOND W. KELLY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, CITY OF NEW YORK, MICHAEL R. BLOOMBERG, IN HIS OFFICIAL CAPACITY AND INDIVIDUALLY,

Defendants.*

Before:

CALABRESI, LIVINGSTON, and LYNCH, *Circuit Judges*.

Defendants-appellants, New York Police Department officers, appeal from an order of the United States District Court for the Southern District of New York (Jed S. Rakoff, *Judge*) denying their motion pursuant to Rule 12(b)(6) to dismiss plaintiffs-appellees' complaint against them on qualified immunity grounds. Defendants argue that the district court erred in concluding that plaintiffs' complaint, and the other materials that could properly be considered on a motion to dismiss for failure to state a claim, did not establish that defendants had arguable probable cause to arrest plaintiffs for disorderly conduct. We disagree, and affirm the judgment of the district court.

AFFIRMED.

Judge Livingston dissents in a separate opinion.

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* The Clerk of Court is respectfully directed to amend the official caption in this case to conform with the caption above.

MARA VERHEYDEN-HILLIARD (Andrea Hope Costello and Carl Messineo, *on the brief*), Partnership for Civil Justice Fund, Washington, D.C., *for Plaintiffs-Appellees*.

RONALD E. STERNBERG, Assistant Corporation Counsel (Leonard Koerner and Arthur G. Larkin, Assistant Corporation Counsel, *on the brief*), *for* Michael A. Cardozo, Corporation Counsel of the City of New York, New York, New York, *for Defendants-Appellants*.

GERARD E. LYNCH, *Circuit Judge*:

Defendants-appellants ask us to definitively conclude, on the limited record before us on their motion to dismiss for failure to state a claim, that they are entitled to qualified immunity for their arrest of a group of demonstrators. Because we cannot resolve at this early stage the ultimately factual issue of whether certain defendants implicitly invited the demonstrators to walk onto the roadway of the Brooklyn Bridge, which would otherwise have been prohibited by New York law, we AFFIRM the judgment of the United States District Court for the Southern District of New York (Jed S. Rakoff, *Judge*).

BACKGROUND

Plaintiffs commenced this action for false arrest under 42 U.S.C. § 1983 following their arrests for participating in a demonstration in support of the Occupy Wall Street movement. Although plaintiffs have not been able to conduct discovery, they attached five video excerpts and nine still photographs as exhibits to the Second Amended Complaint (the "Complaint"), which we consider when deciding this

appeal, see *DiFolco* v. *MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010). We also consider videos submitted by defendants, which plaintiffs concede are incorporated into the Complaint by reference. For purposes of this appeal, we take as true the facts set forth in the Complaint, see *Almonte* v. *City of Long Beach*, 478 F.3d 100, 104 (2d Cir. 2007), to the extent that they are not contradicted by the video evidence.

I. The Protest And Plaintiffs' Arrests

On October 1, 2011, thousands of demonstrators marched through Lower Manhattan to show support for the Occupy Wall Street movement. The march began at Zuccotti Park in Manhattan and was to end in a rally at Brooklyn Bridge Park in Brooklyn. Although no permit for the march had been sought, the New York City Police Department ("NYPD") was aware of the planned march in advance, and NYPD officers escorted marchers from Zuccotti Park to the Manhattan entrance to the Brooklyn Bridge (the "Bridge"), at times flanking the marchers with officers on motorscooters or motorcycles. Those officers issued orders and directives to individual marchers, at times directing them "to proceed in ways ordinarily prohibited under traffic regulations absent police directive or permission." J. App'x at 165. The officers blocked vehicular traffic at some intersections and on occasion directed marchers to cross streets against traffic signals.

When the march arrived at the Manhattan entrance to the Bridge, the first marchers began funneling onto the Bridge's pedestrian walkway. Police, including command officials, and other city officials stood in the roadway entrance to the Bridge immediately south of the pedestrian walkway and, at least

at first, watched as the protesters poured across Centre Street towards the Bridge. A bottleneck soon developed, creating a large crowd at the entrance to the Bridge's pedestrian walkway. While video footage suggests that the crowd waiting to enter the pedestrian walkway blocked traffic on Centre Street, defendants do not contend that they had probable cause to arrest plaintiffs for their obstruction of traffic at that point, as opposed to their obstruction of traffic on the Bridge roadway. Indeed, plaintiffs alleged in their complaint that the police themselves stopped vehicular traffic on Centre Street near the entrance to the bridge[1] before the majority of the marchers arrived at the entrance to the Bridge.

While a steady stream of protesters continued onto the walkway, a group of protesters stopped and stood facing the police at the vehicular entrance to the Bridge at a distance of approximately twenty feet. Some of these protesters began chanting "Take the bridge!" and "Whose streets? Our streets!" An officer stepped forward with a bullhorn and made an announcement. In the video taken by NYPD's Technical Assistance Response Unit, the officer can clearly be heard repeating several times into the bullhorn: "I am asking you to step back on the sidewalk, you are obstructing traffic."

Plaintiffs, ten protesters who purport to represent the class of all protesters arrested that day, allege that the officers knew that these statement were "generally inaudible." J. App'x at 166. In a video provided by plaintiffs, recorded from roughly the second

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[1] There are three eastbound entry ramps to the Bridge on the Manhattan side. The ramp referred to here is the first ramp moving from west to east.

row of protesters, it is clear that protesters even at the front of the crowd twenty feet away could not make out the words of this announcement over the noise of the demonstration. Two minutes later the same officer announced into the bullhorn: "You are obstructing vehicular traffic. If you refuse to move, you are subject to arrest," and "If you refuse to leave, you will be placed under arrest and charged with disorderly conduct." While it is clear that at least one marcher at the front of the crowd heard this announcement, plaintiffs allege that the officers knew that they had not given any warnings or orders to disperse that would have been audible to the vast majority of those assembled.

A minute and a half after the second announcement, the officers and city officials in the lead group turned around and began walking unhurriedly onto the Bridge roadway with their backs to the protesters. The protesters began cheering and followed the officers onto the roadway in an orderly fashion about twenty feet behind the last officer. The protesters on the roadway then encouraged those on the pedestrian walkway to "come over," and the videos show several protesters jumping down from the pedestrian walkway onto the roadway. When one such protester was told by someone still on the pedestrian walkway "Don't go into the street, you will get arrested," he can be heard responding, "Whatever, they're allowing us to." Officers initially blocked protesters from impeding the second and third entry ramps to the Bridge and the southernmost lane of traffic, but eventually both of these ramps and all lanes of traffic across the Bridge were blocked by the protesters.

Midway across the bridge, the officers in front of the line of marchers turned and stopped all forward

movement of the demonstration. An officer announced through a bullhorn that those on the roadway would be arrested for disorderly conduct. Plaintiffs allege that this announcement was as inaudible as the previous announcements. Officers blocked movement in both directions along the Bridge and "prevented dispersal through the use of orange netting and police vehicles." J. App'x at 173. The officers then methodically arrested over seven hundred people who were on the Bridge roadway. These individuals were "handcuffed, taken into custody, processed and released throughout the night into the early morning hours." Id. at 174.

Plaintiffs allege that the officers "led the march across the bridge," and that the marchers saw the officers' movement onto the roadway as an "actual and apparent grant of permission to follow." J. App'x at 168. They allege that the combination of those officers in front "leading" the protesters onto the roadway and the officers on the side escorting them along the roadway led them to believe that the NYPD was escorting and permitting the march to proceed onto the roadway, as it had escorted and permitted the march through Lower Manhattan earlier in the day. Officers at the roadway entrance did not instruct the ongoing flow of marchers not to proceed onto the roadway. Other officers walked calmly alongside the protesters in the roadway and did not direct any protesters to leave the roadway. The named plaintiffs allege that they did not hear any warnings or orders not to proceed on the roadway, and understood their passage onto the Bridge roadway to have been per-

mitted by defendants.[2] Several allege that they did not even realize they were on the roadway until they were already on it. Plaintiffs allege that "[p]rior to terminating the march when it was mid-way across the bridge, the police did not convey that they were going to revoke the actual and apparent permission of the march to proceed," and that the officers therefore did not have probable cause to arrest them for disorderly conduct. *Id*. at 173.

II. District Court Proceedings

Plaintiffs sued the unidentified NYPD officers who participated in their arrests[3] as well as Mayor Michael Bloomberg, Police Commissioner Ray Kelly, and the City of New York, alleging that the arrests violated plaintiffs' rights under the First, Fourth, and Fourteenth Amendments. Defendants moved to dismiss plaintiffs' Second Amended Complaint on qualified immunity grounds and pursuant to *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), arguing, in part, that the Complaint and the videos demonstrate that they had probable cause to arrest plaintiffs for disorderly conduct.[4]

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[2] While one plaintiff, Cassandra Regan, acknowledges that she was told to leave the roadway, she alleges that the warning was given only after defendants had blocked off the roadway and no exit was possible.

[3] Eleven of these 40 John and Jane Does have since been identified and their names have replaced "John/Jane Does ## 1-11" in the caption of the district court proceedings. When the Complaint was filed and the relevant district court opinion was issued, however, none of the NYPD officers who participated in the arrests had been identified.

[4] While defendants initially arrested many of the plaintiffs for failure to obey a lawful order, the offense that an officer cites at the time of the arrest need not be the same as, or even "closely

The district court denied the motion to dismiss the claims against the individual officers and granted the motion to dismiss the claims against the City, Bloomberg, and Kelly.[5] *Garcia* v. *Bloomberg*, 865 F. Supp. 2d 478 (S.D.N.Y. 2012). The district court held that the allegations of the Complaint, if true, established that a reasonable officer would have known that he did not have probable cause to arrest plaintiffs. The district court further held that while plaintiffs had clearly violated the law by entering the Bridge roadway and blocking vehicular traffic, based on the facts alleged, no reasonable police officer could believe that plaintiffs had received fair warning that their behavior was illegal, as required by law. The district court concluded that while New York's disorderly conduct statute would normally have given protesters fair warning not to march on the roadway, it did not do so here, where defendants, who had been directing the march along its entire course,

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related" to, the offense that the officer later cites as probable cause for the arrest. See *Devenpeck* v. *Alford*, 543 U.S. 146, 154-55. Defendants now argue that plaintiffs engaged in disorderly conduct, defined as "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof … obstruct[ing] vehicular or pedestrian traffic." N.Y. Penal Law § 240.20. While defendants argued before the district court that they also had probable cause to arrest plaintiffs for marching without a permit in violation of New York City Administrative Code § 10-110(a), defendants have abandoned that argument on appeal.

[5] Plaintiffs argued that the City of New York maintains a policy, practice, and/or custom of trapping and arresting peaceful protesters without probable cause. The district court held that plaintiffs had not plausibly alleged any such policy, practice, or custom. That interlocutory ruling is not before us, and we have no occasion to address its merits.

seemed implicitly to sanction the protesters' movement onto the roadway.[6]

Defendants now appeal the denial of their motion to dismiss on qualified immunity grounds, arguing that under the circumstances, "an objectively reasonable police officer would not have understood that the presence of police officers on the Bridge constituted implicit permission to the demonstrators to be on the Bridge roadway in contravention of the law."[7] Appellants' Br. at 3.

DISCUSSION

I. Appellate Jurisdiction

We have jurisdiction over an appeal from a district court's denial of qualified immunity at the motion to dismiss stage because "qualified immunity—which shields Government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights—is both a defense to liability and a limited entitlement not to stand trial or face the other burdens of litigation." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 672 (2009) (citation and internal quotation marks omitted). "Provided it turns on an issue of law," a denial of qualified immunity is a final reviewable order

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[6] The district court stressed that its conclusion did "not depend in any way on a finding that the police actually intended to lead demonstrators onto the bridge." *Garcia*, 865 F. Supp. 2d at 491 n.9. Indeed, the court considered it far more likely that defendants had decided to move the protesters to a point where they believed they could better control them, not that defendants had orchestrated a "charade" to create a pretense for arrest. *Id.*

[7] Defendants also moved to dismiss plaintiffs' claims for failure to state a claim and for failure to properly notify the City of the claims. Defendants do not appeal the denial of these motions.

because it "conclusively determine[s] that the defendant must bear the burdens of discovery; is conceptually distinct from the merits of the plaintiff's claim; and would prove effectively unreviewable on appeal from a final judgment." *Id*. ((internal quotation marks omitted); see also *Locurto* v. *Safir*, 264 F.3d 154, 164 (2d Cir. 2001) (noting that "denials of immunity are conclusive with regard to a defendant's right to avoid *pre-trial* discovery, so long as the validity of the denial of the qualified immunity defense can be decided as a matter of law in light of the record on appeal" (emphasis in original)).

II. Standard Of Review

We review a district court's denial of qualified immunity on a motion to dismiss de novo, "accepting as true the material facts alleged in the complaint and drawing all reasonable inferences in plaintiffs' favor." *Johnson* v. *Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 250 (2d Cir. 2001).

III. Qualified Immunity

"Qualified immunity protects public officials from liability for civil damages when one of two conditions is satisfied: (a) the defendant's action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe that his action did not violate such law." *Russo* v. *City of Bridgeport*, 479 F.3d 196, 211 (2d Cir. 2007) (internal quotation marks omitted). Defendants bear the burden of establishing qualified immunity. *Vincent* v. *Yelich*, 718 F.3d 157, 166 (2d Cir. 2013). "Even if this or other circuit courts have not explicitly held a law or course of conduct to be unconstitutional, the unconstitutionality of that law or course of conduct will nonetheless be treated as clearly established if decisions

by this or other courts clearly foreshadow a particular ruling on the issue, even if those decisions come from courts in other circuits." *Scott* v. *Fischer*, 616 F.3d 100, 105 (2d Cir. 2010) (citation and internal quotation marks omitted).

An officer is entitled to qualified immunity against a suit for false arrest if he can establish that he had "arguable probable cause" to arrest the plaintiff. *Zalaski* v. *City of Hartford*, 723 F.3d 382, 390 (2d Cir. 2013) (internal quotation marks omitted). "'Arguable probable cause exists if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met.'" *Id*., quoting *Escalera* v. *Lunn*, 361 F.3d 737, 743 (2d Cir. 2004). "In deciding whether an officer's conduct was objectively reasonable …, we look to the information possessed by the officer at the time of the arrest, but we do not consider the subjective intent, motives, or beliefs of the officer." *Amore* v. *Novarro*, 624 F.3d 522, 536 (2d Cir. 2010) (internal quotation marks omitted).

Under both federal and New York law, an officer "has probable cause to arrest when he or she has knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." *Dickerson* v. *Napolitano*, 604 F.3d 732, 751 (2d. Cir. 2010) (internal quotation marks omitted); see also *Michigan* v. *DeFillippo*, 443 U.S. 31, 37 (1979) (holding that a police officer has probable cause to arrest when the "facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasona-

ble caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense"). Where an arrest is made without warrant, "the defendant in a false arrest case bears the burden of proving probable cause as an affirmative defense." *Dickerson*, 604 F.3d at 751.

IV. Probable Cause And The First Amendment

The First Amendment's prohibition on laws "abridging the freedom of speech . . . or the right of the people peaceably to assemble," U.S. Const. amend. I, "embodies and encourages our national commitment to 'robust political debate,'" *Papineau* v. *Parmley*, 465 F.3d 46, 56 (2d Cir. 2006), quoting *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 51 (1988). It protects "political demonstrations and protests — activities at the heart of what the Bill of Rights was designed to safeguard." Id. Courts have therefore been especially solicitous where regulation of protests threatens to discourage the exercise of First Amendment rights.

Cox v. *State of Louisiana* established that when officials grant permission to demonstrate in a certain way, then seek to revoke that permission and arrest demonstrators, they must first give "fair warning." 379 U.S. 559, 574 (1965). In *Cox*, officials explicitly permitted civil rights protesters to demonstrate across the street from a courthouse, even though a statute prohibited demonstrating "near" a courthouse. *Id*. at 568-69. A few hours later, the officials changed their minds and ordered the demonstrators to disperse, arresting those who refused. *Id*. at 572. The Supreme Court held that because the statute prohibiting demonstration "near" the courthouse was vague, the demonstrators had justifiably relied on

the officials' "administrative interpretation" of "near," *id*. at 568-69, and that the protesters' conviction for picketing where directed by officials therefore violated due process.

We reiterated the need for fair warning in *Papineau*. 465 F.3d at 60-61. There, the plaintiffs were protesting on private property bordering a public highway. A handful of protesters violated state law by briefly entering the highway to distribute pamphlets. Later, once the protesters were all back on private property, police officers marched onto the property and began arresting protesters without giving any warning. *Id*. at 53. We affirmed the district court's denial of qualified immunity to the officers, holding that even if the officers had a lawful basis to interfere with the demonstration, the plaintiffs "still enjoyed First Amendment protection, and absent imminent harm, the troopers could not simply disperse them without giving fair warning." *Id*. at 60, citing *City of Chicago* v. *Morales*, 527 U.S. 41, 58 (1999) ("[T]he purpose of the fair notice requirement [in disorderly conduct statutes] is to enable the ordinary citizen to conform his or her conduct to the law." (alteration in original)). *Papineau* also suggested in dictum that if the police had granted permission to demonstrate in a certain fashion, as in *Cox*, "even an order to disperse would not divest demonstrators of their right to protest." *Id*. at 60 n.6.

The Seventh and Tenth Circuits have applied Cox's requirement of fair warning before revoking permission to protest to situations similar to the protest here. In *Vodak* v. *City of Chicago*, protesters were arrested after walking down a street that officers arguably led them to think was a permitted route along their march. 639 F.3d 738, 743-44 (7th Cir.

2011). While officers had ordered protesters not to march westward from their planned route, on one street they stood aside and permitted protesters to march westward, then moved in behind the protesters and arrested them. Some marchers alleged that they believed that the police were directing them to proceed west on the road. *Id*. at 744. The court denied qualified immunity to the officers, finding that while the officers did not give explicit permission to move west down the street, "their presence, not blocking the avenue, might have made the marchers think it a permitted route west for them." *Id*. In *Buck* v. *City of Albuquerque*, a protester was arrested for marching without a permit and walking in the street. 549 F.3d 1269, 1283 (10th Cir. 2008). The Tenth Circuit denied qualified immunity to the arresting officers, holding that taking facts in the light most favorable to the plaintiff, the police officers' "street closures and direction of the procession sanctioned the protesters walking along the road and waived the permit requirement." *Id*. at 1284.

V. Probable Cause To Arrest Plaintiffs

Defendants acknowledge that "[i]n some circumstances, advice from officials as to the propriety of proposed conduct may indeed justify an individual in believing that his planned conduct is not prohibited," *Piscottano* v. *Murphy*, 511 F.3d 247, 286 (2d Cir. 2007), and that had the officers explicitly invited protesters onto the bridge, they could not have arrested the protesters without fair warning of the revocation of such permission. Indeed, defendants concede that the involvement of officers in directing the protest prior to its movement onto the roadway "may have sanctioned the demonstration . . . so long as the parameters of the implied permission were complied

with and the demonstrators remained on the sidewalk." Appellants' Br. at 28-29.

However, defendants argue that the protesters violated this initial implied permission when they left the sidewalk and entered the Bridge roadway. They argue that after this point in the march, plaintiffs' actions were in direct contravention of the officers' repeated admonitions to protesters to remain on the sidewalk, and that plaintiffs have not alleged facts sufficient to establish that a reasonable police officer would have understood that plaintiffs had been invited onto the roadway. Defendants argue that a reasonable officer would have understood that the lead group of officers were not "leading" the protesters onto the roadway but were instead strategically retreating, "reacting to a surging crowd that was following leaders who were intent on 'taking the bridge' despite both the law and direct and explicit warnings that their continued presence on the roadway would result in arrest." Appellants' Br. at 28. In such a situation, where no "implicit invitation" had been given to proceed onto the roadway, defendants argue that New York's disorderly conduct statute, which criminalizes "obstruct[ing] vehicular or pedestrian traffic" with "intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof," N.Y. Penal Law § 240.20, gave plaintiffs fair warning that their conduct was illegal, and no further warning was necessary.

Defendants have identified the relevant inquiry: not whether plaintiffs will ultimately prevail, or whether a reasonable demonstrator would have understood the police's actions as an invitation to enter the roadway, but rather whether a reasonable police officer (in the position of the officers who decided to

arrest plaintiffs) should have known that under the totality of the circumstances, the conduct of the police could have been reasonably understood by plaintiffs as an implicit invitation to enter the Bridge roadway, and thus should have known that additional, louder, or clearer instructions were required. But defendants' assertions of what the officers understood are unsupported by the Complaint or the record, which do not provide any details as to what any individual defendant knew or saw of the events leading up to the arrests.[8] Further, to the extent that defendants' arguments rest on a markedly different characterization of the events of the protest than those alleged by plaintiffs, we are unable to consider the resulting factual dispute at this stage. We must take the Complaint's allegations as true when considering defendants' motion to dismiss, as they are not "blatantly contradicted" or "utterly discredited"

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[8] The dissent references the Supreme Court's recent decision in *Wood* v. *Moss*, 134 S. Ct. 2056 (2014), implying that the decision requires us to ignore the reality of what each defendant officer knew or saw. But *Wood* did not unmoor the reasonableness standard from facts as they transpire in an individual case. In *Wood*, the Court reasoned that a discriminatory motive cannot be inferred from facts that conclusively point in a neutral direction, in that case, towards officers' reasonable concern for the safety of the President. *Id*. at 2069. But that common-sense conclusion does not change the analysis here. Officers at the Brooklyn Bridge had a constitutional obligation to warn protesters of a revoked invitation to march on the roadway. If the officers knew, or should have known, that their actions would be construed by reasonable protesters as inviting them onto the bridge, then a reasonable officer should have issued a fair warning revoking that permission. Plaintiffs allege that the officers' actions amount to such an invitation. Discovery will illuminate whether that it is indeed true.

by the submitted videos and still images, *Scott* v. *Harris*, 550 U.S. 372, 380 (2007).[9]

Given the paucity of the record as to the actions of any specific defendant on the day of the march, we cannot say at this stage whether or not defendants had sufficient knowledge of plaintiffs' perceptions of the officers' actions such that they acted unreasonably in arresting plaintiffs. A homely analogy will illustrate what is ultimately a common-sense point. Any driver knows that he may not ordinarily cross an intersection against a red light, but that an officer directing traffic can lawfully order him to ignore the red light and proceed. We assume arguendo that being signaled by a police officer to proceed in the face of a red light would be a valid defense for a driver charged with running that red light. In that situation, an officer who directed a driver to proceed, or realized that her gesture could reasonably have been seen as giving such a directive, would clearly act unreasonably by ticketing the driver for ignoring the red light. On the other hand, a second officer who saw the driver run the red light but was unaware of her colleague's instructions to do so would have probable cause to ticket the driver.

The facts of this case are of course far more complicated than this simple example. Although we have recounted the facts by referring to "the police" and "the demonstrators," we have done so only because the record is so undeveloped that we cannot specify

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[9] The videos and still images submitted by the parties are inconclusive on these points. They depict only what can be seen and heard from particular vantage points, and not what the police or protesters in general, or particular officers named as defendants, saw and heard.

the conduct or knowledge of particular named defendants. Ultimately, to recover damages, the plaintiffs will need to establish that particular defendants acted unreasonably in arresting them (or directing their arrest). Just as some demonstrators (but not others) might be convicted of disorderly conduct because it can be proven that they had heard and defied a clear warning that they were obstructing traffic and needed to move, so discovery might reveal that some police officers (but not others) were fully aware of facts that would lead reasonable officers to know that many of the demonstrators reasonably understood that they had been granted permission to proceed across the bridge, just as plaintiffs allege.

Given this standard, plaintiffs may have a difficult time establishing liability or avoiding the qualified immunity defense at a later stage of litigation.[10] In order to have a reasonable belief that probable cause exists, an officer need not anticipate or investigate every possible defense that a person suspected of violating the law may have, and an officer may have probable cause despite knowledge of facts that create an arguable defense. On the other hand, as *Cox* and *Papineau* clearly establish, an officer may not constitutionally arrest a demonstrator when he is personally aware that responsible officials have implicitly or explicitly authorized the very conduct for which he seeks to make the arrest. As the Seventh Circuit has held, "[o]nce a police officer discovers sufficient facts to establish probable cause, she has no

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[10] The difficulty may be especially pronounced with respect to officers who were unaware of earlier events, and were directed by superiors to arrest demonstrators who plainly appeared, at that later stage of events, to be in violation of New York Penal Law § 240.20(5).

constitutional obligation to conduct any further investigation in the hope of discovering exculpatory evidence," but "[a] police officer may not ignore conclusively established evidence of the existence of an affirmative defense." *Hodgkins ex rel. Hodgkins* v. *Peterson*, 355 F.3d 1048, 1061 (7th Cir. 2004); see also *Fridley* v. *Horrighs*, 291 F.3d 867, 873 (6th Cir. 2002) (holding that an officer, when assessing probable cause, "is not required to inquire into facts and circumstances in an effort to discover if the suspect has an affirmative defense," but may not "ignore information known to him which proves that the suspect is protected by an affirmative legal justification" (emphasis and internal quotation marks omitted)).

Taking plaintiffs' allegations as true, as we must, we believe that they have adequately alleged actionable conduct. Plaintiffs have alleged that the police directed the demonstrators' activity along the route of their march, at times specifically condoning, or even directing, behavior that on its face would violate traffic laws. When the bottleneck at the pedestrian walkway of the Bridge led the demonstrators to pool into the roadway, the police did not immediately direct them out of the street, and when they did undertake to issue such a warning to clear the roadway, they did so in a way that no reasonable officer who observed the warning could have believed was audible beyond the first rank of the protesters at the front of the crowd.[11] According to plaintiffs' account,

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[11] The fact that some protesters clearly heard the warning does not establish probable cause to arrest the entire group, when defendants knew that the vast majority had *not* heard the warning. See *Papineau*, 465 F.3d at 59-60 (holding that officers could not engage in "indiscriminate mass arrests" of a group where a few unidentified individuals from the group had violat-

the police then retreated back onto the Bridge in a way that would reasonably have been understood, and was understood, by the bulk of the demonstrators to be a continuation of the earlier practice of allowing the march to proceed in violation of normal traffic rules.

We emphasize that the procedural posture of this case presents a formidable challenge to defendants' position. They urge us to find that qualified immunity is established for all defendants based on *plaintiffs'* version of events (plus a few inconclusive photos and videos). The evidence, once a full record is developed, may contradict plaintiffs' allegations, or establish that some or all of the defendants were not aware of the facts that plaintiffs allege would have alerted them to the supposed implicit permission. We express no view on whether some or all of the defendants may be entitled to qualified immunity at a later stage of the case. *Cf. Pena* v. *DePrisco*, 432 F.3d 98, 111-12 (2d Cir. 2005) (affirming denial of application for qualified immunity at motion to dismiss stage without prejudice to renew application at a later stage). But to reverse the district court's denial of qualified immunity on a motion to dismiss, we would have to say that on the basis of plaintiffs' account of events, no officer who participated in or directed the

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ed the law). Nor would any warning the officers gave after demonstrators had already proceeded halfway across the bridge qualify as "fair warning." At that point, the police had allegedly blocked off any avenues of retreat. As the district court noted, "[i]mplicit in the notion of 'fair warning' is an opportunity for plaintiffs to conform their conduct to requirements." *Garcia*, 865 F. Supp. 2d at 488 n.7; see also *Morales*, 527 U.S. at 58 (noting that "the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law").

arrests could have thought that plaintiffs were invited onto the roadway and then arrested without fair warning of the revocation of this invitation.[12] Since we cannot do so on this limited record, we affirm the judgment of the district court.[13]

VI. The Dissent

We add a few words in response to Judge Livingston's dissent, which seems to us to ignore the procedural context of this decision, and accordingly to draw unwarranted conclusions about the nature and consequences of our holding today. We emphatically do *not* hold that—and have no occasion to decide whether—any police officer acted unlawfully, is liable for damages, or lacks qualified immunity for his or her actions on the day in question. As we have clearly stated, upon the development of an appropriate factual record, any or all of the police officer defendants may well properly be found entitled to qualified immunity at the summary judgment stage, or

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[12] Contrary to the dissent's assertion, to say that officers may have had different experiences is not to say that they were all reasonable or all unreasonable. Discovery is necessary in this case simply because, as a factual matter, individual officers may have had different experiences on the day of the march, and, thus, some may be liable and some may not, depending on what they saw, heard, and knew. With a full record, the district court can then evaluate whether reasonable officers could disagree about the legality of what each officer did.

[13] We also affirm the district court's denial of qualified immunity on plaintiffs' state law claims, as our analysis of federal qualified immunity is equally applicable to qualified immunity under New York law, which "in the context of a claim of false arrest depends on whether it was objectively reasonable for the police to believe that they had probable cause to arrest." *Papineau*, 465 F.3d at 64.

after trial. The dissent, however, engages in a lengthy description of various inflammatory facts gleaned from a viewing of some of the videotapes submitted by the parties, all taken from differing and partial perspectives, and treats its factual conclusions as established facts about what "the police" were aware of. If it turns out, after discovery, that no reasonable factfinder could see the evidentiary record differently than the dissent does, qualified immunity may well prove appropriate.

Even at the summary judgment stage, however, it is well established that dismissal on qualified immunity grounds may not be granted when factual disputes exist, unless the defendants concede the facts alleged by the plaintiffs for purposes of the motion. *Loria* v. *Gorman*, 306 F.3d 1271, 1280 (2d Cir. 2002), citing *Coons* v. *Casabella*, 284 F.3d 437, 440 (2d Cir. 2002). Here, we are at an even earlier stage, at which defendants, in order to prevail, must be entitled to qualified immunity *based on the very facts alleged by the plaintiffs*. While we agree that a motion to dismiss on such grounds can lie, success on such a motion must be limited to situations where immunity is clear based on the allegations in the complaint itself. As is evident from the dissent, defendants here do not rest their claim to immunity on the allegations of the complaint, but rather on an extensive analysis of "facts" asserted by the defendants. The existence of videotapes depicting *some* of the events from the perspectives of *some* of the participants does not establish those facts; a comparison of the tapes recording the police announcement to the protesters to disperse makes entirely apparent how different the events could appear from different vantage points.

To take only a few examples: the dissent suggest that some protesters lawfully headed onto the pedestrian walkway of the Bridge while others unlawfully headed for the roadway. But that is hardly established fact. The pedestrian walkway is narrow, and large numbers of demonstrators appear to have pooled on Centre Street, near the entrance to both the roadway and the walkway, as they approached the bottleneck at the Bridge entrances. Defendants do not argue that they had probable cause to arrest these demonstrators, who were already in the roadway of Centre Street. Indeed, the complaint implies that the police themselves had blocked off traffic at that point. And, according to the complaint, the police alleviated congestion at the base of the bridge by inviting protesters to ignore traffic laws and stream across Centre Street regardless of walkway signals and standard right-of-way rules. Given police tactics that day, officers could quite plausibly have decided to channel the ballooning mass of protesters onto the Bridge roadway in order to keep the march moving towards its end on the other side of the East River, and, thus, protesters may have reasonably believed that officers were doing so whether that was their true motive or not.[14] It is hardly apparent that many

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[14] The dissent states that neither the complaint, photos, or videos support this narrative. But this conclusion reflects the Rashomon-like quality of this case. Photos attached as Exhibits, B, C, and D to the Second Amended Complaint depict throngs of people pooling on Centre Street, the entrance to the bridge's pedestrian path, and the plaza to the east of City Hall. In each, members of the crowd stand shoulder to shoulder. And at 23:12, the video focuses on a crowd of people waiting at a standstill on Centre Street, looking around as if unsure where to go and what to do. Perhaps the dissent believes that the befuddled crowd had no reason to think that it should migrate onto the

of the protesters who eventually entered the Bridge roadway did so knowing that they were eschewing a concededly lawful alternative and taking an illegal turn onto that road.

Similar questions of fact undermine the dissent's conclusion that the officers on the scene all made objectively reasonable decisions. Contrary to the dissent's suggestion, it is not clear that "it was anything *but* reasonable for any officer—named or John Doe—to conclude that each of the plaintiffs on the roadway of the Bridge (among the thousands who did not take to the roadway and were not arrested) was obstructing traffic." (Dis. Op. at 25). At the time the district court decided the motion in question, essentially all of the defendants were sued as John Does. While some officers participating in the arrest have now been identified, there is no clear record yet of who made the decision to arrest the protesters on the roadway, where the decisionmakers were stationed, what those decisionmakers observed, and what reasoning process they followed. We do not know why the officers at the front of the march chose to retreat onto the bridge, and what if anything they intended to convey.[15] As noted above, we share the dissent's

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roadway. That may be true. But at this stage in the litigation it is but one view of facts that can be arranged and understood in multiple ways, including along the lines asserted by plaintiffs in their complaint.

[15] This is not to say that officers' subjective experience will ultimately decide the qualified immunity question. But the officers' perspective will surely help illuminate what actually happened in those pivotal moments on the bridge. Put differently, were an officer to admit that he led marchers onto the bridge with the intent of inviting them to continue marching on the roadway, such testimony would certainly corroborate protesters' contention that the officers' retreat onto the bridge objectively

expectation that many individual officers participating in the arrests, based on their perspective on the events, will have had every reason to believe that the protesters were acting unlawfully, and will have reasonably participated in the arrests. It does not follow, however, that those who made the command decisions for the police to retreat onto the Bridge (and thus to create a situation in which the protesters moved forward and eventually blocked traffic from other eastbound entrance ramps that may have been unimpeded before the police moved back), and then to arrest the protesters who predictably followed them, would have been similarly unaware that the protesters' actions had previously been condoned and that no adequate warning had been given. Based on the allegations of the Complaint, and the confused images from the videos submitted, the experienced district judge correctly ruled that discovery should go forward.

Nor do we regard the applicable law as unsettled. The dissent correctly notes that *Cox* does not address the issue of probable cause. As the dissent concedes, however, *Cox* holds that when demonstrators have been given police permission to be where they are, they cannot be found guilty of a crime absent clear warning that permission has been revoked. If a person cannot as a matter of law be guilty of a crime, an officer aware of the facts establishing the applicable defense cannot have probable cause to make an arrest. In any event, our own holding in *Papineau* applies exactly this analysis in the qualified immunity context. It may well be that no police officer, including those who made the critical tactical decisions in

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appeared to be an invitation to continue marching on the roadway.

this case, was aware of the relevant facts. It is impossible, however, to know that at this stage.

Unlike the dissent, we do not regard this case as presenting novel issues of weighty consequence. The only question before us is whether the Complaint on its face (or as supplemented by a handful of still and moving images) unequivocally establishes that the officers unquestionably had either probable cause or arguable probable cause to arrest the plaintiffs. Our answer is that it does not.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

DEBRA ANN LIVINGSTON, *Circuit Judge*, dissenting:

The majority misapplies the Supreme Court's qualified immunity cases, first subjecting police officers to "the burdens of broad-reaching discovery" in the absence of clearly established law supporting its strained theory of liability, *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)) ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery."); accord *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009) (noting that the "'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that 'insubstantial claims' against government officials . . . be resolved prior to discovery" (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 n.2 (1987)), and then standing the objective reasonableness doctrine on its head. In so doing, it threatens the ability of police departments in this Circuit lawfully and reasonably to police large-scale demonstrations and to make the necessary on-the-spot judgments about whether arrests are required in the face of unlawful conduct threatening public safety. Respectfully, I dissent.

The New York City Police Department ("NYPD") officers who policed the movement of thousands of "Occupy Wall Street" protesters from Zuccotti Park to the Brooklyn Bridge on October 1, 2011, brought these many people (who did not obtain a permit before their march) through downtown Manhattan safely and, so far as the Second Amended Complaint (the "complaint" or "putative class action complaint") alleges, without incident. Amidst loud and insistent chants of "Take the Bridge! Take the Bridge!," dem-

onstrators at the head of the march thereafter defied police instructions to use the Bridge's footpath and instead led a subset of protesters onto the Bridge's roadway – a vehicular artery that constitutes both a major route for daily traffic moving between lower Manhattan and downtown Brooklyn and, during emergencies, for the movement of first responders. As a result, some 700 demonstrators who took to the roadway (among the thousands who did not) were arrested.

The putative class action complaint is devoid of allegations that even *one* of these many protesters suffered any indignity at the hands of police – any indignity, that is, apart from the fact of arrest while obstructing all traffic on the Brooklyn Bridge. The majority determines, nevertheless, that some 40 officers making arrests that day are not entitled to qualified immunity, at least at the motion to dismiss stage. But the majority can point to no clearly established law supporting its theory of potential police liability: which is, in essence, that because police escorted these unpermitted demonstrators to the Bridge, sometimes assisting them in crossing the street against the light, police thereby incurred a "constitutional obligation to warn protesters of a revoked invitation to march on the roadway," apparently by using sound amplifying equipment adequate to the majority's taste. Maj. Op. 18 n.8. Citing *Cox* v. *Louisiana*, 379 U.S. 559 (1965), the majority claims that because: (1) some of the 700 may not have heard the repeated police instructions to stay off the Bridge roadway; and (2) police may have "implicitly" (if inadvertently) "invited the demonstrators to walk onto the roadway of the Brooklyn Bridge," Maj. Op. 3, by assisting them in crossing streets and then falling away before the insistent throng at the Bridge's

base, discovery must be had as to whether the 40 police officers "had sufficient knowledge of plaintiffs' perceptions of the officers' actions" – so that police "acted unreasonably," Maj. Op. 19, in believing they had probable cause to arrest. But *Cox* does not suggest – much less clearly establish – any such thing.

And that is for the best. Police are called upon to shepherd demonstrators through busy city streets and, to do so safely, they sometimes overlook infractions (such as the absence of a permit) either to expedite the movement of large and sometimes raucous crowds, to minimize disruption to others, or simply to avoid unnecessary confrontation with people out to have their say. The majority's "rule of *Cox*" suggests that in so doing, police will henceforth repeatedly incur the costs of class action inquiry into the question whether their conduct implicitly invited later illegality by demonstrators and whether officers had "knowledge of plaintiffs' perceptions of the officers' actions" so as to defeat probable cause for subsequent arrests. To avoid the costs of civil litigation in such a fantastical world, police managers would be wise to counsel officers to arrest at the first infraction (irrespective of any risk this might pose), to disregard nothing, and thereby to suppress much First Amendment expression. Thus, in a case like this, arrests should have begun, perilously, when the obdurate protesters in front first stepped onto the Bridge roadway – or perhaps when marchers first stepped foot on a city street.[16]

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[16] The New York Civil Liberties Union, in an amicus brief, urges the panel not to reach the question whether New York City Administrative Code § 10-110(a) (providing in relevant part that "[a] procession, parade, or race shall be permitted upon

This is not the law of qualified immunity. As the Supreme Court said only last Term, "[r]equiring [an] alleged violation of law to be 'clearly established' 'balances . . . the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.'" *Wood* v. *Moss*, 134 S. Ct. 2056, 2067 (2014) (quoting *Pearson*, 555 U.S. at 231) (ellipsis in *Wood*). The "dispositive inquiry," the Supreme Court said, "is whether it would have been clear to a reasonable officer" in the position of those on the Bridge "that their conduct was unlawful in the situation they confronted." *Id.* (quoting *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001)) (brackets and internal quotation marks omitted).

The majority turns this standard upside down, asserting that qualified immunity at the motion to dismiss stage is appropriate only if, taking as true the plaintiffs' allegations, "no officer who participated in or directed the arrests could have thought" that police were violating the plaintiffs' constitutional rights. Maj. Op. 23. Alluding to the supposed "Rashomon-like quality" of this case, Maj. Op. 26 n.14, the majority concludes that extensive inquiry into the police officers' "knowledge of plaintiffs' perceptions of the officers' actions," Maj. Op at 19, is re-

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any street or in any public place only after a written permit therefor has been obtained from the police commissioner") applies to marches conducted wholly on the sidewalks. Although both parties appear to have agreed below that § 10-110(a) applies to sidewalk marches (so that the unpermitted Occupy demonstrators were subject to arrest from the start), the issue need not be decided here, since the Occupy marchers who were arrested were on the roadway of the Brooklyn Bridge – a location, incidentally, for which a permit is clearly required.

quired before it can be determined if the defendants are entitled to have this case dismissed. But the majority is wrong. The plaintiffs have not alleged facts plausibly suggesting that a reasonable police officer would have believed she was violating the Constitution by arresting those "Occupy Wall Street" demonstrators who posed a threat to public safety by occupying the roadway of the Brooklyn Bridge. Not even close. In such circumstances, the officers are presently entitled to qualified immunity. It's a shame they are being denied its protections.

I.

At the start, the majority contends, erroneously, that my conclusion that this complaint should be dismissed "do[es] not rest . . . on the allegations of the complaint, but rather on an . . . analysis of 'facts'" from the photographic and video exhibits. Maj. Op. 25. But the majority acknowledges – as it must – that the plaintiffs' photographs and videos are attached to their complaint and that the defendants' videos have been "incorporated into the Complaint" by reference. Maj. Op. 4. These photographs and videos are thus *part* of the complaint, see *Int'l Audiotext Network, Inc.* v. *Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995) ("The complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." (brackets and internal quotation marks omitted)); see also Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."), and Supreme Court precedent *requires* that we consider them, see *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts *must* consider the complaint in its entirety, as well as oth-

er sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference. . . ." (emphasis added)). Moreover, contrary to the majority's claim, the analysis here as to why these officers are presently entitled to qualified immunity is in no way dependent on my adoption of "various inflammatory facts gleaned" from videotapes offering "differing and partial perspectives" on the events of the day. Maj. Op. 24. Rather, it proceeds from the complaint's allegations, as supplemented by basic, indisputable facts depicted in the photographs and videos. Those facts are presented here.

* * *

On October 1, 2011, after camping in lower Manhattan for almost two weeks, supporters of the "Occupy Wall Street" movement staged an unpermitted march through lower Manhattan. The protesters planned to march from Zuccotti Park to the Brooklyn Bridge Park. Aware of these plans, the NYPD deployed substantial resources, including dozens of patrol officers, as well as officers on bicycles, motorscooters, motorcycles, in police cruisers, and in other types of vehicles, to accompany the mass of people, which numbered in the thousands, as they marched. Police officers escorting the marchers north from Zuccotti Park provided them with a steady stream of oral and visual directions, ordering them repeatedly, as depicted in the video footage, to stay on the sidewalks and to keep within pedestrian walkways. The police also on occasion restricted the movement of traffic and pedestrians along the unpermitted route, facilitating the protesters' movement across streets while at the same time ensuring not only the safety of protesters, but also that of the New York City residents and visitors among whom

the march was staged. At other times, and again as shown in the video footage, police officers formed human "walls" between protesters and the street to keep the protesters out of vehicular traffic and to keep vehicles away from the protesters.

The protest proceeded from Zuccotti Park to the entrance of the Brooklyn Bridge without incident, so far as the complaint alleges, and despite the thousands involved. The video footage of the trek from Zuccotti Park to the Bridge further establishes, beyond peradventure, that the police permitted the demonstrators to march only *on the sidewalk*, and not in the street, except at crossings. "Nobody is walking in the street; everyone is walking on the sidewalk," said one officer with a bullhorn. "Folks, I need everyone to walk on the sidewalk." The putative class action complaint at no point alleges that protesters were permitted to march on the streets, except when crossing, on the way to the Brooklyn Bridge. As the very first protesters reached the entrance to the Bridge, moreover, these protesters marched directly onto the Bridge's pedestrian walkway, apparently at the direction of officers and in compliance with the general instructions throughout to stay out of traffic.[17]

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[17] The majority posits that my assertion that "some protesters lawfully headed onto the pedestrian walkway of the Bridge . . . is hardly established fact." Maj. Op. 25. But this fact is both pled in plaintiffs' complaint and shown clearly in the plaintiffs' photographs attached thereto. *See* Second Amended Complaint ¶ 87 ("[T]hose in the front of the march crossed Centre Street and moved to the pedestrian walkway or promenade of the Brooklyn Bridge."); *id.* ¶ 88 ("When the front section of the march encountered the narrow pedestrian walkway of the bridge, there was a natural congestion as the large group began

But not so other protesters, who wanted to march over the vehicular roadway. Several of them, two holding a red flag that said, "PEOPLE NOT PROFITS," headed onto the roadway rather than the pedestrian promenade. They motioned for others to follow. The crowd on the roadway grew and within a few moments, a group of two dozen or more protesters had positioned themselves on the roadway and begun to chant. A large group quickly amassed there; the resulting congestion restricted vehicular traffic, which began to form behind the protesters, as well as pedestrian traffic both onto the Bridge and at its base.

The majority asserts that because the Bridge's pedestrian walkway is narrow and demonstrators depicted in the videos appear to have pooled on Centre Street, at the Bridge's base, officers initially "could quite plausibly have decided to channel the ballooning mass of protesters onto the Bridge roadway in order to keep the march moving towards its end on the other side of the East River." Maj. Op. 25. To be clear, the complaint does not allege any such thing (which is irrelevant to the qualified immunity

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to file onto the smaller walkway."); *id.* ¶ 100 ("hundreds of persons upon the pedestrian walkway"); *id.* ¶ 104 n.2 ("The original front of the march had entered onto the pedestrian walkway with several hundred others."). Indeed, the plaintiffs' class action complaint cites two of its own pictorial exhibits and asserts that these pictures show this very thing. *Id.* ¶ 88 (alleging that exhibit B depicts a "large number of marchers entering and on the pedestrian walkway); *id.* (alleging that exhibit C depicts the "pedestrian walkway packed with marchers while [the] roadway remains clear"). Thus, at this stage, it is indeed a fact that we take as given in assessing the complaint. The majority's criticism of my dissent for asserting that "some protesters lawfully headed onto the pedestrian walkway" is bewildering.

analysis herein in any event), nor does the video or photographic evidence depict it. The incorporated video material *does* clearly show, however, that NYPD Captain Jack Jaskaran, after briefly conferring with fellow officers, approached the by now sizable crowd on the roadway with a bullhorn and stated, "Ladies and gentlemen, you are blocking the roadway. You need to go to the sidewalk." Plaintiffs contend that this command was not audible to many in the roadway. But there is no dispute that Jaskaran said (consistent with police instructions throughout the march to remain on the sidewalk): "You are obstructing traffic. You need to get on the sidewalk."

Despite this repeated warning, the crowd remained on the roadway, faced by a small number of officers who were standing farther up the roadway to the Bridge. The crowd now chanted "Whose streets? Our streets!" This chant was loud enough to be audible to the entire crowd at the base of the Bridge. Once begun, the chant continued for another minute during which other protesters, disregarding the assembled (and loudly chanting) group on the roadway, proceeded up the pedestrian promenade.

Captain Jaskaran then gave a third warning, asking the wayward protesters to leave the roadway. Around this time a shirtless protester with a large red star on his back, who was standing at the front of the crowd, turned his back on the officers to face the assembled throng. He stood silently with his fist raised. The crowd standing on the roadway had grown considerably by this point. The protesters continued to chant: "Whose streets? Our streets!" A spontaneous cheer erupted.

Shortly afterward, the demonstrators ceased chanting "Whose streets? Our streets!" and began loudly and vigorously screaming, "Take the Bridge!" The shirtless man had by now turned to face the police, fist still raised. Captain Jaskaran again announced that the protesters were obstructing vehicular traffic, and he stated that if they refused to move, they would be placed under arrest: "You are obstructing vehicular traffic. You are standing in a roadway. If you refuse to move, you are subject to arrest." Jaskaran identified himself, using the bullhorn, as an NYPD captain. He ordered all protesters to leave the roadway and stated that if the protesters refused to leave they would be arrested and charged with disorderly conduct. Demonstrators, including those standing directly in front of Captain Jaskaran, continued to chant, "Take the Bridge! Take the Bridge!" The man without a shirt, fist still raised, asked Captain Jaskaran to confirm the charge the protesters would face. When informed that those refusing to leave would be charged with disorderly conduct, he replied, "Just disorderly?"

Further signaling their intention to march on the Bridge's roadway, whether permitted by police or not, the protesters at the front of the crowd, facing police, linked arms. The shirtless man stood in front of them, fist still raised. The front line of the protesters moved forward several feet to align itself with the shirtless man. Nine protesters, arms linked, continued slowly walking forward, the crowd following behind. A spontaneous cheer then erupted from the crowd. Police can thereafter be seen in the video footage walking in front of the demonstrators along the side of the roadway. The plaintiffs allege that the officers "led" them up the roadway. But not a single named plaintiff alleges that he or she *saw* any

NYPD officer leave his position blocking the Bridge's roadway and invite demonstrators onto it. Instead, the named plaintiffs allege simply that they followed other protesters onto the Bridge.

Car traffic, meanwhile, continued to enter the Bridge's roadway from a ramp ahead of the protesters. Officers can be seen in the video footage redeploying to stop the vehicular traffic – and thus to protect the safety of the demonstrators – before demonstrators reached the ramp. The protesters in front continued to link arms as the mass of people moved further onto the Bridge, filling up the roadway. As demonstrators approached a second ramp from which cars were still entering the Bridge, police walked beside and in front of the demonstrators, at one point forming a human line between the cars entering the roadway and the protesters moving up it. Protesters continued to chant as car horns sounded. Eventually, all vehicular traffic ground to a halt.

The demonstrators marched up the roadway, still chanting "Whose streets? Our streets!," until the police formed a line partway across the Bridge, halting the march. When those in the front of the march had stopped a few feet in front of the police, Captain Jaskaran announced: "Ladies and gentlemen, since you have refused to leave this roadway, I have ordered you arrested for disorderly conduct." The crowd responded by chanting, "Let us go!" The officers began arresting the protesters. There was some jostling as the police made arrests. Some protesters climbed up to the promenade in an apparent effort to avoid being arrested. There are no allegations of any injuries or use of excessive force during these arrests, however, which numbered over 700.

Nine of the arrested protesters, on behalf of a putative class of all those arrested that day, brought a 42 U.S.C. § 1983 claim against the City of New York, former Mayor Michael Bloomberg, former Police Commissioner Ray Kelly, and the NYPD officers involved in their arrests. The protesters seek both compensatory and punitive damages from the arresting officers, along with attorneys' fees, alleging violations of plaintiffs' First, Fourth, and Fourteenth Amendment rights and bringing state law claims for false arrest, negligence, gross negligence, and negligent supervision. The district court granted a motion to dismiss as to the City, Mayor Bloomberg, and Commissioner Kelly, rejecting plaintiffs' claim to have plausibly alleged a pattern of "indiscriminate mass false arrest" and noting that out of the thousands of protesters marching that day, only the 700 who proceeded onto the Brooklyn Bridge's vehicular roadway were arrested. *Garcia* v. *Bloomberg*, 865 F. Supp. 2d 478, 492-93 (S.D.N.Y. 2012). The district court denied the motion to dismiss the claims against the individual police officers, however, determining that plaintiffs *had* plausibly alleged that by "turn[ing] and . . . walking away from the demonstrators and onto the roadway" at the base of the Bridge, police had thereby issued protesters "an implicit invitation to follow" that deprived officers of the protection of qualified immunity in carrying out arrests, at least at this stage. *Id.* at 489. The officers timely appealed.

II.

Qualified immunity is an affirmative defense designed to "protect[ ] the [defendant public] official not just from liability but also from suit . . . , thereby sparing him the necessity of defending by submitting

to discovery on the merits or undergoing a trial." *X-Men Sec., Inc.* v. *Pataki*, 196 F.3d 56, 65 (2d Cir. 1999). The majority characterizes my conclusion that these officers are presently entitled to qualified immunity as an "unwarranted conclusion[ ]" that ignores the procedural posture of this case. Maj. Op. 24. But the Supreme Court has, by its own description, "repeatedly stressed the importance of resolving immunity questions at the *earliest possible stage* of the litigation." *Wood*, 134 S. Ct. at 2065 n.4 (emphasis added) (brackets and internal quotation marks omitted); see also *Saucier*, 533 U.S. at 200 (stating that a ruling on qualified immunity "should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive"), *overruled on other grounds by Pearson,* 555 U.S. 223 (2009). Indeed, only last Term the Supreme Court reversed the denial of a motion to dismiss on qualified immunity grounds, for the very reason present here: that protesters in the context of a demonstration had failed to "allege[ ] violation of a clearly established . . . right" based on the "on-the-spot action" of law enforcement agents engaged in crowd control. See *Wood*, 134 S. Ct. at 2061, 2066.[18]

Qualified immunity shields officers from suits for money damages provided that their conduct does not

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[18] The Secret Service agents sued in *Wood* for alleged First Amendment violations were charged with protecting the President and, in that capacity, required protesters to move "some two blocks away" from a restaurant at which the President had made a "last-minute decision to stop." *Id.* at 2060-61. The Supreme Court reversed the Ninth Circuit's decision affirming the district court's denial of a motion to dismiss on the ground that the plaintiff protesters had failed to allege the violation of any clearly established law. *Id.* at 2061.

violate clearly established statutory or constitutional rights of which a reasonable person would have been aware. See *Harlow*, 457 U.S. at 806-07. It provides a broad shield, protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). Liability is precluded, moreover, if government actors "of reasonable competence could disagree on the legality of the action at issue in its particular factual context." *Manganiello* v. *City of New York*, 612 F.3d 149, 165 (2d Cir. 2010) (internal quotation marks omitted). Thus, an officer is protected by qualified immunity unless (1) his conduct violated "clearly established constitutional rights," *Holcomb* v. *Lykens*, 337 F.3d 217, 220 (2d Cir. 2003) (quoting *Weyant* v. *Okst*, 101 F.3d 845, 857 (2d Cir. 1996)), and (2) it would have been unreasonable for him to have believed otherwise, see *Manganiello*, 612 F.3d at 165. As set forth below, this test, fairly applied, dooms plaintiffs' allegations as a matter of law.

A. The Complaint Alleges No Violation of Clearly Established Law

The standard for "clearly established law" is a familiar one: the right "must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 (2012) (brackets and internal quotation marks omitted). In other words, "existing precedent must have placed the . . . constitutional question . . . *beyond debate*." *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2023 (2014) (emphasis added) (internal quotation marks omitted). In this Circuit, we look to whether (1) the right was defined with reasonable clarity, (2) the Supreme Court or the Second Circuit has confirmed the existence of the

right, and (3) a reasonable defendant would have understood that his conduct was unlawful. *Young* v. *Cnty. of Fulton*, 160 F.3d 899, 903 (2d Cir. 1998). Further, a determination of whether the right at issue is "clearly established" "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier,* 533 U.S. at 201. "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640 (internal citation omitted).

The majority does not afford the NYPD officers who policed the "Occupy Wall Street" demonstration this basic protection. The majority contends that a single Supreme Court decision – *Cox* v. *Louisiana*, 379 U.S. 559 (1965) – established the rule that (as the majority puts it) "when officials grant permission to demonstrate in a certain way, then seek to revoke that permission and arrest demonstrators, they must first give 'fair warning.'" Maj. Op. 14. This is an interesting lesson to draw from *Cox*, which discusses neither arrest nor fair warning by police. See *Cox*, 379 U.S. at 572. Indeed, *Cox* does not even address the Fourth Amendment, nor the question of probable cause – the legal issue of consequence to whether these police officers are entitled to qualified immunity – but the different issue of whether a citizen may be *punished* for a crime, consistent with due process, for undertaking conduct "which the State had clearly told him was available to him." *Cox*, 379 U.S. at 571 (quoting *Raley* v. *Ohio*, 360 U.S. 423, 426 (1959)) (internal quotation marks omitted). At any rate, it is not necessary to squabble over the majority's "rule of *Cox*" to determine whether plaintiffs have adequate-

ly alleged its violation. See *Pearson*, 555 U.S. at 227 (holding that in conducting qualified immunity analysis, courts need not determine whether an official's conduct violated constitutional rights before addressing whether such rights are clearly established). Even accepting the majority's view of the matter, *Cox* sets forth no *clearly established right* which these officers are plausibly alleged to have transgressed.

The facts of *Cox* make this abundantly clear. The appellant in *Cox* was convicted pursuant to a statute that prohibited picketing or parading "near a building housing a court" with the intent, *inter alia*, of influencing judges, jurors, witnesses, or court officers in the discharge of their duties. 379 U.S. at 560. There was no question in the case that the appellant had staged a protest in the vicinity of a courthouse, with the requisite intent. The problem in *Cox*, as laid out in the Supreme Court's opinion, was that "the highest police officials" of Baton Rouge, "in the presence of the Sheriff and Mayor," had given the appellant *express permission* to stage his protest where he did, on the west side of the street, directly across from the court. *Id.* at 571. The Supreme Court concluded that in these circumstances, Cox's conviction violated due process because protesters "were affirmatively told that they could hold the demonstration on the sidewalk of the far side of the street, 101 feet from the courthouse steps" – in effect, "that a demonstration at the place it was held would not be one 'near' the courthouse within the terms of the statute." *Id*. This affirmative authorization was thus integral to the Supreme Court's holding that it would be "an indefensible sort of entrapment by the State" to punish a citizen for engaging in an activity that "the State had *clearly told* him was available to him." *Id.* (emphasis added) (internal quotation marks

omitted). For *Cox* states expressly that if the appellant had staged his demonstration in the very same spot *without* this express authorization, "or *a fortiori*, had he defied an order of the police requiring him to hold this demonstration at some point further away," the matter "would be subject to quite different considerations." *Id*. at 571-72.

Cox, then, is a very different case from the one alleged in this class action complaint. For plaintiffs here do not and cannot allege that the police provided them any express, clear, and undisputed grant of permission to be on the Brooklyn Bridge roadway. The majority, moreover, concedes this point – arguing *not* that such affirmative permission is adequately alleged, but that some demonstrators (basically, those not in front, and allegedly unable to hear Captain Jaskaran's instructions) might simply have *inferred* they had permission from the fact that vastly outnumbered police officers did not block their entrance onto the roadway and may have earlier assisted them in crossing streets against the light. In effect, the majority takes a due process right (a right not to be entrapped by government officials who expressly assure that conduct will not constitute a violation and then seek to punish for it) and converts it into a Fourth Amendment right not to be *arrested* in circumstances in which no such assurance has been afforded, and on the theory that the police here had a constitutional obligation to provide over 700 demonstrators with "additional, louder, or clearer instructions," Maj. Op. 18, before reacting to the fact that these demonstrators, warned throughout the march to stay on the sidewalk, elected instead to "take" the Brooklyn Bridge roadway.

This newly discovered Fourth Amendment right is neither the due process right recognized in *Cox* nor a clearly established rule derived from *Cox*. *Cox* does not involve (or even mention) the Fourth Amendment. Nor can the majority's rule be derived from Fourth Amendment first principles. The Fourth Amendment only requires that officers have "a reasonable ground for [the] belief" that an arrestee has committed a crime. *Maryland* v. *Pringle*, 540 U.S. 366, 371 (2003). No implied permission through inaction can be used to negate this reasonable belief. See *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 761 (2005) (officers have "discretion in deciding when and where to enforce city ordinances" (internal quotation marks omitted)). There is similarly no clearly established authority for the proposition that *First* Amendment interests, however important, trump the operation of ordinary Fourth Amendment law, *cf.* *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), much less traffic regulations. Simply put, the basis for the majority's constitutional rule is a constitutional puzzle, and I cannot see how this is clearly established law of which a reasonable officer would be aware.

To be clear, a protester who didn't hear police admonitions to leave the roadway and who believed police had granted him permission to cross the Bridge amidst traffic might well establish a defense to the charge of violating New York's disorderly conduct statute, which criminalizes obstructing traffic with "intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof." N.Y. Penal Law § 240.20(5). But the possibility that some protesters might have a *mens rea* defense to the charge of disorderly conduct establishes neither that police lacked probable cause to arrest them nor that plaintiffs have plausibly alleged as much. For

Cox sets forth no clearly established constitutional right to the "additional, louder, or clearer instructions" that the majority apparently believes should have issued at the base of the Brooklyn Bridge. The majority's claim to the contrary notwithstanding, its "rule of *Cox*" is simply not clearly established law.

Moreover, even if there were any doubt whether *Cox* covers the general situation described above – and there is not – there is no doubt that *Cox* does not cover the claims outlined by the nine named plaintiffs in this case. Although wholly ignored by the majority, none of the named plaintiffs allege that they received *even an implicit* grant of permission from any officer before entering the Brooklyn Bridge roadway. Instead, all of the plaintiffs (many of whom specifically allege that they marched on the sidewalk to get to the Bridge or heard officers "frequently issue[ ] directives to stay on the sidewalk") state that they followed the crowd in front of them onto the roadway and fail to allege any explicit *or* implicit signals from officers to the effect that this was permitted:

- Plaintiff Becker "did not see or hear any police at [the] time" when he "reached the bridge." He "followed the people in front of him forward, entering the roadway of the bridge because he happened to be on the right side of the crowd." J.A. 169.
- Cartier "followed the march. He did not hear any warnings, orders, directives or indications from police that following the march was not permitted." J.A. 169-70.
- Crickmore was "[f]ollowing and within the body of the march" when he "entered upon

the roadway of the Brooklyn Bridge. He was given and heard no orders or warnings not to be upon the roadway." J.A. 170.

- Feinstein "only" saw officers "[w]hen crossing the street from City Hall Park to the Brooklyn Bridge." She "continued to follow the crowd and entered the roadway as she followed the people ahead of her." J.A. 170.
- Garcia "followed the march." J.A. 171.
- Osorio "followed the march forward. He did not see or hear any police at this time. [He] did not realize he was on the roadway of the bridge until [later]." He only "subsequently saw police officers walking on the side of the crowd in the roadway." J.A. 171.
- Perez "marched in the same direction that she observed the escorting police officers to be walking." J.A.171.
- Sova followed "several hundred persons entering the roadway," and "did not hear any orders or directives not to proceed or follow the march on the roadway." It was only after he was "on the bridge roadway" that "he observed officers alongside the march." J.A. 172.
- Umoh "followed the marchers proceeding on the right, which happened to be on the roadway. . . . As she entered the roadway[,] . . . [she] did not see any police officers." J.A. 172.

Markedly absent from this putative class action complaint is any allegation that a single named plaintiff even *saw* the police officers at the base of the Brooklyn Bridge prior to walking onto the road-

way – a prerequisite, one would think, to these officers having "invited [plaintiffs] onto the roadway and then arrested [them] without fair warning of the revocation of this invitation." Maj. Op. 23. The plaintiffs allege only that they saw the police officers *after* they had entered the vehicular roadway of the Bridge.

The fact that each of the named plaintiffs did nothing more than follow the crowd onto the roadway (amidst insistent chants, it should be noted, of "Take the Bridge!") destroys their claim that police violated any clearly established rule emanating from *Cox* by arresting them. For even if the majority were correct (and it is not) as to the clearly established rule it finds in *Cox* – namely, that a loud and clear warning is constitutionally required before a demonstrator's arrest whenever police may be argued to have implicitly, if inadvertently, signaled permission to commit an offense – surely it cannot be argued to have clearly established that police may not arrest someone who receives no grant of permission from police at all (actual or apparent), but merely follows another citizen's lead in engaging in unlawful conduct.

Nor does the majority gain any refuge of clearly established law from our decision in *Papineau* v. *Parmley*, 465 F.3d 46 (2d Cir. 2006). The majority simply misreads it. *Papineau*, contrary to the majority's claim, did not "reiterate" any fair warning requirement from *Cox* and did not even cite *Cox* except in a footnote, and for a proposition not relevant here. The plaintiffs in *Papineau* challenged neither a conviction nor an arrest, but asserted claims of excessive force and interference with First Amendment rights in connection with a demonstration that took place

on private property. See 465 F.3d at 57-58. Because the protest occurred on private property, the plaintiffs in *Papineau* did not need (or receive) any sort of permission from the police to conduct their protest. Thus, *Papineau* is simply not germane to the "rule in *Cox*" that the majority finds to be clearly established.[19]

B. The Complaint Alleges No Objectively Unreasonable Conduct

Even if the majority were right as to the scope of clearly established law, moreover, qualified immunity still shields these officers from money damages in this class action suit. For even when constitutional privileges "are so clearly defined that a reasonable public official would know that his actions might violate those rights," qualified immunity is still appropriate "if it was objectively reasonable for the public official to believe that his acts did not violate those rights." *Kaminsky* v. *Rosenblum*, 929 F.2d 922, 925

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[19] The majority also relies on two out-of-circuit cases, noting that a right may be "clearly established if decisions by this or other courts clearly foreshadow a particular ruling on the issue, even if those decisions come from courts in other circuits." Maj. Op. 12 (quoting *Scott* v. *Fischer*, 616 F.3d 100, 105 (2d Cir. 2010)). To the extent these cases are apposite, they extend *Cox* beyond its due process holding and agree on neither the constitutional right at stake nor its contours. These cases cannot foreshadow the law of which a reasonable officer in this circuit should be aware, *cf. Weber* v. *Dell*, 804 F.2d 796, 801 n.6, 803-04 (2d Cir. 1986) (finding a right clearly established when this circuit's previous cases foreshadowed the rule and seven other circuits found the right established), rendering applicable the general rule that "[w]hen neither the Supreme Court nor this Court has recognized a right, the law of our sister circuits and the holdings of district courts cannot act to render that right clearly established," *Pabon* v. *Wright*, 459 F.3d 241, 255 (2d Cir. 2006).

(2d Cir. 1991); see also *Magnotti* v. *Kuntz*, 918 F.2d 364, 367 (2d Cir. 1990). Qualified immunity therefore allows for "reasonable mistakes" in an officer's application of law to fact. *Saucier*, 533 U.S. at 205.

Contrary to well-settled precedent, the majority dispenses with this protection for the police officers at the Brooklyn Bridge. The majority asserts that qualified immunity would be appropriate at the motion to dismiss stage in this case only if, based on the plaintiffs' account of events, "no officer who participated in or directed the arrests could have thought [that the plaintiffs' rights were violated]." Maj. Op. 23. This is the wrong standard. Under Supreme Court and Second Circuit precedent, officials are granted qualified immunity if government actors "of reasonable competence could disagree on the legality of the action at issue in its particular factual context," *Manganiello*, 612 F.3d at 165 (internal quotation marks omitted). "In an unlawful arrest action," moreover, "an officer is . . . *subject to suit* only if his 'judgment was so flawed that no reasonable officer would have made a similar choice.'" *Provost* v. *City of Newburgh*, 262 F.3d 146, 160 (2d Cir. 2001) (quoting *Lennon* v. *Miller*, 66 F.3d 416, 425 (2d Cir. 1995)) (emphasis added); accord *Walczyk* v. *Rio*, 496 F.3d 139, 163 (2d Cir. 2007). Thus, to be protected by qualified immunity officers need not show, as the majority's erroneous (and demanding) articulation requires, that "no officer" could have thought the challenged conduct was unconstitutional. Rather, defendants need only show that at least one reasonable officer, taking the plaintiffs' allegations as true,

could believe such conduct fell within constitutional constraints.[20]

This distinction matters. As we have said, "qualified immunity employs a deliberately 'forgiving' standard of review." *Zalaski* v. *City of Hartford*, 723 F.3d 382, 389 (2d Cir. 2013). It does so to ensure "that those who serve the government do so with the decisiveness and the judgment required by the public good." *Filarsky* v. *Delia*, 132 S. Ct. 1657, 1665 (2012) (internal quotation marks omitted). By failing to afford immunity when reasonable officers can disagree about the legality of an officer's action, the majority provides no breathing room for reasonable mistakes. But this flies in the face of the Supreme Court's admonition that qualified immunity is to provide "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341; see also *Messerschmidt* v. *Millender*, 132 S. Ct. 1235, 1244 (2012) (noting that qualified immunity affords officials "breathing room to make reasonable but mistaken judgments" without dread of

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[20] The majority's "no officer" reformulation of the qualified immunity test is contrary to this Circuit's precedent, see, *e.g., Provost*, 262 F.3d at 160; *Walczyk*, 496 F.3d at 163; see also *id.* at 169-70 (Sotomayor, J., concurring) (recognizing that this Circuit applies the "reasonable officers could disagree" standard), and also separates this Court from the six other circuits that have held that qualified immunity is appropriate when officers of reasonable competence could disagree on the constitutionality of the challenged conduct. *Hoffman* v. *Reali,* 973 F.2d 980, 986 (1st Cir. 1992); *Babb* v. *Dorman*, 33 F.3d 472, 477 (5th Cir. 1994); *Armstrong* v. *City of Melvindale,* 432 F.3d 695, 700-01 (6th Cir. 2006); *Wollin* v. *Gondert*, 192 F.3d 616, 625 (7th Cir. 1999); *Brittain* v. *Hansen*, 451 F.3d 982, 988 (9th Cir. 2006); *Roska ex rel. Roska* v. *Peterson*, 328 F.3d 1230, 1251 (10th Cir. 2003).

potentially disabling liability (internal quotation marks omitted)).

The majority's novel rule is directly contrary, moreover, to extensive precedent discussing qualified immunity in the particular context of a police officer's assessment of probable cause to arrest. The legal standard for probable cause is clear – and notably, does not demand that an officer's assessment that a person is committing an offense be "correct or more likely true than false," *Texas* v. *Brown*, 460 U.S. 730, 742 (1983) (plurality opinion), but only that a "fair probability" of criminality exist, based on all the circumstances, *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983). As the Supreme Court has said, however, there are "limitless factual circumstances" that officers must confront when applying the probable cause standard. *Saucier*, 533 U.S. at 205. Accordingly, even when probable cause is lacking, as judged by a reviewing court, an officer is still entitled to qualified immunity where there is arguable probable cause – where "it was objectively reasonable for the officer to believe that probable cause existed, or . . . officers of reasonable competence could disagree on whether the probable cause test was met." *Escalera* v. *Lunn*, 361 F.3d 737, 743 (2d Cir. 2004) (internal quotation marks omitted); accord *Walczyk*, 496 F.3d at 163. Thus, so long as an officer chooses among the "range of responses . . . that competent officers [could] reasonably think are lawful," then the "officer enjoys qualified immunity for 'reasonable mistakes.'" *Walczyk*, 496 F.3d at 154 n.16 (emphases omitted) (quoting *Saucier*, 533 U.S. at 205).

It is difficult to see how this standard could possibly by deemed unsatisfied, given plaintiffs' allegations, as supplemented by the incorporated video

material and photographic evidence. Each of the plaintiffs in this putative class action, as the complaint alleges, was arrested on the roadway of the Brooklyn Bridge – a major route for New York City traffic, wholly obstructed by virtue of the demonstrators' unpermitted presence. The plaintiffs do not allege (and the video material does not show) that prior to reaching the Brooklyn Bridge, the plaintiffs were marching on roadways with the acquiescence of police. Rather, the plaintiffs were marching on sidewalks. Plaintiffs moved onto the Bridge roadway, *as they themselves allege*, following fellow demonstrators – demonstrators who, as the video footage shows, linked arms, loudly chanted "Whose streets? Our streets!" and "Take the Bridge!", and defied police instructions to remain on the sidewalk.

The plaintiffs contend that they did not hear the police instructions and that they believed officers were escorting them over the Bridge.[21] They allege, in sum, that they lacked intent. But as we have recognized before (although not today), "because the practical restraints on police in the field are greater with respect to ascertaining intent . . . , the latitude accorded to officers considering the probable cause issue" as it relates to the arrestee's state of mind "*must be correspondingly great*." *Zalaski*, 723 F.3d at 393 (omission in original) (quoting *Cox* v. *Hainey*, 391 F.3d 25, 34 (1st Cir. 2004)) (internal quotation marks omitted) (emphasis added); see also *Paff* v. *Kaltenbach*, 204 F.3d 425, 437 (3d Cir. 2000) (an of-

[21] As previously noted, however, none of the named plaintiffs allege observing any specific conduct by police at the Bridge that they understood to constitute an invitation to use the Bridge roadway.

ficer's "judgment call" based on circumstantial evidence as to an offender's state of mind is entitled to qualified immunity where objectively reasonable, even when the issue is "close enough that there was the potential of a court subsequently determining that he made the wrong choice").

Thus, it does not matter whether an officer might reasonably have inferred as to any particular demonstrator that he or she might conceivably lack *mens rea* so long as the inference of a culpable intent was also reasonable. See *Conner* v. *Heiman*, 672 F.3d 1126, 1132 (9th Cir. 2012) (noting in the qualified immunity context that whether an inference of innocent intent "was also reasonable, or even more reasonable, does not matter so long as the [culpable intent] conclusion was itself reasonable"). Similarly, it does not matter whether a particular demonstrator *in fact* lacked *mens rea* (and so could not be convicted of disorderly conduct) so long as a reasonable officer could have believed to the contrary.

Here, plaintiffs have failed to allege facts plausibly suggesting that it was anything *but* reasonable for any officer – named or John Doe – to conclude that each of the plaintiffs on the roadway of the Bridge (among the thousands who did not take to the roadway and were not arrested) was obstructing traffic with "intent to cause public inconvenience" or "recklessly creating a risk thereof." N.Y. Penal Law § 240.20(5). The majority has no persuasive argument showing that as a matter of clearly established law *about which all reasonably competent officers would agree*, police officers should have realized they were acting unconstitutionally in making arrests. Stripping the complaint of rhetoric and conclusions unsupported by factual assertions, the named plain-

tiffs allege nothing more than that Captain Jaskaran's bullhorn was not loud enough to be heard by them and that police had earlier assisted demonstrators in crossing against the light. Simply put, these meager allegations are insufficient to draw into question the defendants' arguable probable cause. Accordingly, the defendants are presently entitled to qualified immunity, and this complaint should be dismissed.

Finally, it is telling that the majority's response to my dissent turns its treatment of qualified immunity from bad to worse. Not only does the majority – contrary to Second Circuit precedent – assert that officers must be denied qualified immunity at the motion to dismiss stage even if, based on the plaintiffs' allegations, officers of reasonable competence could disagree about the constitutionality of an arrest, the majority now also resurrects a *subjective* intent element that officers must satisfy before they can be afforded immunity. The majority asserts that these defendants will be entitled to qualified immunity, if at all, only after they show "what reasoning process they followed[,] . . . why [they] chose to retreat onto the bridge, and what if anything they intended to convey." Maj. Op. 27. This is an attempt, *sub silentio*, to turn back the clock on qualified immunity law. Previously, courts applied a subjective component to the qualified immunity test, but in *Harlow*, the Supreme Court excised this subjective inquiry and defined "the limits of qualified immunity essentially in objective terms." *Harlow*, 457 U.S. at 819. The Court did so in order to ensure that qualified immunity could be decided *earlier* in the course of the litigation. See *id.* at 817-18. Following *Harlow*, the Supreme Court has held that "[e]vidence concerning the defendant's subjective intent is simp-

ly irrelevant to [the qualified immunity] defense." *Crawford-El* v. *Britton*, 523 U.S. 574, 588 (1998); see also *Anderson*, 483 U.S. at 641 (noting, in context of assessing whether officer was entitled to qualified immunity in connection with a search, that "subjective beliefs about the search are irrelevant."). The majority's decision also contravenes this long-settled Supreme Court precedent.

* * *

The majority has failed to afford the NYPD officers policing the "Occupy Wall Street" march the basic protection that qualified immunity promises – namely, that police officers will not be called to endure the effort and expense of discovery, trial, and possible liability for making reasonable judgments in the exercise of their duties. See *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (per curiam) (reiterating the "importance of resolving immunity questions at the earliest possible stage in litigation"). The majority attempts to weave "Rashomon-like" complexity into the question whether police officers had probable cause to arrest unpermitted demonstrators who were wholly obstructing traffic on the Brooklyn Bridge. But this is, in fact, a simple case. The plaintiffs have alleged neither "violation of [any] clearly established . . . right," *Wood*, 134 S. Ct. at 2066, nor objectively unreasonable conduct by police. In such circumstances, this complaint should be dismissed.

I fear that, over time, the majority's "Rashomon-like" interpretation of *Cox* will prove a poor instrument, indeed, for micromanaging, through threat of class action liability, the sensitive function of policing large demonstrations. Indeed, by unwarrantedly exposing these officers to the costs of class action litigation for arresting unpermitted demonstrators who

had blocked all traffic on the Brooklyn Bridge (and on the theory that police officers' earlier, successful efforts to shepherd thousands safely through New York's downtown imposed on police unanticipated constitutional constraints), the majority makes more difficult the judicious use of discretion in policing large crowds. This decision will thus frustrate, not further, the work of police attempting to facilitate peaceful demonstrations while ensuring both the safety of demonstrators and those among whom demonstrations are staged.

As the Supreme Court has said, qualified immunity "balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231. The plaintiffs have alleged no irresponsible conduct by these police officers and the majority has struck the balance badly, depriving these officers of qualified immunity absent any basis in clearly established law and in circumstances in which it is impossible to conclude that an officer could not reasonably believe that his conduct was lawful. For this reason, I respectfully dissent.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KARINA GARCIA, BENJAMIN BECKER, MICHAEL CRICKMORE, MARCEL CARTIER, BROOKE FEINSTEIN, YARI OSORIO, YAREIDIS PEREZ, CASSANDRA REGAN, TYLER SOVA, STEPHANIE JEAN UMOH, as Class Representatives on behalf of themselves and others similarly situated.

Plaintiffs,

v.

MICHAEL R. BLOOMBERG, THE CITY OF NEW YORK, RAYMOND W. KELLY, JANE and JOHN DOE 1–40,

Defendants.

NO. 11 Civ. 6957 (JSR)

OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

What a huge debt this nation owes to its "troublemakers." From Thomas Paine to Martin Luther King, Jr., they have forced us to focus on problems we would prefer to downplay or ignore. Yet it is often only with hindsight that we can distinguish those troublemakers who brought us to our senses from those who were simply . . . troublemakers. Prudence, and respect for the constitutional rights to free

speech and free association, therefore dictate that the legal system cut all non-violent protesters a fair amount of slack.

These observations are prompted by the instant lawsuit, in which a putative class of some 700 or so "Occupy Wall Street" protesters contend they were unlawfully arrested while crossing the Brooklyn Bridge on October 1, 2011. More narrowly, the pending motion to dismiss the suit raises the issue of whether a reasonable observer would conclude that the police who arrested the protesters had led the protesters to believe that they could lawfully march on the Brooklyn Bridge's vehicular roadway.

By way of background, this suit was originally filed on October 4, 2011 by certain of the named plaintiffs, purportedly on behalf of the class of all protesters who were arrested, alleging that the arrests violated the protesters' rights under the First, Fourth, and Fourteenth Amendments. Subsequently, on November 30, 2011, plaintiffs amended their complaint to add additional plaintiffs and claims, but the Court concluded that this First Amended Complaint contained improper material and needed to be revised. Accordingly, on December 12, 2011, the plaintiffs filed a Second Amended Complaint ("SAC"), which is the operative instrument here. On December 23, 2011, the defendants moved to dismiss the Second Amended Complaint. The parties submitted extensive written briefs, and the Court heard oral argument on January 19, 2011. Having now fully considered the matter, the Court grants defendants' motion in part and denies it in part, for the reasons stated below. Specifically, the Court dismisses plaintiffs' "*Monell*" claims against the City, Mayor Bloomberg, and Commissioner Kelly, but denies the

motion to dismiss plaintiffs' claims against the officers who arrested them.

The Second Amended Complaint alleges that, on October 1, 2011, thousands of demonstrators marched from Zuccotti Park in downtown Manhattan to the Brooklyn Bridge in order to show support for the Occupy Wall Street movement. SAC ¶ 65. The New York Police Department ("NYPD"), Mayor Bloomberg, and Commissioner Kelly allegedly knew that the protesters planned to march and conferred about how to respond. *Id.* ¶¶ 63-64. The NYPD accompanied the marchers and prepared its personnel and equipment to ensure that the crowd remained under control. *Id.* ¶¶ 67-68. The SAC alleges, based on "information and belief," that Commissioner Kelly monitored the march and communicated with subordinates while it proceeded. *Id.* ¶¶ 70-71.

The NYPD allegedly guided the marchers toward the Brooklyn Bridge. *Id.* ¶¶ 74-79. Although in the process the police allegedly permitted, and even directed, marchers to violate traffic regulations, *id.* ¶ 81, this caused no problems because the police had also blocked vehicular traffic in order to accommodate the march, *id.* ¶ 82. The marchers, in turn, allegedly relied on police officers' commands in order to determine how they could legally proceed. *Id.* ¶¶ 83-85. When the marchers reached the Brooklyn Bridge, they slowed down because only a few marchers could enter the bridge's pedestrian walkway at the same time. *Id.* ¶ 88. Police officers initially blocked the eastbound vehicular roadway, preventing marchers from proceeding onto that portion of the bridge. *Id.* ¶ 90. Subsequently, however, the police officers who had blocked the entrance to the bridge's vehicular roadway turned and, followed by a large number of

marchers, walked onto that portion of the bridge. *Id.* ¶ 104. After approximately 700 of the marchers had entered the bridge's vehicular roadway, the police restricted the marchers' ability to move forward or backward and arrested them. *Id.* ¶¶ 129-130, 134.

The plaintiffs assert, in effect, that they attempted at all times to follow the NYPD's instructions and that they had every reason to believe the police were permitting them to enter the bridge's vehicular roadway. The police, by contrast, assert that they expressly warned the marchers that entering the bridge's vehicular roadway would lead to their arrest. In assessing these competing contentions, the Court, at the parties' behest, has examined two videos of the events. *Broder* v. *Cablevision Sys. Corp.*, 418 F.3d 187, 196 (2d Cir. 2005).[1]

Plaintiffs' video, apparently filmed by a protester, shows a uniformed police officer speaking into a "bull horn" approximately fifteen feet from the camera, at the Manhattan entrance to the Brooklyn Bridge. SAC Ex. F. Many protesters chant and clap. *Id.* A whistle blows in the background. *Id.* A viewer who listens closely can understand some of the officer's words over the protester's persistent chants, but not enough to perceive the officer's meaning. *Id.*

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[1] Under applicable precedent, the Court can consider both videos in deciding the motion to dismiss plaintiffs' claims. See *Blue Tree Hotels Inv.* v. *Starwood Hotels & Resorts*, 369 F.3d 212, 217 (2d Cir. 2004) (permitting consideration of "any documents that are either incorporated into the complaint by reference or attached to the complaint as exhibits"). Plaintiffs attached their video to the complaint as an exhibit, and acknowledged at oral argument that the complaint also incorporates the defendants' videos by reference. Transcript from January 19, 2012 ("Tr.") at 3:1-3.

Once the officer finishes speaking, he turns his back to the protesters and returns to the line of officers blocking access to the vehicular roadway. *Id*. After a few moments, the line of officers turns and proceeds onto the vehicular roadway, followed, at a distance of at least ten feet, by hundreds of protesters. *Id*.

The defendants' video, filmed by the NYPD's Technical Assistance Response Unit ("TARU"), SAC ¶ 113, is shot from behind the officer speaking into the bull horn. Decl. of Arthur G. Larkin dated December 23, 2011 ("Larkin Decl.") Ex. A.[2] In the TARU video, the viewer can clearly hear the officer tell protesters, "Ladies and gentlemen you are obstructing vehicular traffic. If you refuse to move you are subject to arrest." *Id*. The officer later says, "I am ordering you to leave this roadway now. If you do so voluntarily, no charges will be placed against you." *Id*. It appears that some of the protesters near the bull horn can hear these warnings, and one at the front asks the officer what offense the officers intend to charge. *Id*. Others standing farther away, however, appear not to hear the officer or even notice that he has addressed them. *Id*. After the officer has finished delivering his warnings and rejoined his colleagues blocking the entry to the vehicular roadway, the demonstrators closest to the camera lock arms. *Id*. The officers, followed almost simultaneously by the demonstrators, move in the direction of the bridge's vehicular roadway. *Id*. Photographers run into the space between them to photograph the de-

[2] The TARU video also shows other interactions between police officers and demonstrators. Larkin Decl. Ex. A. For example, the video shows instances in which officers who are not located at the Brooklyn Bridge instruct demonstrators and other pedestrians to walk only on the sidewalk. *Id*.

monstrators. *Id*. Both the demonstrators and the police officers remain calm and restrained. *Id*. Other than the initial warnings given by the officer with the bull horn, the officers and demonstrators do not appear to communicate. *Id*.

The SAC alleges that, though the NYPD possesses sound equipment capable of projecting a message over several blocks, *id*. ¶ 103, it did not deploy that technology in this situation, and the great majority of marchers thus could not hear the directives that the officer with the bull horn gave shortly before officers ceased blocking the vehicular roadway. *Id*. ¶¶ 98-103. Other than the warnings issued from the bull horn, the officers allegedly made no effort to stop marchers from entering the roadway. *Id*. ¶ 109. Most of the marchers therefore believed, according to the Second Amended Complaint, that they had the NYPD's permission to use the vehicular roadway to cross the bridge. *Id*. ¶ 112. Of the ten identified plaintiffs bringing this action, nine allegedly did not hear any warning that they could not enter the vehicular roadway,[3] and some of them believed that, when the line of officers blocking the entrance to the vehicular roadway turned and started to walk forward on the roadway it was a signal that the NYPD intended to permit marchers to proceed by that route. *Id*. ¶¶ 116-124. Allegedly, two of the named plaintiffs, Michael Crickmore and Brooke Feinstein,

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[3] As to the tenth, Cassandra Ryan, the SAC alleges that an officer told Regan to "leave or get arrested," but did so only after she had entered the vehicular roadway and the police had blocked the exit. SAC ¶ 131. Because the timing of the warning Regan received is unclear, the Court, awaiting further factual development, treats Regan similarly to the other plaintiffs for the limited purposes of this motion.

walked onto the vehicular roadway alongside police officers, who made no attempt to warn them about the illegality of their actions. *Id.* ¶¶ 118-119.

After approximately 700 marchers entered the vehicular roadway, the police officers who had proceeded ahead of the demonstrators stopped. *Id.* ¶ 127. Although one officer spoke into a bull horn, the SAC alleges that, given the noise, those marchers who were more than a few feet away allegedly could not hear that officer. *Id.* Officers then blocked all forward and backward movement by the marchers. *Id.* ¶¶ 129-130. Using orange netting to trap the marchers, the police then arrested the marchers who had entered the vehicular roadway. *Id.* ¶¶ 130, 136. Officers handcuffed marchers, took them into custody, and processed and released them, giving each a summons that indicated that the officers had seen the marcher commit one or another offense, such as failure to obey a lawful order. *Id.* ¶¶ 136-140.

The SAC also alleges that the City has a policy, practice, or custom of arresting large groups of protesters in the absence of probable cause in order to disrupt mass demonstrations. *Id.* ¶¶ 158-160. In 1993, Commissioner Kelly published the "Disorder Control Guidelines," which have guided the NYPD in its responses to both violent riots and peaceful assemblies. *Id.* ¶ 181. Utilizing these guidelines, the City, according to the SAC, has allegedly engaged in mass false arrests, frequently using orange nets to trap protesters. *Id.* ¶¶ 182-183. For example, the SAC alleges that, on April 7, 2003, the NYPD indiscriminately trapped and arrested demonstrators who protested the invasion of Iraq. *Id.* ¶ 184. Similarly, the SAC alleges that the NYPD indiscriminately arrested protesters at the 2004 Republican National

Convention ("RNC"), but could not press charges against many arrestees because officers had given demonstrators the impression that the march had official sanction. *Id.* ¶¶ 185-186. According to the SAC, Mayor Bloomberg and Commissioner Kelly knew of these mass arrests and approved or ratified them. *Id.* ¶¶ 187-191. The SAC also notes that, one week before the arrests at issue in this case, the police surrounded and arrested thirty to forty protesters related to the Occupy Wall Street movement in Greenwich Village. *Id.* ¶¶ 192-193.

Finally, the SAC alleges that Mayor Bloomberg and Commissioner Kelly knew of and either approved in advance or subsequently ratified the October 1, 2011 arrests. *Id.* ¶¶ 198-205. Both have allegedly rejected calls for an investigation into whether those arrests deprived demonstrators of constitutional rights. *Id.* ¶ 209. Alternatively, the SAC alleges that Mayor Bloomberg and Commissioner Kelly failed to properly train officers regarding constitutional prohibitions against indiscriminate arrests. *Id.* ¶ 169.

A motion to dismiss under Rule 12(b)(6) tests not the truth of a complaint's allegations, but only their legal sufficiency to state a claim. Specifically, a court must assess whether the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). Mere conclusory statements in a complaint and "formulaic recitation[s] of the elements of a cause of action" are not sufficient. *Twombly*, 550 U.S. at 555. Thus, a court discounts conclusory statements, which are not entitled to the presumption of truth, before

determining whether a claim is plausible. *Iqbal*, 129 S. Ct. at 1949-50. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 1949. "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id*. at 1950.

In their motion to dismiss, the defendants, in addition to arguing that the Second Amended Complaint fails to state a claim, raise the defense of qualified immunity. "The doctrine of qualified immunity protects government officials '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.'" *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). "Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001), overruled in part on other grounds by *Pearson*, 555 U.S. 223. When the defense of qualified immunity is raised as part of a 12(b)(6) motion, a court must decide whether the complaint has plausibly alleged that the government official claiming immunity violated a constitutional right and whether that right was "clearly established" at the time of the alleged misconduct. *Id*. at 232.

Against this background, the defendant police officers argue, first, that the SAC fails to adequately allege a violation of the Fourth Amendment (which

the Fourteenth Amendment makes applicable to state and local governments), and, second, that, even if a substantive offense is adequately pleaded, the defendants are entitled to qualified immunity. Under the Fourth Amendment, officers can arrest a suspect only on the basis of probable cause. *Weyant* v. *Okst*, 101 F.3d 845, 852 (2d Cir. 1996). "[P]robable cause to arrest exists when the officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." *Id*. When determining whether probable cause exists, courts must consider those facts available to the officer at the time of arrest and base their analyses on the "totality of the circumstances." *Caldarola* v. *Calabrese*, 298 F.3d 156, 162 (2d Cir. 2002).[4] "[T]he existence of probable cause is an absolute defense to a false arrest claim." *Jaegly* v. *Couch*, 439 F.3d 149, 151-52 (2d Cir. 2006).

In the context of peaceful demonstration, the First Amendment affects the determination of when an officer has probable cause to arrest under the Fourth Amendment. The Supreme Court has long held that in such a context laws and regulations

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[4] Just as an officer's subjective intent does not determine whether a prudent person would have concluded that probable cause existed, so too the offense that an officer cites at the time of the arrest need not be the same as, or even "closely related" to, the offense for which the officer has probable cause to arrest. *Devenpeck* v. *Alford*, 543 U.S. 146, 153-55 (2004). Accordingly, the mere fact that many plaintiffs here were initially charged with failure to obey a lawful order does not prevent defendants from justifying the arrests based on probable cause to arrest for a different crime.

must "give citizens fair warning as to what is illegal." *Cox* v. *Louisiana*, 379 U.S. 559, 574 (1965). Indeed, because of the tension between First Amendment protections and local laws aimed at preventing disruption, difficult questions frequently arise as to the applicability to protest marchers and demonstrators of laws that require parade permits or that criminalize disruption of the peace. As a result, "fair warning as to what is illegal" often comes not from the legislative bodies that draft the potentially relevant laws, but instead from the executive officials who enforce them. For example, in *Cox*, police officers told demonstrators that, if they protested across the street from a courthouse, they would not violate a prohibition on protesting "near" the courthouse. *Id*. at 569-70. Without deciding whether, in the absence of advice from police, the demonstrators might have violated the prohibition, the Supreme Court held that "to sustain appellant's later conviction for demonstrating where they told him he could 'would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him.'" *Id*. at 571-72 (quoting *Raley* v. *Ohio*, 360 U.S. 423, 426 (1959)).

Courts of appeal have likewise confirmed demonstrators' rights to "fair warning" that their conduct violates the law. For example, the Tenth Circuit has found that, where ordinances prohibited walking in a street and parading without a permit, police officers who closed streets in anticipation of a march and directed the procession effectively "sanctioned the protesters walking along the road and waived the permit requirement." *Buck* v. *City of Albuquerque*, 549 F.3d 1269, 1283-84 (10th Cir. 2008). Similarly, where police officers used bull horns to advise a large mass

of protesters to either adhere to a specific but previously unannounced route or disperse, officers could not arrest protesters who did not take that route because "there was no mechanism (at least no mechanism that was employed) for conveying a command to thousands of people." *Vodak* v. *City of Chicago*, 639 F.3d 738, 745-46 (7th Cir. 2011) (Posner, J.). In each of these circumstances, police did not give the "notice of revocation of permission to demonstrate" that was required before they could "begin arresting demonstrators." *Id*. at 746.

In the Second Circuit, the leading applicable case is *Papineau* v. *Parmley*, 465 F.3d 46 (2d Cir. 2006). *Papineau* involved a case in which a protest originated on private property bordering on an interstate highway but spilled over onto the highway when a small group of protesters walked onto the interstate, attempting to distribute leaflets. *Id*. at 52. These actions potentially violated state law. *Id*. at 59. Shortly after the group abandoned its attempts to distribute leaflets on the interstate, a large number of police officers began to disperse all of the protesters, arresting those who failed to comply. *Id*. at 53. The Second Circuit, in an opinion written by then-Judge Sonia Sotomayor, held that "even if the [officers] had a lawful basis to interfere with the demonstration," the demonstrators "still enjoyed First Amendment protection, and absent imminent harm, the troopers could not simply disperse them without giving fair warning." *Id*. at 60.

Despite some differences,[5] these cases all stand for the basic proposition that before peaceful demon-

[5] *Papineau* differs from *Vodak* and *Buck* in two respects. In *Papineau*, the plaintiffs did not argue that the officers had giv-

strators can be arrested for violating a statutory limitation on the exercise of their First Amendment rights, the demonstrators must receive "fair warning" of that limitation, most commonly from the very officers policing the demonstration. Relatedly, when, as here, the defense of qualified immunity is raised as part of a motion to dismiss, the question the Court must then answer is: would it be clear to reasonable police officers, in the situation the defendant officers confronted, that they lacked probable cause to believe (i) that the plaintiff demonstrators had committed a crime and (ii) that the plaintiff demonstrators had received fair warning?

The first prong is easily satisfied because, even on the face of the Second Amended Complaint, there are two criminal statutes that plaintiffs seemingly transgressed. To begin with, the plaintiffs conducted a parade without a permit. Under N.Y. City Admin. Code § 10-110(a), "[a] procession, parade, or race shall be permitted upon any street or in any public place only after a written permit therefor has been obtained from the police commissioner." A parade means "any procession or race which consists of a recognizable group of 50 or more pedestrians . . . proceeding together upon any public street or roadway," 38 R.C.N.Y. § 19-02(a), and the Second Amended Complaint avers that more than fifty demonstrators proceeded together on a public street, SAC ¶¶ 65-66.

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en them apparent permission to demonstrate on the highway. 465 F.3d at 58. On the other hand, many plaintiffs had not entered the interstate at all. The Second Circuit expressed considerable skepticism concerning whether the intrusions of a few would justify the officers' decision to disperse the entire protest, *id*. at 59, but also concluded in the alternative that, even if those intrusions justified dispersal, the officers had nonetheless failed to give the required "fair warning," *id*. at 60.

Section 10-110(c) of the Code provides that "[e]very person participating in any procession, parade or race, for which a permit has not been issued when required by this section, shall, upon conviction thereof, be punished by a fine of not more than twenty-five dollars, or by imprisonment for not exceeding ten days, or by both such fine and imprisonment."

Additionally, the plaintiffs engaged in disorderly conduct. Under N.Y. Penal Law § 240.20(5) (the same provision at issue in *Papineau*), a "person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof . . . [h]e obstructs vehicular or pedestrian traffic." The Second Amended Complaint avers, in effect, that the plaintiff demonstrators walked onto the Brooklyn Bridge's vehicular roadway at a time when vehicles were driving there. SAC ¶ 109; see also Larkin Decl. Ex. A.

The SAC does adequately allege, however, that the individual plaintiffs and the great majority of the plaintiff class failed to receive fair warning. See SAC ¶¶ 92-124. The more difficult question is with respect to the second prong of the qualified immunity defense, namely, whether a *reasonable* officer could have *believed*, based on the facts known to *defendants*, that the plaintiffs received fair warning. With respect to the alleged violation of the parade permit requirement, N.Y. City Admin. Code § 10-110(c), the defendants cannot reasonably contend, given plaintiffs' allegations, that they did not knowingly allow the march to proceed even in the absence of a permit. Indeed, the defendants acknowledge that, in the few warnings the officers gave, they identified marching as permissible conduct, and prohibited only marching on the vehicular roadway. The officer with the

"bull horn" advised protesters "to leave this *roadway* now. If you do so voluntarily, no charges will be placed against you." Larkin Decl. Ex. A (emphasis added). Marching without a permit, then, simply was not a problem, and no reasonable officer would have thought that the plaintiffs received a warning to the contrary.

With respect to the alleged disorderly conduct violation, N.Y. Penal Law § 240.20(5), the plaintiffs have alleged, and the videos submitted by each side show, that the NYPD exercised some degree of control over the marchers, defining their route and directing them, at times, to follow certain rules. SAC ¶¶ 74-79. In certain instances, the police even directed marchers to violate traffic regulations, *id.* ¶ 81, which, however, caused no problems because the police had also blocked vehicular traffic in order to accommodate the march, *id.* ¶ 82.[6] The marchers, in turn, allegedly relied on the police officers' commands in order to determine how they could legally proceed. *Id.* ¶¶ 83-85.

Under these circumstances, a reasonable officer would have understood that it was incumbent on the police to clearly warn the demonstrators that they must not proceed onto the Brooklyn Bridge's vehicular roadway.[7] While, initially, the police officers con-

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[6] The defendants point out that the TARU videos show that some of the officers repeatedly asked the demonstrators to proceed on the sidewalk when possible. Larkin Decl. Ex. A. But this must be assessed in the context of the police at other times directing the marchers to violate traffic regulations.

[7] Any warning police officers gave after demonstrators had already proceeded halfway across the bridge could not have provided "fair warning." After demonstrators entered the bridge, police allegedly prevented them from retreating, sealing their

gregated at the entrance to the bridge's vehicular roadway, thus effectively blocking the demonstrators from proceeding further, SAC Ex. F, the officers then turned and started walking away from the demonstrators and onto the roadway—an implicit invitation to follow. While the demonstrators might have inferred otherwise if they had heard the bull-horn message, no reasonable officer could imagine, in these circumstances, that this warning was heard by more than a small fraction of the gathered multitude. Here, as in *Vodak*, a single bull horn was "no mechanism . . . for conveying a command" to the hundreds, if not thousands, of demonstrators present. 639 F.3d at 745-46. Indeed, the plaintiffs' video shows what should have been obvious to any reasonable officer, namely, that the surrounding clamor interfered with the ability of demonstrators as few as fifteen feet away from the bull horn to understand the officer's instructions. SAC Ex. F.

Even though most demonstrators could not hear the instruction not to enter the roadway, one might argue that common sense would warn them that they could not walk onto the part of the bridge reserved for, and in fact used by, vehicles. The circumstances here, however, rebut that argument. As described above, police officers defined what rules demonstrators had to follow under the circumstances. Having not heard any warning, many demonstrators watched as police officers abandoned their previous position and proceeded ahead of demonstrators onto the bridge's vehicular roadway. *Id*. Eventually, some

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fate. *Id*. ¶¶ 130-131. Implicit in the notion of "fair warning" is an opportunity for plaintiffs to conform their conduct to requirements. See *City of Chicago* v. *Morales*, 527 U.S. 41, 58 (1999).

demonstrators even walked beside the officers who were on the vehicular roadway, *id.* ¶ 119, and those officers allegedly did not offer any warning that the demonstrators faced imminent arrest as a result of their present conduct. *Id.* The pictorial and video evidence submitted by the parties shows that these allegations are plausible. *Id.* Exs. I, J, K; see also Larkin Decl. Ex. A. Assuming the truth of plaintiffs' allegations, the officers' "direction of the procession sanctioned the protesters walking along the" vehicular roadway, depriving the protesters of any warning that the officers regarded their conduct as illegal. *Buck*, 549 F.3d at 1284.

Finally, the defendants argue that, even if many of the 700 demonstrators whom the officers arrested did not receive any warning, nevertheless, since at least a few of the demonstrators undoubtedly did receive a warning, the circumstances permitted the officers to treat the demonstrators as a group. For this argument, defendants rely on *Carr* v. *District of Columbia*, which held that "[p]olice witnesses must only be able to form a reasonable belief that the entire crowd is acting as a unit and therefore all members of the crowd violated the law." 587 F.3d 401, 408 (D.C. Cir. 2009). In that case, however, "it appeared to officers as if the entire crowd was rioting or encouraging riotous acts." *Id.* at 410 n.6. Thus, the D.C. Circuit found that no First Amendment protection attached because resort to and encouragement of violence forfeited any such protection. *Id.* (citing *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972)). Here, the defendants do not suggest, and the videos do not show, that the demonstrators engaged in any kind of violence or otherwise endangered their own or others' safety. To the contrary, both the demonstrators and the officers appeared calm and re-

strained. While rioters hardly need fair warning that their violent behavior violates the law, peaceful demonstrators who are otherwise complying with police direction require fair warning before they can be arrested for alleged noncompliance.

Indeed, the Second Circuit, in *Papineau*, expressly rejected the argument that "the fact that some demonstrators had allegedly violated the law" permitted officers to disperse a larger, lawful crowd. 465 F.3d at 57. Instead, the Second Circuit noted that "the police may not interfere with demonstrations unless there is a 'clear and present danger' of riot, imminent violence, interference with traffic or other immediate threat to public safety." *Id.*[8] Moreover, the Second Circuit found that, in the absence of "imminent harm," even officers with a "lawful basis" for ordering dispersal must still give demonstrators "fair warning." *Id.* at 60.

The same logic applies here. Because the defendants have not argued that plaintiffs posed a threat of imminent harm, they have shown neither that circumstances would have alerted demonstrators to the

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[8] While the Second Circuit lists "interference with traffic" among the "threat[s] to public safety" that justify immediate intervention, the videos submitted show that the interference that occurred in this case did not constitute a "clear and present danger" to anyone's safety. As demonstrators proceeded onto the bridge, the officers accompanying them formed a barrier between them and the vehicular traffic, which slowed. SAC Exs. I, J, K; see also Larkin Decl. Ex. A. Thus, while the demonstrators may have delayed traffic from proceeding, the available record does not show that they endangered themselves or others. In any event, the available record indicates that many of the 700 arrestees came nowhere near cars. Some even arrived on the bridge only after police had stopped traffic.

illegality of their conduct nor that mass arrest served some pressing law enforcement need. A finding that the ordinary need to facilitate vehicular traffic permitted officers to impute "fair warning" to all protesters would eviscerate the requirement of such warning. Indeed, such a finding would allow the arrest of those who participated in a demonstration that, unbeknownst to them, lacked a parade permit, a claim courts have consistently rejected. See *Buck*, 549 F.3d at 1283-84; *Am.-Arab Anti-Discrimination Comm.* v. *City of Dearborn*, 418 F.3d 600, 613 (6th Cir. 2005) ("[W]e hold that the Ordinance, on its face, violates the First Amendment by holding participants in a march along public rights of way strictly liable if the march proceeds without a permit.").

For the reasons described above, the allegations of the Second Amended Complaint, if true, establish that the officers did not give fair warning to the overwhelming majority of the 700 demonstrators who were arrested in this case. Nor, given the allegations of the Second Amended Complaint, are any of the defendant police officers entitled to qualified immunity at this stage. A reasonable officer in the noisy environment defendants occupied would have known that a single bull horn could not reasonably communicate a message to 700 demonstrators. Furthermore, a reasonable officer would have known that those who did not hear any warning might infer permission to enter the vehicular roadway from the fact that officers, without offering further warnings, proceeded ahead of and alongside plaintiffs onto that roadway. Each of the circuit court cases described above found that demonstrators' right to "fair warning" was "clearly established." *Vodak*, 639 F.3d at 746-47; *Buck*, 549 F.3d at 1286-87; *Papineau*, 465 F.3d at 61. The circumstances of this case barely dif-

fer from those in *Vodak*, *Buck*, and *Papineau*, and no difference among the cases would have suggested to a reasonable officer either that she did not need to give fair warning in these circumstances or that the defendants had adequately given such warning to more than a small fraction of demonstrators. Thus, the Court denies the defendants' motion to dismiss plaintiffs' claims under the First, Fourth, and Fourteenth Amendments.[9]

Similar analysis leads the Court to deny defendants' motion to dismiss plaintiffs' state law claims. The defendants identify two potential bases for dismissal of these claims. First, they invoke state law qualified immunity as a defense. "New York law . . . grant[s] government officials qualified immunity on state-law claims except where the officials' actions are undertaken in bad faith or without a reasonable basis." *Papineau*, 465 F.3d at 63. Here, the same allegations that plausibly suggest that a reasonable officer would have clearly known that the arrests violated plaintiffs' rights also suggest that defendants

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[9] This conclusion, incidentally, does not depend in any way on a finding that the police actually intended to lead demonstrators onto the bridge. Indeed, the videos themselves seemingly negate plaintiffs' suggestion that the police orchestrated a "charade" designed to create a pretense for arrest. *Cf.* SAC ¶¶ 2, 7. Rather, they are more consistent with the theory that the police believed they could better control the crowd at a later point. For present purposes, however, what motivated the officers to retreat from their position at the entrance to the vehicular roadway does not matter. The officers putatively violated the First and Fourth Amendments when, having maintained their control over a peaceful demonstration, they imposed the serious sanction of arrest on many who, while attempting to exercise their First Amendment rights, never received fair notice that the officers had prohibited their conduct.

acted "without a reasonable basis." See *id.* ("[D]efendants' [state law immunity] defense would necessarily depend on the same 'reasonableness' at issue with respect to Plaintiffs' federal claims.").

Second, defendants argue that plaintiffs failed to comply with N.Y. Gen. Mun. Law § 50-e, which requires those who seek to sue the City or its officers to notify the City of its claim. Nonetheless:

> actions that are brought to protect an important right, which seek relief for a similarly situated class of the public, and whose resolution would directly affect the rights of that class or group are deserving of special treatment. The interests in their resolution on the merits override the State's interest in receiving timely notice before commencement of an action.

Mills v. *Cnty. of Monroe*, 59 N.Y.2d 307, 311 (1983). Because plaintiffs assert an important and directly affected right on behalf of a class, § 50-e does not apply, and the Court denies defendants' motion to dismiss plaintiffs' state law claims.

Turning finally to plaintiffs' claims against Mayor Bloomberg, Commissioner Kelly, and the City for supervisorial and municipal liability, plaintiffs have failed to allege "factual content that allows the court to draw the reasonable inference" that the defendants are liable on such claims. *Iqbal*, 129 S. Ct. at 1949. Although, plaintiffs argue that they have adequately alleged claims against Bloomberg, Kelly, and the City on three separate theories, none is persuasive.

First, they argue that the existence of "Disorder Control Guidelines," the arrests of protesters in 2003

and 2004, and the arrests a week before the incident in this case all indicate that the City has a policy of conducting mass false arrests in order to discourage protesting. SAC ¶¶ 180-193. As they note, "[l]ocal governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978) (footnote omitted). *Monell*'s policy or custom requirement is satisfied where a local government is faced with a pattern of misconduct and does nothing, compelling the conclusion that the local government has acquiesced in or tacitly authorized its subordinates' unlawful actions." *Reynolds* v. *Giuliani*, 506 F.3d 183, 192 (2d Cir. 2007).

Here, however, plaintiffs have not plausibly alleged that officers' conduct in this case constituted part of a "pattern of misconduct," about which Bloomberg, Kelly, and the City did nothing. The breadth with which plaintiffs define the alleged policy underscores its implausibility. Plaintiffs argue that the defendants have acquiesced in or tacitly authorized "indiscriminate mass false arrest of groups of protesters in the absence of individualized probable cause." SAC ¶ 189. Here, however, out of thousands of protesters, the police officers arrested only the 700 who proceeded onto the Brooklyn Bridge's vehicular roadway. While, as described above, the officers may have violated protesters rights by depriving them of "fair warning," this does not mean that they acted indiscriminately. As noted above, the videos themselves rebut plaintiffs' allegations that officers engaged in a "calculated effort to sweep the

streets of protesters and disrupt a growing protest movement." *Id.* ¶ 2. Plaintiffs have not explained why the implementation or execution of a policy of "indiscriminate mass false arrest of protesters" would have produced the relatively narrow set of arrests in this case.

The plaintiffs cannot bridge the gap between the broad, conspiratorial policy they attribute to the City and the violations that they have plausibly alleged in this case. Their meager attempts to do so fail. For example, plaintiffs suggest that the "Disorder Control Guidelines" allegedly issued by Commissioner Kelly "initiated" the use of orange netting to contain protesters and rioters. *Id.* ¶¶ 180-183. Use of orange netting to contain protesters, however, does not by itself violate the Constitution, and it has nothing to do with whether protesters have received fair warning of what the law requires. Further, plaintiffs allege that, in 2004, officers unconstitutionally arrested protesters for participating in an unpermitted march that the police had apparently sanctioned. *Id.* ¶¶ 185-186. Here, however, notwithstanding defendants' argument that violation of the permit regulations provided a basis for arrest, officers did not arrest marchers under permit regulations, as the distinction between marchers who entered the bridge's vehicular roadway and those who did not makes clear. As for plaintiffs' final two allegations concerning prior misconduct, plaintiffs allege in conclusory fashion that "[w]ithout warning or notice," police officers surrounded and arrested large groups of protesters. *Id.* ¶¶ 184, 193. Plainly, without additional factual content, these allegations cannot provide a plausible basis to conclude that the City either had or tolerated a policy of failing to provide fair warn-

ing, much less that the officers implemented such a policy in this case.

Thus, even if plaintiffs have plausibly alleged that the City "acquiesced in or tacitly authorized" a pattern of mass false arrests designed to discourage protesting—and the Court does not find that they have adequately so alleged—the plaintiffs have failed to connect that pattern with the arrests in this case. Simply put, while the police failed to give plaintiffs fair warning before they arrested them, plaintiffs have neither plausibly alleged that the officers intended to discourage protesting nor explained why, had they intended to do so, they would have arrested only the protestors who entered the bridge's vehicular roadway. Even if the Court charitably interpreted the SAC to allege that the City tolerated a "pattern" of failure to provide fair warning, the one factual example plaintiffs have provided, which involved circumstances that differed from those in this case, cannot provide the basis for a *Monell* claim. See *Green* v. *City of New York*, 465 F.3d 65, 81 (2d Cir. 2006). Accordingly, plaintiffs have not plausibly alleged that the violations in this case resulted from a policy that Mayor Bloomberg, Commissioner Kelly, or the City implemented, executed, or tolerated.

Second, plaintiffs argue that Mayor Bloomberg and Commissioner Kelly either ratified or directly participated in the alleged constitutional violations. Under *Iqbal*, plaintiffs may not base § 1983 claims on a theory of *respondeat superior*, but must instead show that a supervisory "official's own individual actions" subject him to liability. *Iqbal*, 129 S. Ct. at 1948. Policymakers face liability only where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials

responsible for establishing final policy." *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 483 (1986).

Plaintiffs have not met this demanding standard. With respect to Commissioner Kelly, plaintiffs allege, on "information and belief," that he "participated in, approved and/or ratified" the officers' conduct. SAC ¶ 199. These very different courses of action, apparently pled in the alternative, only underscore the observation that plaintiffs have not alleged any facts concerning Commissioner Kelly's conduct. Similarly, plaintiffs' allegations that Mayor Bloomberg and Commissioner Kelly conferred about how police would respond to "protest marches" in general, *id.* ¶ 63, cannot remotely indicate that either one made "a deliberate choice to follow a course of action" that resulted in the arrest of these particular plaintiffs at this particular march. Finally, plaintiffs' allegations that Mayor Bloomberg and Commissioner Kelly ratified the arrests *after* they occurred cannot constitute participation in or election to follow an unconstitutional course of conduct. Only where supervisors and policymakers can "rectify the situation" does ratification create a basis for liability. *Cf. Amnesty Am.* v. *Town of West Hartford*, 361 F.3d 113, 128 (2d Cir. 2004). Accordingly, plaintiffs have not stated a claim against Mayor Bloomberg or Commissioner Kelly based on their participation in or ratification of the alleged violations.

Finally, the plaintiffs argue that Mayor Bloomberg and Commissioner Kelly face liability based on their failure to train the arresting officers. "[A] municipality's failure to train its employees in a relevant respect must amount to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'" *Connick* v. *Thomp-*

son, 131 S. Ct. 1350, 1359 (2011) (quoting *Canton* v. *Harris*, 489 U.S. 378, 388 (1989)). To satisfy the deliberate indifference standard, a plaintiff must show that an officer's actions were "clearly unreasonable in light of the known circumstances." *Davis Next Friend LaShonda D.* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648-49 (1999). "A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train." *Connick*, 131 S. Ct. at 1360 (quoting *Bd. of Comm'rs of Bryan Cty.* v. *Brown*, 520 U.S. 397, 409 (1997)).

Plaintiffs' claim of failure to train must fail for substantially the same reasons that their claim based on an alleged municipal policy failed. While plaintiffs allege that the named defendants did not properly train officers "to give fair notice prior to the initiation of mass protest arrests," SAC ¶ 169, they describe only one other circumstance in which officers allegedly arrested protesters in the absence of fair warning, *id.* ¶ 186. Given the differences described above between those circumstances and the events alleged here, plaintiffs simply have not plausibly alleged a "pattern of similar constitutional violations" that rendered Mayor Bloomberg's and Commissioner Kelly's actions "clearly unreasonable in light of known circumstances." Accordingly, the plaintiffs have not stated a claim against either defendant for failure to train. Since the plaintiffs have failed to state a plausible claim under any of their three proposed theories, the Court dismisses their *Monell* claims against the City, Mayor Bloomberg, and Commissioner Kelly.

In sum, for the reasons stated above, the Court denies defendants' motion to dismiss plaintiffs'

claims against the officers who arrested them, but grants the motion to dismiss plaintiffs' *Monell* claims against the City, Mayor Bloomberg, and Commissioner Kelly. The Clerk of the Court is hereby ordered to close items number 7 and 14 on the docket of this case. The Court directs the parties to jointly call Chambers no later than June 15, 2012 to schedule further proceedings in this case.

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York

June 7, 2012

APPENDIX F

12-2634-cv
Garcia v. Jane and John Does 1-40

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at 40 Foley Square, in the City of New York, on the 23rd day of February, two thousand fifteen.

Present: ROBERT A. KATZMANN,
Chief Judge,
DENNIS JACOBS,
GUIDO CALABRESI, *
JOSE A. CABRANES,
ROSEMARY S. POOLER,
REENA RAGGI,
RICHARD C. WESLEY,
PETER W. HALL,
DEBRA ANN LIVINGSTON,
GERARD E. LYNCH,
DENNY CHIN,
RAYMOND J. LOHIER, JR.,
SUSAN L. CARNEY,
CHRISTOPHER F. DRONEY,
Circuit Judges.

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* Senior Circuit Judge Guido Calabresi was a member of the initial three judge panel that heard this appeal and is therefore eligible to participate in *in banc* rehearing. See 28 U.S.C. § 46 (c)(1).

KARINA GARCIA, as Class Representative on behalf of herself and others similarly situated, YARI OSORIO, as Class Representative on behalf of herself and others similarly situated, BENJAMIN BECKER, as Class Representative on behalf of himself and others similarly situated, CASSANDRA REGAN, as Class Representative on behalf of herself and others similarly situated, YAREIDIS PEREZ, as Class Representative on behalf of herself and others similarly situated, TYLER SOYA, as Class Representative on behalf of himself and others similarly situated, STEPHANIE JEAN UMOH, as Class Representative on behalf of herself and others similarly situated, MICHAEL CRICKMORE, as Class Representative on behalf of himself and others similarly situated, BROOKE FEINSTEIN, as Class Representative on behalf of herself and others similarly situated,

Plaintiffs-Appellees,

MARCEL CARTIER, as Class Representative on behalf of himself and others similarly situated,

Plaintiff,

v. No. 12-2634-cv

JANE AND JOHN DOES 1-40, Individually and in their official capacities,

Defendants-Appellants,

RAYMOND W. KELLY, Individually and in his official capacity, CITY OF NEW YORK, MICHAEL R. BLOOMBERG, in his official capacity and Individually,

Defendants.

For Plaintiffs-Appellees:	Mara Verheyden-Hillard (Andrea Hope Costello and Carl Messineo, *on the brief*), Partnership for Civil Justice Fund, Washington, DC
For Defendants-Appellants:	Ronald E. Sternberg, Assistant Corporation Counsel (Leonard Koerner and Arthur G. Larkin, Assistant Corporation Counsel, *on the brief*), *for* Zachary W. Carter, Corporation Counsel of the City of New York, New York, NY

The Court voted to rehear this appeal *in banc* on December 17, 2014. However, in light of the amended panel opinion that will be issued today, *see Garcia v. Does 1-40*, ___ F.3d ___ (2d Cir. 2015), this case no longer warrants consideration by the *in banc* Court. The in banc Court is hereby dissolved. The in banc Court, having determined that the case is no longer worthy of rehearing *in banc*, and having therefore dissolved itself, takes no position on the opinion of the panel.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE, CLERK

APPENDIX G

12-2634-cv
Garcia v. Jane & John Does

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of December, two thousand fourteen,

Present:

ROBERT A. KATZMANN,
Chief Judge,
DENNIS JACOBS,
GUIDO CALABRESI,*
JOSE A CABRANES,
ROSEMARY S. POOLER,
REENA RAGGI,
RICHARD C. WESLEY,
PETER W. HALL
DEBRA ANN LIVINGSTON,
GERARD E. LYNCH,
DENNY CHIN,
RAYMOND J. LOHIER, JR.,
SUSAN L. CARNEY,
CHRISTOPHER F. DRONEY,

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* Senior Circuit Judge Guido Calabresi was a member of the initial three-judge panel that heard this appeal and is therefore eligible to participate in *in banc* rehearing. See 28 U.S.C. § 46 (c)(1).

Circuit Judges.

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Karina Garcia, as Class Representative on behalf of herself and others similarly situated, Yari Osorio, as Class Representative on behalf of herself and others similarly situated, Benjamin Becker, as Class Representative on behalf of himself and others similarly situated, Cassandra Regan, as Class Representative on behalf of herself and others similarly situated, Yareidis Perez, as Class Representative on behalf of herself and others similarly situated, Tyler Sova, as Class Representative on behalf of himself and others similarly situated, Stephanie Jean Umoh, as Class Representative on behalf of herself and others similarly situated, Michael Crickmore, as Class Representative on behalf of himself and others similarly situated, Brooke Feinstein, as Class Representative on behalf of herself and others similarly situated,

Plaintiffs - Appellees,

Marcel Cartier, as Class Representative on behalf of himself and others similarly situated,

Plaintiff,

v. 12-2634

Jane and John Does 1-40, Individually and in their official capacities,

Defendants - Appellants,

Raymond W. Kelly, Individually and in his official capacity, City of New York, Michael R. Bloomberg, in his official capacity and Individually,

Defendants.

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For Plaintiffs-Appellees:	Mara Verheyden-Hillard (Andrea Hope Costello and Carl Messineo, on the brief), Partnership for Civil Justice Fund, Washington, DC
For Defendants-Appellants:	Ronald E. Sternberg, Assistant Corporation Counsel (Leonard Koerner and Arthur G. Larkin, Assistant Corporation Counsel, on the brief), for Zachary W. Carter, Corporation Counsel of the City of New York, New York, NY

ORDER

Following disposition of this appeal on August 21, 2014, an active judge of the Court requested a poll on whether to rehear the case *in banc*. A poll having been conducted and a majority of the active judges of the Court having voted in favor of rehearing this appeal *in banc*,

IT IS HEREBY ORDERED that this appeal be heard *in banc*. See Fed. R. App. P. 35(a). The *in banc* panel will consist of the active judges of the Court and (subject to his election) the senior circuit judge who served on the three-judge panel. See 28 U.S.C. § 46(c).

The panel having recommended withdrawal of its opinions in this case, such withdrawal shall be noted on the docket by the Clerk of Court.

A briefing schedule will follow in due course.

FOR THE COURT:
Catherine O'Hagan Wolfe
Clerk of Court