12-2634

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees,

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

Plaintiff,

– v. –

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

Defendants,

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

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

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JURSIDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(3) and (4), 1332(d)(2), 1367, 2201 and 2202, as this case raises federal questions under the Constitution on behalf of a putative class. Plaintiffs filed this action pursuant to 42 U.S.C. § 1983 for violations of their First, Fourth and Fourteenth Amendment rights and included pendent state law claims. (A160.)

The District Court denied Defendants'[1] motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), concluding, *inter alia*, that those individuals who participated in or caused the arrest of Plaintiffs, and the putative class, were not entitled to qualified immunity for violations of their constitutional rights. (SPA3, 16-23, 30.) This Court has jurisdiction under 28 U.S.C. § 1291 pursuant to the collateral order doctrine because the appeal involves a denial of qualified immunity. *Papineau v. Parmley*, 465 F.3d 46, 64 (2d Cir. 2006) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)).

STANDARD OF REVIEW

[1] The currently identified named Defendants (previously identified as Jane and John Does) in this case are command staff and police who significantly participated in and/or caused the mass arrest of Plaintiffs (e.g., including ranking officers observed commanding the police lines at the Brooklyn Bridge, Chief Joseph Esposito, the highest ranking uniformed member of the New York Police Department (NYPD) and Assistant Chief Thomas Purtell, commander Manhattan South), Captain Jack Jaskaran who clearly participated in the mass arrest, as well as the arresting officers of named Plaintiffs.

The review of a District Court's denial of qualified immunity on a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is *de novo*, accepting as true the material facts alleged in the complaint and drawing all reasonable inferences in Plaintiffs' favor.[2] *Johnson v. Newburgh Enlarged School Dist.*, 239 F.3d 246, 250 (2d Cir. 2001).

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." *Dickson v. Napolitano*, 604 F.3d 732, 751 (2d. Cir. 2010).

With respect to video evidence, Plaintiffs assert it has only one objective interpretation: establishing apparent invitation of marchers to proceed following police across the bridge. Defendants' video interpretation, which Plaintiffs assert is objectively unreasonable, must be rejected. Were the video to be understood as being subject to multiple reasonable interpretations, unlike in the posture of *Scott v. Harris*, 550 U.S. 372 (2008), at this stage of litigation Plaintiffs' reasonable interpretation must be credited. *See Zellner v. Summerlin*, 494 F.3d 344, 371 (2d Cir. 2007) (citing *Scott*, 550 U.S. at 378-80).

[2] Defendants have improperly cited the standard of appellate review in this case as one for a motion for summary judgment under Fed. R. Civ. P. 56. (*See* Appellants' Br. 5, 35.)

STATEMENT OF ISSUES

Whether the District Court correctly denied Defendants' motion to dismiss based on the defense of qualified immunity?

STATEMENT OF THE CASE

Plaintiffs brought this civil rights action pursuant to 42 U.S.C. § 1983 and asserted pendant state law claims. Ruling on individual Defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6), the District Court rejected claims of qualified immunity advanced on behalf of the command officials, arresting officers and persons alleged to have caused and/or participated in the mass arrest of named plaintiffs, who were arrested within a mass and indiscriminate arrest of over 700 peaceful protesters.

STATEMENT OF FACTS

Defendants' Statement of Facts, which presents a selective, as well as inaccurate, at times, characterization of the content of video evidence should be rejected in entirety in favor of consideration of the substance of the record video evidence, *per se*. Plaintiffs draw this Court's attention to Plaintiffs' Video Exhibit F (showing inaudible orders at base of Brooklyn Bridge, command staff and officers turning and leading demonstrators onto the bridge roadway and across the bridge), Ex. G (video of police casually and jocularly leading demonstration onto roadway), Ex. H (additional footage showing police leading marchers onto

roadway further along bridge), Exs. I – K (images of officers flanking and escorting march along bridge roadway), Exs. D and E (photo images of marchers flowing far back from base of bridge), as well as to Plaintiffs' and Defendants' media evidence generally. (A198, A204.)

A. The Occupy Wall Street March Was Peaceful and Posed No Imminent Threat to Public Safety

On October 1, 2011, a mass political demonstration march occurred in connection with the "Occupy movement." (A162 ¶ 62.)

Defendants, at oral argument, conceded and agreed with the District Court that the march conducted itself "peacefully." (A313:12, A313:1 – 4 ("I think the Court was correct that the march generally was peaceful and these people. . . they certainly weren't violent, didn't appear to be violent.").) Plaintiffs alleged the march was peaceful. (A158 ¶ 40, A161 ¶ 58, A174 ¶ 133, A178 ¶ 156.) The District Court found the march was peaceful. (SPA23 n.9 (the march was "a peaceful demonstration"); *see* SPA12, SPA14, SPA20 (relevant law is that which applied to peaceful demonstrations).)

As observed by the District Court, "defendants have not argued that plaintiffs posed a threat of imminent harm." (SPA21.) The Court, examining record video evidence, concluded as a matter of fact that the march did not pose any imminent threat to public safety. (SPA21 n.8.)

B. Permission Was Granted for the March by Police, Notwithstanding Code Requirements of an Advance Written Permit

By effect of municipal administrative code, such a march ordinarily needed "a required written permit" to lawfully occur. (Appellants' Br. 6; A226-228, A267-269; SPA15-16.) *See* New York City Admin. Code § 10-110(a)). The City has argued successfully that the plain language of the Code encompasses marches on "any public place" including sidewalks. *See Allen v. City of N.Y.*, 2007 U.S. Dist. LEXIS 15, *19-20 (S.D.N.Y. Jan. 3, 2007). (*See also* A228 (arguing any march or gathering on a roadway requires permit).) It is undisputed the march did not possess a written permit.

Defendants concede, notwithstanding the Code's requirement of a written permit, that "permission [was] granted for the march" by the police (Appellants' Br. 24). (*See* Appellants' Br. 2-3, 7-8, 28-29 n.8.) In other words, Defendants concede that police overrode codified proscriptions and allowed the march to proceed on public ways ordinarily prohibited.

The Court found that Defendants acknowledged they permitted the march, overriding and waiving the codified prohibition. (SPA17 (Court finds "Marching without a permit . . . simply was not a problem.").)

Plaintiffs allege the police led, escorted and permitted the march, including ultimately permitting and inviting marchers to proceed upon the Brooklyn Bridge

roadway. (A158 ¶¶ 40, 42, 47; A160 ¶¶ 55; A164-165 ¶¶ 73-85; A168 ¶ 110; A169 ¶ 114; A173 ¶ 125; A174 ¶¶ 135, 137; A181 ¶¶ 172-173.)

C. Police Exercised Control Over, Directed and Guided the Route of the March

The District Court found, and Defendants concede, "[i]t is indeed true, as the District Court appropriately recognized, that police officers 'exercised some degree of control over the marchers, defining their route and directing them, at times, to follow certain rules." (Appellants' Br. 22 (citing SPA17), 28 n.8 (Defendants concede "the involvement of police officers in directing the protest"); A164 ¶¶ 77-78 (Plaintiffs allege police guided, exercised control over and escorted the march).)

Defendants concede the mass march throughout downtown Manhattan was "a reasonably orderly march to the [Brooklyn] Bridge." (Appellants' Br. 23; A166 ¶ 89 (asserting absence of non-compliance).) Defendants concede that "the marchers understood [police] orders and followed them." (A83 (underlining in original), A164 ¶ 80 (alleging same).)

D. At Points and Times, Police Blocked Vehicular Traffic to Facilitate the March and Directed Marchers to Proceed Upon the Roadways in Manners Ordinarily Prohibited

Throughout the march, police issued orders to marchers directing them how to proceed. At some points and times, individual police officers directed marchers to remain on the sidewalk. Such directives were sporadic as reflected by the fact that only two named Plaintiffs assert in the complaint that they heard these. (A170

¶ 118 (Plaintiff Crickmore heard and complied, but also observed that when he found himself on the Bridge and looked to the police escorts for guidance, in sharp contrast, they were giving no orders whatsoever and making no suggestion whatsoever that proceeding on the Bridge roadway was problematic in any way), A172 ¶ 123 (Plaintiff Sova, same); SPA17 (Court references "the few warnings the officers gave" to stay on sidewalk).)

At points and times, police directed and permitted marchers to proceed in ways ordinarily prohibited under traffic regulations (absent police permission or directive). (SPA4 (citing A165 ¶ 81).)

At some intersections of the march — in order to facilitate the movement of marchers — police temporarily blocked vehicular traffic, directed and permitted marchers to cross the street upon the roadways against the traffic signal. (SPA4 (citing A165 ¶ 82.)

Marchers relied on the orders or signals from police that certain movement, ordinarily prohibited, was at that or any particular time and place being permitted and directed by police who were guiding and escorting the march. SPA4 (citing A165 ¶ 83).

In general, marchers relied on police for directives and indications as to what actions were being permitted at what times in order to conform their conduct and

comply with orders and indications being given by police. (SPA4 (citing A165 ¶¶ 83-85.)

The District Court found:

> [T]he 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 (footnote omitted). The marchers, in turn, allegedly relied on the police officers' commands in order to determine how they could legally proceed. *Id.*"

(SPA 17.)

Defendants concede and defend the fact that police blocked vehicular traffic and directed marchers to cross upon the roadway against the signal in manners ordinarily prohibited. (A329-30 (Defendants argue "officers have the authority to direct pedestrian and vehicles in order to ensure public safety, whether against the traffic signal or not. That officers did so during this march," they argued, did not void the arrests.).)

E. At No Time Did Police Ever Provide Notice That Permission to March Was Conditioned on Marchers Never Moving Upon Roadways

In their opening brief, Defendants twice represent that they granted "implied permission" for the march to proceed. (Appellants' Br. 28-29 n.8.) Within this "implied permission," Defendants contend there were "explicitly stated parameters of the [implied] permission granted for the march," to wit, that the police explicitly

gave notice to the marchers as a whole that they were prohibited from moving upon roadways, although conceding as above that they blocked roadway vehicular traffic to direct marchers to cross upon the roadway in manners ordinarily prohibited.

These are contradictory representations by Defendants.

Any claim, that there was an explicit statement to all marchers and those arrested that the permission for the march was conditioned on never entering the roadway, even when it was blocked by police and marchers were directed, invited or led by the police, is a material factual dispute. As reflected in the immediately preceding sections, it is undisputed that the police permitted the march, permitted it to move upon roadways at times and blocked vehicular traffic to facilitate the march movement on the roadway at points. Individual officers did at occasional times and places direct some marchers to stay on the sidewalk, and at other times and places direct that they traverse upon the roadway against the traffic light while police stopped vehicles. Whatever the direction was at any given place or moment, Defendants concede that the march as a whole as it proceeded to the Bridge was orderly and compliant with all police orders.

With respect to record evidence, there is no evidence whatsoever that the police ever issued *any* order or directive, including any condition, to the march as a whole. (*See, e.g.*, A167 ¶¶ 97-103.) At no time did the putative class as a group or

named Plaintiffs fail to obey a police order, including any "explicitly stated" condition. (A174 ¶ 137.)

The record evidence is that individual officers, at sporadic times, did direct or remind random subsets of persons within earshot to — at that time and place — stay on the sidewalk as the march proceeded. The Complaint alleges this with specificity. The District Court found that this disputed assertion of the Defendants that there was explicit group notice must be considered in the context of the fact and allegation that at other times the police directed the marchers to violate traffic regulations (SPA17 n.6), including specifically by moving upon the roadway against traffic lights while vehicular traffic was blocked by police (A165 ¶ 83.)

Plausibly, and clearly, the Complaint alleges that marchers were issued directives, effective only for the limited time and place at which they were issued, regarding what conduct was being permitted or prohibited at that moment and location. (*Id.* ¶¶ 83-84; SPA4.) Logically, in handling the march, the police issued different directives based on the location and needs of the orderly procession at different times.

F. As The March Approached the Entrance to the Brooklyn Bridge, the March Was Vast, with Thousands of Marchers Stretching Back and Flowing for Blocks Around City Hall Park

The march was escorted by police and ultimately reached the City Hall Park area as well as across Centre Street, and to the pedestrian entrance of the Brooklyn

Bridge. (A165 ¶¶ 87-88.) Thousands of people stretched back from the entrance of the Bridge, across Centre Street and filled blocks of sidewalk space wrapping around City Hall Park. (A167 ¶ 101; A166 ¶ 89; A198 Exs. D, E (images of marchers flowing far back from the base of the Bridge).)

G. The Marchers at the Front of the March Entered Upon the Pedestrian Walkway of the Bridge, Which Due to Its Narrowness Slowed the March, and a Natural Congestion and Overflow of Persons Occurred at the Base of the Entrance to the Bridge

When the front of the escorted march reached the pedestrian walkway of the Brooklyn Bridge, the lead marchers entered and amassed upon the relatively narrow pedestrian walkway. (A165-166 ¶¶ 87-88; A198 Exs. B (image, large number of marchers entering walkway), C (image, walkway packed with marchers while roadway remains clear); SPA4; Appellants' Br. 8 (Defendants concede some demonstrators "proceed[ed] directly onto the Bridge's pedestrian walkway," which became "crowded with demonstrators").)

The march slowed because of the narrowness of the walkway, resulting in a natural congestion of persons. (A165-166 ¶ 88; SPA4.)

H. Police Initially Formed a Police Line on the Roadway Entrance to the Bridge and One Officer, Captain Jaskaran, Issued Inaudible Directives; Defendants Concede that at Most Only a Tiny Fraction Of the 700+ Putative Class Members Heard Such Warnings

Police officers initially blocked the eastbound vehicular roadway to all traffic. (A166 ¶ 90; SPA4.) A number of inaudible directives were issued by a

single officer, identified by Defendants as Captain Jaskaran, through the use of a single hand held bullhorn. (A167 ¶¶ 97–103.)

The Court reviewed Exhibit F (A198), an audio-video recording shot from within the front of the demonstrators at the base of the entrance to the roadway. The Court found:

> 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.* 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.*

(SPA5-6.)

The Court reviewed the police video, shot from behind the officer speaking into the bull horn, between the officer and the police line. The Court found that, from this particular position next to the bull horn itself, the officer's specific orders to clear the roadway can be heard, and:

> 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. (citing police video). 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 demonstrators. *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.*

(SPA6 - 7.)

With respect to the audibility of Jaskaran's orders to clear the roadway, after which the police turned and led marchers across the bridge, the Defendants argue that its audible reach "clearly" encompassed "those in front of the demonstrators on the roadway." (Appellants' Br. 8, 22 ("At least the first line of demonstrators heard" the order).)

None of the Plaintiffs heard warnings or orders to not proceed on the bridge roadway. (A158 ¶ 41; SPA7-8.) The vast majority of those arrested did not hear any such warnings or orders. (A167 ¶¶ 98-103.)

As a matter of fact, regardless of fine distinctions between the parties as to the maximum extent of the minimal reach of audibility, it is undisputed that these were not warnings or orders issued such that they reached any significant number of putative class members. Plaintiffs concede at least one non-Plaintiff demonstrator heard the order, as he directly responded, and argue that no more than a handful possibly could have. Defendants concede the scope "clearly"

reached only "those in front of the demonstrators on the roadway." (Appellants' Br. 8, 22.)

The District Court found, based on the record audio-video evidence, as a matter of fact and related legal conclusion that "no reasonable officer could imagine, in these circumstances, that this warning was heard by more than a small fraction of the gathered multitude." (SPA18.)

The Court also found, citing Exhibit F, "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." (SPA18.)

The legal implications of the issuance of these warnings to relatively none of the marchers is addressed below, in terms of their irrelevancy with respect to notice to the class as they were not heard, their irrelevancy as an order since they were thereupon superseded by the same officers leading the marchers mid-way across the bridge, and their significance to the qualified immunity analysis which is that no objectively reasonable officer could have maintained a belief that fair warning had issued to the class — as constitutionally required — prior to opportunity for compliance and then, only after defiance (if there was any at all), the arrest of those who were non-compliant.

I. At the Roadway Entrance to the Brooklyn Bridge, Police Led and Escorted the Marchers Across the Roadway of the Bridge

After these warnings — which no one suggests were issued in a manner to be heard by the putative class — the police (including Captain Jaskaran, high ranking command officials, and other Defendants) who had been facing demonstrators and blocking all traffic from entering the roadway literally did an about-face so that their backs were now to the marchers, and started walking across the Brooklyn Bridge roadway, proceeding ahead of the demonstrators who likewise followed them across the Bridge on the roadway, permitting and escorting and leading[3] the marchers across and upon the Brooklyn Bridge roadway. (A167-173 ¶¶ 104-126, A154 ¶ 5, A158 ¶ 43, A158-159 ¶ 47, A160 ¶55, A165 ¶¶ 85-86, A174 ¶ 137; SPA4-5 (District Court observes well pled and "plausible" allegations "the police . . . turned and, followed by a large number of marchers, walked onto that portion of the bridge").)

Defendants, admit and concede the underlying facts that the Defendants and police led the Plaintiffs across the Brooklyn Bridge. (Appellants' Br. 11 ("Police officers are seen to be walking in front of the demonstrators along the side of the road") ("police officers walking in front of the demonstrators.") ("The Captain with the bullhorn walks ahead of the demonstrators"), 12 ("A group of about 25 officers walks ahead of the demonstrators.'), 14 ("The officers turn and walk in front of the demonstrators.") (Exhibit G "is a video of officers walking on the

[3] The Merriam-Webster dictionary defined the verb "lead" as: "to guide on a way especially by going in advance." http://www.merriam-webster.com/dictionary/lead.

Bridge roadway ahead of the demonstrators"), 15 ("Officers are walking in front of the demonstrators.").)

From that signal on, no orders were issued from the police at the roadway entrance to the Bridge warning or directing the ongoing flow of hundreds of marchers to not follow. (A168 ¶¶ 106-107.) The escorting officers flanked the march, forming a protective barrier between marchers and vehicles which continued to use limited lanes on the roadway. These flanking officers – perhaps including some of those who had previously directed individuals, at given times and places, to walk on the sidewalk - - did not warn against entering or continuing upon the Bridge roadway. (A168 ¶ 108.)

This is reflected in record evidence. (A198 Exs. F (video from base of Bridge showing entire series of events, including inaudible warnings, and the officers and command staff turning and leading demonstrators into roadway); Exhibit G (video of police casually leading marchers onto roadway), G-1 (image, unconcerned officers chatting as they lead the march), G-2 (image, officer leading march onto bridge roadway casually carrying beverage), H (video footage showing police leading demonstrators further along bridge roadway), I-K (photo images of officers flanking and escorting march along the bridge roadway).)

The District Court found likewise, based on video evidence. "[T]he line of officers turns and proceeds onto the vehicular roadway [of the Brooklyn Bridge],

followed, at a distance of at least ten feet, by hundreds of protesters." (SPA6.) "The officers, followed almost simultaneously by the demonstrators, move in the direction of the bridge's vehicular roadway." (SPA7.)

Citing record audio-video evidence and Plaintiffs' Complaint, the District Court found this conduct to objectively convey permission or an invitation to march upon the roadway of the Bridge. (SPA18-19.)

The conduct of the police, in turning, escorting and leading the marchers including Plaintiffs across the Bridge on the roadway objectively and unambiguously conveyed that police were, permitting, escorting and leading marchers including Plaintiffs across the Bridge on the roadway. (*See* A169 ¶ 113, A198 Ex. L (police video, marcher on the roadway exclaims to pedestrian marchers "They're allowing us to! They're allowing us to!").) The demeanor of police leading the march was somewhat jocular, as they casually chatted with each other, some carrying coffee or beverages. (A167-168 ¶ 105 (citing media Exhibits F, G, G-1, G-2 and H).) There were no warnings or efforts by any officers against entering or continuing upon the Bridge roadway. (A167-168 ¶¶ 106–110.)

The police themselves blocked vehicular traffic onto the roadway at the entrance to the Bridge roadway and as the police entered further onto the Bridge stopped vehicles from flowing into lanes of traffic on the roadway and traffic from entering through on ramps. (A174 ¶ 137.) This conduct is objectively consistent

with that of the police throughout the march, in which they temporarily inconvenienced and blocked vehicular traffic and directed marchers to proceed on the roadway in a manner ordinarily prohibited apparently in order to facilitate an orderly and faster contiguous movement of the march. (A168 ¶ 111, A165 ¶¶ 81-85.)

Plaintiffs Michael Crickmore and Brooke Feinstein, walked onto the roadway alongside the escorting officers, who made no attempt to warn or suggest that such passage was not sanctioned and being permitted under the circumstances then-present. Escorted by the police onto the roadway, Plaintiffs Crickmore and Feinstein did not even realize they were entering the roadway until they had already proceeded upon it. (A170-71 ¶¶ 118–19; SPA8.)

Plaintiffs Yari Osorio and Yareidis Perez observed the escorting and flanking officers, which conveyed to each that movement across the bridge was being permitted. (A171-72 ¶ 121-122.) Perez observed escorting officers chatting among themselves, not warning marchers or indicating there was any absence of permission. (A171-72 ¶ 122.)

Plaintiff Benjamin Becker observed police at the front of the march, leading it across the bridge, which conveyed to him that the march across was permitted. (A168 ¶ 116.)

Some of the named Plaintiffs, given their position within the vast body of marchers did not personally observe the police on the roadway — although they knew of the police permission of the march — but simply were following the crowd understanding that it was a proper and permitted route for the march. (A171 ¶ 120 (Plaintiff Garcia), A172-73 ¶ 124 (Plaintiff Umoh only saw one officer on the bridge roadway, who did not issue any warnings or communications at all).)

Video, including the police TARU video, evidences that the police conduct, turning and leading the marchers across the bridge, objectively conveyed a grant of permission to cross the bridge on the roadway.

This actual and apparent police permission to use the bridge roadway caused scores of demonstrators who had initially entered upon the pedestrian walkway to join the marchers on the roadway being led by the police. (A169 ¶ 114 (citing Ex. M).)

Each of the Plaintiffs understood that their passage on the roadway was permitted by police, consistent with the objective message conveyed by the conduct of the police in leading and escorting the march upon the roadway without objection. (A158 ¶ 42.)

J. Defendants and Police, Having Permitted, Invited, Led and Escorted Hundreds of Marchers Upon the Roadway of the Brooklyn Bridge, Then Suddenly Arrested Plaintiffs and the 700+ Putative Class Members for Being Present Upon the Roadway Precisely Where Police Had Led Them and Permitted Them to Be

Defendants, having led and escorted hundreds of peaceful marchers upon the roadway of the Brooklyn Bridge, mid-way across the bridge arrested over seven hundred persons including the named Plaintiffs for being present upon the bridge, precisely where the police had led them and permitted them to be. (A173–74 ¶¶ 125-37), A152 ¶ 5, A158 ¶ 43.)

There is no dispute that the sole basis advanced on appeal to justify probable cause to engage in the undifferentiated and sweeping mass arrest of 700+ peaceful protesters, including Plaintiffs, was their presence upon the roadway of the Brooklyn Bridge. (Appellants' Br. 20 (citing N.Y. Penal Law § 240.20(5) — obstruction of vehicular traffic — as the sole basis for the arrest (A221 (Defendants argue that Plaintiffs and putative class "were arrested and charged with Disorderly Conduct because they disregarded specific warnings[4] not to enter the roadway of the bridge.")).

K. At No Time Did Any Fair Warning Issue to the Putative Class as a Whole or to Any Named Plaintiffs to Not Enter Upon the Bridge

As reflected, above, at no time did any such fair warning issue. (*See generally* Second Amended Complaint; A165 ¶ 86, A166 ¶¶ 92-105, A158 ¶ 41

[4] This is a reference to the inaudible directives issued by Captain Jaskaran to not enter the roadway of the bridge, which were also thereupon apparently superseded by the turning of the police line – including Captain Jaskaran – to lead the marchers upon and across the roadway of bridge.

(none of named Plaintiffs received or heard warnings or orders to not proceed on bridge roadway).)

L. At No Time After the Police Turned and Led the March Upon and Across the Roadway of the Bridge Did Any Fair Warning Issue to the Putative Class or any Named Plaintiffs to Not Follow the Lead of the Police Upon and Across the Bridge

As reflected above, at no time did any such warning issue. (A168 ¶¶ 106-114 (leading and escorting officers did so lead and escort without giving any indication or warning that following their lead was prohibited); *see also* SPA18 n.7 (Court observed the inadequacy of such a warning after marchers had followed the police lead onto the Bridge roadway and were prohibited from leaving or conforming to an order).)

THE DECISION BELOW

A. First Amendment Rights Preserve the Most Treasured Freedoms in a Democratic Society

Presiding Judge Jed S. Rakoff observed the fundamental nature of First Amendment rights as critical in a democracy as well as noting the essential underpinning that political speech and dissent has played in this nation's history.

> What a huge debt this nation owes to its "troublemakers." From Thomas Paine to Martin Luther King, Jr., they have forces 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.

(SPA2.)

This choice of language hearkens back to the seminal Supreme Court case of *Cox v. Louisiana*, 379 U.S. 559 (1965), a case relied upon both by Judge Rakoff (SPA12) and also by the Second Circuit in the leading and applicable case of *Papineau v. Parmley*¸ 465 F.3d 46 (2d Cir. 2006). Free speech needs breathing space to survive. As such, constitutional restraints on police disturbance of such protected activities are fundamental.

The Supreme Court in *Cox* observed the long line of "repeated holdings of this Court that our constitutional command of free speech and assembly is basic and fundamental and encompasses peaceful social protest, so important to the preservations of the freedoms treasured in a democratic society." *Cox*, 379 U.S. at 574.

B. Regulation of Peaceful Protest is Required to Be Through Clear and Fair Warning as to What Conduct is Permitted and/or Prohibited

The *Cox* Court also observed the critical corollary of these principles, that regulation of peaceful protest be through clear and fair notice:

> so as to give citizens fair warnings as to what is illegal; for regulation of conduct that involved freedom of speech and assembly not to be so broad in scope as to stifle First Amendment freedoms, which "need breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963); for appropriate limitations on the discretion of public officials where speech and assembly are intertwined with regulated conduct. . ."

Cox, 379 U.S. at 574 (excerpted at SPA12).

C. Fair Warning is Required to be Issued to Those Subject to Arrest Before There Exists Probable Cause to Arrest Peaceful Demonstrators Allegedly in Violation of a Statutory Limitation on the Exercise of First Amendment Rights

The District Court recognized that the case at bar involves the arrest of persons, which implicates Fourth Amendment rights, who were engaged in peaceful demonstration activity, which implicates First Amendment rights. (SPA12-13.)

The ordinarily restricted authority of the police to exercise the power of arrest is further limited by the space that the police must afford constitutionally to protected peaceful protest activity. This is necessary to avoid the State's unconstitutional disruption or chilling of this fundamental free speech activity, the lifeblood of a democracy.

Judge Rakoff observed that:

> 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 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 crimininalize 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.

(SPA12-13.)

As one example, the District Court observed the unconstitutionality under the First Amendment of the imposition of strict liability for the offense of parading without a permit, a circumstance which *if* allowed under law would mean that any person could be penalized with jail time simply for approaching a demonstration which lacked a permit – even though there was no way for the approaching individual to be aware of the absence of a permit unless the police or other circumstances effect "fair warning" prior to arrest. (SPA21-22 (citing *Buck v. City of Albuquerque*, 549 F.3d 1269, 1283-84 (10th Cir. 2008) and *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 613 (6th Cir. 2005).) Otherwise, an impermissible chilling effect on free speech activity would result.

Despite the ordinary effect of statutory notice of offenses,[5] where the underlying conduct involves *peaceful* demonstration activity the First Amendment requires the additional issuance of "fair warning" to protesters prior to mass arrest. (SPA21 (citing *Papineau*, 465 F.3d at 60) (absent "imminent harm," First Amendment requires police to issue "fair warning" to protestors, and provide opportunity for compliance, prior to arrest) (quoting *City of Chi. v. Morales*, 527

[5] Statutes or codes are required to be promulgated in a manner such that notice is effective, that the language is not vague or overbroad. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required" or be invalidated under the Due Process Clause of the Fifth Amendment. *FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926))

U.S. 41, 58 (1999) ("The 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.").

The District Court, surveying applicable Supreme Court,[6] the leading Second Circuit[7] and other Circuit case law[8] (described below) concluded that

> [T]hese cases all stand for the basic proposition 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.

(SPA12-15.)

In other words, when responding to peaceful demonstrators, probable cause to mass arrest requires officers to possess an objectively reasonable belief that fair warning has effectively issued to those to be arrested, followed by opportunity for compliance and failure to comply.

D. Where Police Convey Actual or Apparent Permission for Peaceful Demonstrators to Engage in Ordinarily Prohibited Conduct, Fair Warning is Independently Required to be Issued Before Police May Arrest Those Demonstrators for Engaging in the Very Conduct Which the Police Have Permitted or Invited

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[6] *Cox*, 379 U.S. at 574 [SPA12]; *See also City of Chi. v. Morales*, 527 U.S. 41, 58 (1999) (Due Process imposes fair notice requirements).

[7] *Papineau*, 465 F.3d at 60.

[8] *Buck*, 549 F.3d at 1283-84 (SPA13); *Vodak v. City of Chi.*, 639 F.3d 738, 745-46 (7th Cir. 2011) (SPA13-14); *see also Dellums v. Powell*, 566 F.2d 167, 182-83 (D.C. Cir. 1997).

Two of the cases relied upon by the District Court, *Vodak* and *Buck*, involved situations in which police had given actual or apparent permission to protesters to be present upon roadways that were ordinarily prohibited to pedestrians and then — in the absence of effective fair warning — the police proceeded to mass arrest the protestors for being present upon the roadways.

The Seventh Circuit and Tenth Circuit Courts each ruled that probable cause required an officer to possess an objectively reasonable belief that fair notice had been effectively issued to those subject to arrest, particularly where the police had overridden statutory proscriptions and permitted or invited or otherwise allowed the protest conduct.

The fact that police had granted apparent permission for the ordinarily proscribed conduct independently establishes the need for explicitly and effectively stated fair notice to issue *from the police themselves* as a prerequisite to probable cause.

Both Circuits denied qualified immunity to the participating officers, notwithstanding the fact that technically the demonstrators were physically present on the ordinarily prohibited roadways, *i.e.* they were engaged in the *actus reus* of conduct ordinarily proscribed but for which police had conveyed apparent or colorably apparent permission.

The critical common holding was that qualified immunity was unavailable, there was no probable cause to arrest, as no reasonable officer could have objectively believed the prerequisite fair warning had issued. (SPA14-15; SPA20-22.)

The *Vodak* and *Buck* cases, as did *Papineau* and Judge Rakoff (SPA13), all cited the well established principles and Supreme Court precedent that "to sustain [a protester's] later conviction for demonstrating where [police] 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." *Cox*, 379 U.S. at 571-72 (quoting *Raley v. Ohio*, 360 U.S. 423, 426 (1959)).

E. The Constitutional Requirement of Fair Warning Prior to the Arrest of Peaceful Protesters, Particularly Where Police Have Permitted the Underlying Conduct, is Clearly Established

The District Court in this case, having established that probable cause to arrest peaceful demonstrators requires fair warning, especially, although not exclusively, where police have apparently invited or permitted the conduct, found that the fair warning requirement was clearly established. (SPA22.)

The District Court in so finding, relied on established Second Circuit and other Circuit precedents, which each relied upon established Supreme Court precedent. (SPA22.) *Papineau*, 465 F.3d at 60-61 (citing *Cox*, 379 U.S. 559;

Morales, 527 U.S. at 58 (1999)); *Vodak*, 639 F.3d at 746-47 (citing *Cox*, 379 U.S. at 571-73 and *Raley v. Ohio*, 360 U.S. 423, 426 (1959)); *Buck*, 549 F.3d at 1286-87; *see also Dellums v. Powell*, 566 F.2d 167, 182-183 (D.C. Cir. 1977) (citing *Cox*, 379 U.S. at 571-73).

F. Applying These Principles to the Case at Bar, the Court Found That No Objectively Reasonable Officer Could Have Believed Probable Cause to Engage in the Mass Arrest of Plaintiffs and the Putative Class Existed

The Court stated that the Plaintiffs and putative class had engaged in marching and came to be physically present upon the roadway of the Brooklyn Bridge, with the police initially and ultimately blocking vehicular traffic. In other words, that the *actus reus* of the respective offenses of parading without a permit and disorderly conduct – obstruction of vehicular traffic had been committed. (SPA15-16.)[9] That, however, is not the central legal issue of this case.

The real issue, for the purpose of establishing probable cause to arrest and for purposes of the qualified immunity analysis, is "whether a[n objectively] reasonable officer could have believed, based on the facts known to defendants,

[9] It bears noting that this act of being present on the Bridge to the exclusion of vehicular traffic, is not accompanied by other necessary elements of disorderly conduct, including obstruction of traffic, as well as intent or reckless conduct, as it was the police who blocked the vehicular traffic on the Bridge. Some marchers were unaware that they were even entering the roadway of the Bridge as they followed police escort and then found themselves on the roadway. (A170-71 ¶¶ 118 – 19.)

that the plaintiffs received fair warning" that such conduct was prohibited. (SPA16.)

The District Court, ultimately, made two independent findings based on the allegations and record evidence.

> A reasonable officer in the noisy environment defendants occupied would have known that a single bull horn could not reasonably communicate a message [i.e., fair warning] 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.

(SPA22.)

No reasonable officer could believe probable cause to exist, under the facts and allegations of this case, where fair warning clearly had not been issued to the 700+ arrestees. In other words, no officer could have believed that fair warning had issued to the Plaintiffs or the 700+ putative class members, a constitutional prerequisite for probable cause to mass arrest peaceful protesters ostensibly engaged in the alleged statutory violation of disorderly conduct.

Separate and independently, where officers had led protesters onto the roadway of the Brooklyn Bridge, where no fair warning had issued to the Plaintiffs (with opportunity for compliance) to not follow or to disperse, no objectively reasonable officer could have believed probable cause existed to indiscriminately mass arrest the Plaintiffs and the 700+ putative class members.

The Court found, citing Plaintiffs' allegations, Defendants' acknowledgments, and the record video evidence, that Defendants had permitted marching without a permit. "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." (SPA17; *see* Appellants' Br. 24 (Defendants concede that, implicitly and through police conduct, "permission [was] granted for the march.").)

There is no contention or record evidence of any revocation of permission being expressly communicated to the Plaintiffs, the march as a whole or the putative class.

With respect to the alleged disorderly conduct violation under N.Y. Penal Law § 240.20(5) — the only offense regarding which the Defendants claim error — the Court found:

> 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. (A164 ¶¶ 74-79.) In certain instances, the police even directed marchers to violate traffic regulations (A165 ¶ 81), which, however, 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 the police officers' commands in order to determine how they could legally proceed. *Id.* ¶¶ 83-85.

(SPA17-18.)

Defendants do not charge error with the factual underpinnings of this finding and expressly concede it is true. (Appellants' Br. 22 (quoting SPA17).)

Defendants expressly *defend* their authority to block traffic and "to direct pedestrians and vehicles. . . whether against the traffic signal or not." (A330.) They concede "that officers did so during this march." *Id.*

The Court considered the totality of the circumstances, including the Defendants' argument that at sporadic times and places individual officers warned those within earshot to, at that time and place, remain on the sidewalk.

> 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.

(SPA17 at n.6.)

Based on the record evidence and Plaintiffs' well pled and plausible allegations, the Court found that an objectively "reasonable officer would have understood that it was incumbent upon the police to clearly warn the demonstrators that they must not proceed onto the Brooklyn Bridge's vehicular roadway." (SPA18.)

In other words, for an officer to arguably claim probable cause, the officer must possess an objectively reasonable belief that fair notice issued to those 700+ to be arrested. There is no claim by Defendants and no record evidence and no

suggestion such fair warning ever issued to the named Plaintiffs specifically or to the putative class generally.

With respect to the inaudible specific warnings not to enter the roadway of the bridge issued by one officer, Captain Jaskaran, the Court found based on the record video evidence that:

> [N]o 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 mechanisms . . . for conveying a command' to the hundreds, if not thousands of demonstrators present. 639 F.2d at 745-46.

(SPA18.)

The District Court, reviewing the record evidence submitted by Plaintiffs, found:

> [T]he 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.

(SPA18 (citing video Exhibit F).)

Defendants do not charge error with this finding, even though in lower Court proceedings their contention was that the putative class was "arrested and charged with Disorderly Conduct because they disregarded specific warnings not to enter the roadway of the bridge." (A221.) The Defendants themselves assert the reach of these specific warnings not to enter the roadway of the bridge reached only the

"first line of demonstrators" (Appellants' Br. 22), in a march of thousands that stretched for blocks and blocks.

Separate and distinct, legally, from the failure to issue fair warning, the factual underpinnings of which are uncontroverted, the Court considered the objective meaning and understanding conveyed by the police turning and leading protestors onto the roadway of the Bridge. (SPA18-19.)

Invitation obviously negates any suggestion of prohibition.

The District Court found this undisputed conduct to constitute an "implicit invitation to follow." (SPA18.)

The Court observed that the police "defined what rules demonstrators had to follow," referenced its earlier findings that the police exercised control over the marchers, defining their route, and at times even blocking vehicular traffic to facilitate their movement on the roadway. (SPA19.) The Court observed the allegations and the consistent record video evidence that:

> [M]any demonstrators watched as police officers abandoned their previous position and proceeded ahead of demonstrators onto the bridge's vehicular roadway. Eventually, some demonstrators even walked beside the officers who were on the vehicular roadway, and those officers allegedly did not offer any warning that the demonstrators faced imminent arrest as a result of their present conduct.

(SPA19.)

The Court reviewed and relied on the record video evidence in finding these allegations to be "plausible." (SPA19 (citing Plaintiffs' Exs. I, J, K, Larkin Decl. Ex. A).) The Court found, citing *Buck*, 549 F.3d at 1284, that such readily observable conduct deprived "the protesters of any warning that the officers regarded their conduct as illegal." (SPA19.)

The Court, citing video evidence, found that front lines of the demonstrators closest to the police line were "calm and restrained" at the entranceway to the Bridge roadway (SPA7), and "calm and restrained" throughout the march (SPA20). The front lines of marchers the entrance did not approach or violate police lines. The Court observed that as they followed the police onto the bridge, marchers "followed, at distance of at least ten feet" from the police lines (SPA6), and that photographers occupied the space between police and the marchers who followed them (SPA7).

The Court rejected the theory of group culpability argued by Defendants in lower court proceedings. (SPA21-22.) The police contended their understanding to be that if a handful of demonstrators had engaged in alleged misconduct, the entirety of the march could be indiscriminately mass arrested. (A327-28; A237-38 (citing *Carr v. District of Columbia*, 587 F.3d 401 (D.C. Cir. 2009)).) The Court found the City's reliance on *Carr* — involving an allegedly all out riot — to be misapplied to this case, which involved undisputedly peaceful protestors. (SPA19-

SPA20.) The Second Circuit had rejected such guilt by political association theories of mass false arrest in *Papineau*, 465 F.3d at 57 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982)). Defendants do not cite or rely upon *Carr* on appeal.

The District Court also observed the constitutional obligation to allow peaceful demonstrations to proceed absent a "clear or present danger" or "imminent harm." (SPA21-22.)

The Court observed that "defendants have not argued that plaintiffs posed a threat of imminent harm." (SPA21.)

The Court further reviewed the video evidence, which demonstrated that marchers did not constitute a "clear and present danger" to anyone's safety, that escorting officers formed a police line to allow traffic to proceed on part of the roadway for a period, and that many demonstrators "arrived on the bridge only after the police had stopped traffic." (SPA21 n.8 (citing Exs. I, K, L, Larkin Decl. Ex. A).)

Based on the clearly established law, as referenced above, and the allegations of the complaint viewed in conjunction with the record audio-video recordings of the critical events, the Court denied qualified immunity to those Defendants who did participate or cause the arrest of the Plaintiffs and the putative class.

SUMMARY OF ARGUMENT

Under the circumstances presented, an objectively reasonable officer would have understood it was incumbent on the police to issue fair warning, followed by opportunity to comply, and observed defiance before reasonably believing probable cause to arrest peaceful protestors existed.

ARGUMENT

A. The Qualified Immunity Ruling Should Be Affirmed – Violation of Clearly Established Law is Well Pled and Established Through Video Evidence

The Court, for reasoning recited above and in its opinion, was correct in its legal ruling and its articulation of the binding principles of law.

No reasonable officer could have believed probable cause existed to arrest Plaintiffs, or believed that fair warning was issued to Plaintiffs followed by opportunity to comply and failure to do so.

Defendants do not focus their appeal so much on a claim of legal error in the District Court's reasoning. Defendants concur that probable cause requires "'fair warning' from officials" when "permission previously granted by the officials to engage in otherwise illegal activity is withdrawn (unless there is 'imminent harm')." (Appellants' Br. 30 n.9.)

Rather, they argue clear error in the Court's factual findings, i.e., that the allegations of the complaint and the uncontroverted video evidence establish that

the Court's ruling is in error. Defendants repeatedly argue that "the facts in the instant case are different" either from the cases cited or from their (objectively unreasonable) mischaracterization of the events depicted on video. (*See, e.g.*, Appellants' Br. 29, 28 ("Our argument is that the allegations of plaintiffs' second amended complaint do not establish the applicability of this law to the facts of the case. . ." and claiming allegations are "contradicted by the video in evidence").)

The facts are clear as plausibly alleged. They are clear as properly found by the Court based on the record video evidence.

Defendants permitted the march. They guided the march. They escorted the march. This is not even in dispute. Defendants effectively concede, as Plaintiffs allege, that police inconvenienced and blocked vehicular traffic and directed marchers to proceed upon the roadway to cross intersections in violation of ordinary traffic signals. (A329-30.) However, they argue that the Court was in error to recognize the police conduct in directing marchers throughout the march, including at times to proceed in ways not normally lawful, leading marchers across the bridge, and themselves blocking and inconveniencing vehicular traffic for the march to proceed, was effecting an invitation or permission to follow.

At the entrance to the Bridge, Defendants do not claim to have issued any orders or warnings that they allege were heard by even a single named Plaintiff, a relatively important fact given that probable cause must be particularized to the

person being arrested. To allow less particularity than *individualized* particularity "would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949). *See also Maryland v. Pringle*, 540 U.S. 366, 371 (2003); *Whren v. United States*, 517 U.S. 806, 817-18 (1996) (requirement of individualized suspicion constitutionally "necessary to ensure that police discretion is sufficiently constrained."); *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979); *Papineau*, 465 F.3d 46; *Barham v. Ramsey*, 434 F.3d 565 (D.C. Cir. 2006); *Dinler v. City of New York*, 2012 U.S. Dist. LEXIS 141851, *13 (S.D.N.Y. Sept. 30, 2012).

Defendants allege, at most, that only those in the "front of demonstrators" could have heard a warning at the entrance to the Bridge roadway. (Appellants' Br. 8.) There is no dispute that there was never any fair warning or notice issued by the police to the named Plaintiffs or the putative class as a whole at the entrance to the Bridge.

Defendants concede that police turned and walked in front of the hundreds of demonstrators, as lead and escort, across the Brooklyn Bridge, only to minutes later turn around, stop the march, and then arrest hundreds of demonstrators at the midpoint, including Plaintiffs, for being upon the Brooklyn Bridge.

B. No Evidence of Information Known By Defendants at the Time of Arrest Giving Rise to Probable Cause to Arrest the Named Plaintiffs in Particular is Identified by Defendants

The Defendants never identify information known at the time of arrest regarding any of the named Plaintiffs specifically giving rise to probable cause to arrest each or any on an in individualized basis. No information was possessed at the time of arrest regarding any of the named Plaintiffs or that any of them received fair notice from police that their conduct was prohibited, notwithstanding the general permission the police issued to marchers overall to engage in ordinarily or statutorily unpermitted conduct.

C. Qualified Immunity Must Be Denied Where Defendants Did Not Possess Any Information or Reasonable Belief That Police Issued Fair Warning to Plaintiffs or the Putative Class Prior to Arrest

Qualified immunity shields government officials performing discretionary functions "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." *Zellner*, 494 F.3d at 367 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (internal citations omitted). There is no question that the right at issue in this case – to be free from false arrest without probable cause – was clearly established at the time of the demonstrators' arrests on the Brooklyn Bridge. *Id.* (citations omitted). Therefore, the officers are only entitled to qualified immunity "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that probable cause existed." *Id.* (citations omitted).

Probable cause to arrest exists when, at the time of arrest, officers have knowledge of, or reasonably trustworthy information as to, facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested. *Id.* (citations omitted); See also *Michigan v. DeFillippo*, 443 U.S. 31 (1979); *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

Probable cause is evaluated based on the totality of the circumstances. *See, e.g. Papineau*, 465 F.3d at 58-60. "Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of arrest." *Id.* (citations omitted).

The totality of circumstances means a Defendant cannot shield himself from responsibility for these sweeping and indiscriminate mass arrests by pointing to the mere fact that Plaintiffs were physically present on the Bridge roadway while ignoring the fact that police led and escorted Plaintiffs onto the roadway, or by ignoring the absence of fair warning, or by disregarding police permission or invitation to engage in ordinarily or statutorily prohibited conduct.

Defendants invited the Court to find that "arguable probable cause" exists to arrest the named Plaintiffs, as well as the 700+ arrestees in general. However, "arguable probable cause" must "not be misunderstood to mean 'almost' probable

cause.'" *Zellner*, 494 F.3d at 370 (quoting *Jenkins v. City of New York*, 478 F.3d 76, 87 (2d Cir. 2007)).

Probable cause to participate in, or conduct, these sweeping and indiscriminate mass arrests required information at the time of arrest that fair warning had issued to the named Plaintiffs, to the putative class as a whole, that an opportunity for compliance was afforded after such notice, and that only those (if any) who engaged in a defiance of such warnings were arrested.

No officer can even suggest he or she possessed such information. And any claim to such a belief, in light of the undisputed facts, is objectively unreasonable. Such a claim would be completely and totally baseless.

The arrest of Plaintiffs and the putative class was a plain, clear and massive violation of civil rights. Officers of any measure of competence could not reasonably disagree with such an assessment.

D. Defendants' Suggestion that Plaintiffs Engaged in Disorderly Conduct is False

Defendants argue that the Court found "plaintiffs engaged in disorderly conduct" and then argue that probable cause to arrest for disorderly conduct therefore existed without need for fair warning or notice. Appellants' Br. 20 (citing SPA16). At the cited page, the Court states that the marchers had "walked onto the Brooklyn Bridge's vehicular roadway at a time when vehicles were driving there."

SPA16. What the Court is noting is that, yes, pedestrian marchers were on the roadway of the bridge.

There is no dispute to those facts. The Court, however, at the cited page and elsewhere proceeds to address the key legal issues, i.e., that a reasonable officer under the circumstances presented was obligated to know that fair warning had issued (followed by opportunity to comply and failure to do so) before probable cause to arrest existed. SPA16-18.

Being present on the roadway is not unlawful disorderly conduct where police have invited or permitted the conduct.

E. Defendants Improperly Rely on Disputed Fact That Plaintiffs Obstructed Traffic Where it is Plausibly Alleged and the Court Found that Police Had Stopped Traffic

Heavy emphasis is placed by Defendants on the Court's language that there was an obstruction of traffic. The Defendants present disputed fact, arguing "*plaintiffs* obstructed all vehicular traffic," where the Plaintiffs allege, A174[¶137], and the District Court found based on video evidence that "*police* had stopped traffic." SPA21 at n. 8 (italics added).

F. Statutory Notice is Insufficient to Establish Probable Cause to Arrest Under the Circumstances Presented

Defendants argue that statutory "fair warning" — i.e., the warning that certain conduct is prohibited as articulated by the legislature years prior in

promulgating the disorderly conduct penal law — is all the warning to which Plaintiffs are entitled. Appellants' Br. 21.

Defendants contend, in essence, that the totality of circumstances be ignored.

The police lost all right to rely on codified notice, whether the prohibition on parading without a permit or prohibitions against obstruction of traffic, once police overrode those proscriptions and allowed the conduct.

Police have the right to override those ordinarily effective statutory prohibitions [A329-A330]. However, once they override those statutory requirements they must give notice to each affected individual once they are implementing them again. Where permission is granted there must be fair notice of revocation communicated.

Defendants' argument is additionally disingenuous in the context of the undisputed and alleged facts of this case. The police permitted the march to proceed, notwithstanding the promulgated code that would ordinarily forbid such. The police blocked vehicular traffic and directed marchers to proceed in manners ordinarily forbidden. The line of police and command staff at the entrance to the roadway of the bridge turned and walked in front of marchers, leading them across the bridge, with escorting officers flanking them and regulating traffic flow, *never* even suggesting to the hundreds that followed and were arrested that such advance was prohibited.

Defendants state that "[t]he video evidence contradicts in every respect the District Court's assessment that a reasonable officer would have understood that [the police conduct constituted] 'an implicit invitation to follow' officers onto the Bridge roadway." Appellants' Br. 22. This summary statement is as sweeping in its inaccuracy as its reach.

Defendants expressly concede that police exercised "control over the marchers, defining their route and directing them. . ." Appellants' Br. 22.

Seeking to undermine this undisputed reality, the Defendants incongruously contend that although police issued "*implied* permission" for the march to proceed that the marchers violated "explicitly stated parameters" to never move upon the roadways. In direct contradiction, Defendants effectively concede (A330), as it is clearly alleged, that marchers at times were directed by police to move upon roadways against traffic signals with police blocking vehicles. This facilitated the orderly conduct of the march. When police did the same in order to direct and facilitate the march across the roadway of the bridge, this constituted apparent and/or actual permission, and even direction, to follow.

G. Defendants' Argument Must be Rejected That Inaudible Warnings to a Few Demonstrators Constitutes Fair Warning or Justified the Arrest of Named Plaintiffs and 700+ Others

In lower court proceedings the primary argument advanced by Defendants was that Plaintiffs and the putative class "were arrested and charged with

Disorderly Conduct because they disregarded specific warnings [i.e., those by Captain Jaskaran] not to enter the roadway of the bridge." A221. Those warnings, inaudible and then superseded by the leading of marchers across the Bridge,[10] cannot as a matter of law constitute fair warning to the putative class or named Plaintiffs that following was prohibited. On the contrary, by the reasoning of the Defendants – which is that pedestrians are obligated to follow police directives in contravention of usual traffic customs (A330) – the marchers would have been potentially subject to arrest if they did not continue in the manner being directed, led and escorted by police.

Accepting *arguendo* as true, that a small number of unspecified individuals disregarded or even defied audible police orders, the police did not, at that time, arrest the one or handful of persons whom they claim so acted. The police arrested over seven hundred *other* persons, including the named Plaintiffs, who had not so acted and who had not heard any such orders. And police did so after turning and leading the marchers as a whole, including the named Plaintiffs, onto the roadway of the Bridge.

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[10] The argument that the "first lines of demonstrators" proceeded upon the roadway "in the face of explicit warnings" to leave the roadway, Appellants' Br. 25, must be rejected — even were one to accept that these particular individuals, none of whom are alleged to be named Plaintiffs, were given an audible explicit warning — because thereafter the police apparently superseded such explicit warnings with an invitation to follow across the roadway.

On appeal, Defendants shift their emphasis, leaning heavily on the argument that the sporadic orders issued by individual officers at random and other times and places to unidentified subsets of marchers to "stay on the sidewalks" (but apparently *also* to cross on the roadway against the signal) constituted an absolute and consistent condition for the permitting of the march clearly communicated to all of the thousands in the march to never to enter on the roadway against normal traffic customs, regardless of police directives and escort. What was actually conveyed is that marchers should follow the directives, lead, and escort of the police, which they did. When they continued to do so, they were arrested mid-span on the Brooklyn Bridge. This Court is bound to reject Defendants' distortion of facts, disregard of well pled allegations, and contradiction of the District Court's findings that such orders were relatively "few" (SPA17) and "must be assessed in the context of the police at other times directing the marchers to violate traffic regulations" (SPA17 n. 6).

H. Defendants' Suggestions on Appeal That Demonstrators Were Unruly Must Be Rejected Where Defendants Themselves, the Court, the Allegations and the Record All Establish the Character of the March as Peaceful

What the Court has before it is a case involving – up until the time of arrest midway across the Bridge – and in Defendants' own words, "a reasonably orderly march." Appellants' Br. 23. The march was alleged to be peaceful, Defendants

admit it was "peaceful," A313:12; A313:1 – 4, and the Court found to be "peaceful," SPA23 n. 9.

Defendants seem to argue that the words of one or another marcher to "take the bridge" is dispositive of a uniform and collective intent of the peaceful and orderly march of thousands of people stretching back blocks to violate the law and thus provides probable cause for the arrest of more than 700 people defies logic and the law. Indeed, the peaceful character of the march is not in dispute, so to submit such argument to the U.S. Court of Appeals is disingenuous.

> [T]he 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 restrained.

SPA20

The District Court is clear in its finding that there was no "surging mass" of marchers overrunning police lines in an unlawful and forcible effort to "take the bridge." Relying on police video, the District Court finds at the moment when "officers, followed almost simultaneously by the demonstrators, move in the direction of the bridge's vehicular roadway," SPA7, that the "demonstrators . . . remain calm and restrained." *Id.* The Court observes the absence of a surging mass overrunning police lines, as Defendants baselessly suggest, noting the physical distance maintained by protestors from the police, that "the line of officers turns and proceeds onto the vehicular roadway, followed, at a distance of at least ten

feet, by hundreds of protesters." SPA6. "Photographers run into the space between them. . ." SPA7.

In their strained efforts to argue probable cause for the mass arrest of Plaintiffs and more than 700 others, Defendants also appear to present an argument of guilt by political association, prohibited by *Claiborne*. Plaintiffs do not in any way suggest any intent to forcibly seize the bridge was extant.

I. Even, *Arguendo*, if a Handful of Front Line Marchers Were Defiant, Police Were Restrained by the Constitutional Rights of the Named Plaintiffs and 700+ Other Arrestees From Engaging in Indiscriminate Mass Arrests of All Marchers

In lower Court proceedings, misapplying *Carr v. District of Columbia*, 587 F. 3d 401 (D.C. Cir. 2009) the Defendants presented an argument claiming that police were entitled to arrest 700+ persons if a few were believed to have been defiant. The District Court rejected this squarely, relying on clearly established law. SPA19-SPA21 (citing *Papineau*, 465 F.3d at 57); *Papineau*, 465 F.3d at 57 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982)); See also *id.* at 60 (citing *Dellums v. Powell*, 566 F.2d 167, 181 n. 31 (D.C. Cir. 1977)).

Assuming *arguendo*, and trying to give the strongest interpretation to Defendants' allegation, that there was a small number of defiant individuals facing off with police who somehow stated, through chanting, that they intended to engage in forcible seizure of the Brooklyn Bridge from the arrayed forces of the

NYPD,[11] under this clearly established law, such assumed circumstances do not give rise to probable cause to undertake the mass indiscriminate arrest of Plaintiffs and 700+ *others* in the demonstration group.

Indeed, were one to accept the suggestion by police that they engaged in a strategic "retreat" until they possessed sufficiently arrayed resources to control a small number of front line marchers to whom they attributed unruly intention, clearly established constitutional requirements still rendered the mass arrest devoid of probable cause. Were this the case, at the time the police had such resources arrayed, Defendants still possessed the constitutional obligation to only arrest those, if any, who had heard and defied police orders. The named Plaintiffs and the 700+ others arrested still possessed their constitutional rights to continue in peaceable protest and each's liberty interest to be free from false arrest. *Papineau*, 465 F.3d at 60 (quoting *Dellums*, 566 F.2d at 181 n. 31); *Dellums*, 566 F.2d at 181 nn. 30-31 (mass arrest of 1,200 as a group requires objectively reasonable basis to arrest each of the 1,200 or else mass arrest could be only on notice, opportunity for compliance, and refusal to quit).

[11] In *Vodak*, Judge Posner held that even if shouts of "Take Michigan Avenue!" were interpreted to the very extreme as meaning to do harm to "the opulent stores that line Michigan Avenue," *Vodak*, 639 F.3d at 743, that the mass arrest of protesters without effective fair warning violated clearly established law.

Assuming, *arguendo*, the claim of a strategic "retreat" in order to secure resources and the scene, Defendants could only have arrested those who engaged in identifiable offenses and not 700+ others, including the named Plaintiffs.

J. Defendants' Suggestions That Marchers and Not the Police Led Plaintiffs and the Putative Class on to the Bridge Must Be Rejected Where Defendants Themselves, the Court, the Allegations and the Record All Establish That Police and Command Staff Proceeded at the Front

Defendants argue that the video "does not depict officers leading the demonstrators onto the Bridge." Appellants' Br. 23. They argue that "demonstrators did not follow the police onto the Bridge roadway." *Id.* 24. Again, Defendants seek to turn away from Plaintiffs' allegations, and the direct evidence of the video, and ask the Court, improperly, to accept unsupported mischaracterizations. The lower Court found the line of police turned and was "followed, at a distance of at least ten feet, by hundreds of protesters.' SPA6. This Court has the video before it to review.

The "police officers walking in front of the demonstrators" led the march across the Bridge. Appellants' Br. 11. "Officers stop traffic as the demonstrators reach the ramp [by which cars had been entering the roadway]" *Id.* "The Captain with the bull horn walks ahead of the demonstrators." *Id.* "A line of officers is seen walking between the cars entering the roadway [from a second ramp] and the demonstrators. The cars appear to have been stopped, and police officers are

visible ahead of the marchers." Appellants' Br. 12. Those are Defendants' own words, describing the police leading and escorting demonstrators, and stopping vehicular traffic for the march to continue.

Some marchers within the body of the massive march, individually could not see the police at the front and they followed the general movement of the march, reassured such movement was permitted by the escorting and flanking officers. The Defendants' argument that such Plaintiffs followed the general direction of the march and not specifically the officers directly in the lead is of no moment. *See Vodak*, 639 F.3d at 745 *(*"others may simply have been following the crowd, thinking that it . . . was a proper route for the march. . ."*)*

Defendants argue that Plaintiffs possessed a subjective misunderstanding of the police communication and conduct, noting that probable cause evaluations must be viewed based on what is objectively reasonable. Appellants' Br. 25. It was objectively unreasonable for any officer to believe that fair warning had issued to the Plaintiffs or the putative class, and therefore objectively unreasonable for any Defendant to believe actual or arguable probable cause existed to engage in these sweeping mass arrests.

With respect to the proper interpretation of the police conduct in turning and leading marchers across the bridge, the Plaintiffs' own subjective understanding is

merely consistent with the sole and objectively reasonable only understanding of the conduct of the police.

When the police and command staff stand at the foot of the Brooklyn Bridge facing a peaceful march, turn and proceed ahead and lead that march across the bridge roadway, with escorting officers flanking and offering no objection or indication of prohibition to hundreds of marchers, there is only one objectively reasonable understanding of what this conduct conveys: Police are leading – if not directing – the march across the bridge roadway and marchers are permitted – or directed – to follow.

Defendants argue that "[t]ellingly, not a single plaintiff alleges that a police officer explicitly informed her/him that s/he had permission to advance onto the roadway." Appellants' Br. 24. This argument tends to the absurd as a basis for probable cause. The above-referenced conduct of the police clearly conveyed actual or apparent permission, invitation and/or direction to follow the lead of the police across the roadway of the Bridge. At intersections, around roadwork, when motorcades are escorted, street fairs facilitated, or any other like circumstances, when police direct traffic against usual traffic customs, they do so by conduct, not usually by speaking individually to verbally communicate with each pedestrian or driver.

Defendants argue that the Court committed factual and legal error in determining that "the mere presence of police officers upon the bridge" conveyed invitation to cross. Appellants' Br. 26. That is not an accurate or complete statement of the Court's reasoning or comprehensive description of police conduct constituting the invitation to follow. See SPA16-SPA23. *See also Vodak*, 639 F.3d at 744 (mere police "presence, not blocking the avenue, might have made the marchers think it a permitted route" or that by their presence "the police were directing them onto" a prohibited avenue).

K. Defendants' Fail to Distinguish the Cases Relied Upon By the District Court as Factually Inapplicable.

Defendants contend that *Cox* is inapplicable because no Plaintiff alleges s/he was directly issued an "affirmative statement" that using the bridge roadway was permissible. Appellants' Br. 26. The facts of this case, however, establish that the police conveyed through their communication and leadership and escort that very invitation.

Defendants argue *Vodak* is also "distinguishable on its facts," *id.* at 27, because, according to Defendants, "Plaintiffs' subjective interpretations of the unfolding events, as noted, are both irrelevant and contradicted by the video in evidence." *Id.* at 28. In addition to the fact that Plaintiffs averments are fully supported by the video evidence, as noted above, the fact that *every Plaintiff* understood they were permitted to follow the police or march across the roadway is

relevant, as evidence that fair warning not to do so most definitely never issued and that the police conduct objectively conveyed permission or invitation.

However, one need not reach so far as Plaintiffs' subjective interpretation. As above, there is only one objectively reasonable understanding of what police conveyed by turning and leading and escorting the march across the Bridge. It was that the police were in fact leading and escorting the march across the Bridge and that following was either invited, permitted or directed.

Defendants argue "[t]he facts in the instant case are different" from those in *Papineau* because Plaintiffs were present on the public ways, the roadway of the bridge, and were not arrested while standing on private property as occurred in *Papineau.* Appellants' Br. 29. The District Court, however, relied on *Papineau* for its statement of clearly established law regarding fair warning, including citation to the Supreme Court precedent that fair warning is essential in disorderly conduct offenses. SPA 14, 22.

The Defendants in a footnote make a feeble attempt at arguing that "the concept of 'imminent harm' is not applicable or such harm is inherent in the illegal acts themselves" by Plaintiffs being present on the Bridge. Appellants' Br. 30 n.9.. As the District Court observed, in lower court proceedings "defendants have not argued that plaintiffs posed a threat of imminent harm." SPA21. Such contention is therefore waived on appeal. The District Court also reviewed the video evidence

and found, as a matter of fact, that "the videos submitted show that the interference that occurred in this case did not constitute a 'clear and present danger' to anyone's safety." SPA21 n. 8. The Court observed that police first established a line to allot certain lanes to marchers and others to vehicles, *id.*, and ultimately it was the police themselves who "had stopped traffic." Id.

L. Defendants Are not Entitled to Qualified Immunity Under State Law

Since Defendants are not entitled to qualified immunity on Plaintiffs' federal claims for false arrest, their defense to Plaintiffs' claims for false arrest under state law also fails. SPA23; *See Papineau*, 465 F.3d at 63 (defendants' qualified immunity defense to plaintiffs' state law claims depends on the same "reasonableness" at issue with respect to plaintiffs' federal claims). Defendants concede this point. Appellants' Br. 31 n.10.

M. Defendants Have Waived Arguments Not Advanced in their Opening Brief, Including That Probable Cause to Arrest Was Based on Violation of the Parading Without a Permit Administrative Code

In District Court, Defendants argued that probable cause to arrest was based on two claimed offenses: (1) Marching Without a Permit in violation of New York City Admin. Code section 10-110 and title 38, R.C.N.Y. section 19-02 [A214, A226-A232], and (2) Disorderly Conduct – Obstructing Vehicular Traffic in violation of N.Y. Penal Law § 240.20(5) (ostensibly for entering upon the roadway of the Brooklyn Bridge). [A214, A232-A238].

Faced with Plaintiffs' argument in proceedings below [A266-A272; A287–A320, generally] (inter alia, citing *Smith v. California*, 361 U.S. 147, 151 (1959); *Am.-Arab Anti-Discrimination Comm.*, 418 F.3d at 610, and the District's Court opinion, including its dismissal of Defendant's strict liability argument, "a claim courts have consistently rejected" (SPA21-SPA22), on appeal the Defendants have abandoned this argument, and do not reference it anywhere in their opening brief. Defendants concede that "the march . . . was undertaken without a permit. . . the involvement of police officers in directing the protest may have sanctioned the demonstration." Appellants' Br. 28-29 n. 8; *Id.* ("Plaintiffs' march without a permit became illegal when the demonstrators marched on the Brooklyn Bridge roadway"); See also *id.* at 3 ("Plaintiffs were subjected to arrest because they were engaged in disorderly conduct").

Defendants have waived the argument of whether there was probable cause to arrest Plaintiffs, and the putative class, under the parade regulations by failing to sufficiently address it in their opening brief. *See Norton v. Sam's Club*, 145 F.3d 114, 117-18 (2d Cir. 1998) (citations omitted); *See also* Fed. R. App. P. 28 (a)(5) & (8). "Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."[12] *Id.* This includes "an argument made

[12] The Second Circuit will ordinarily not address an argument on appeal if abandoned or waived "unless manifest injustice otherwise would result." *LNC Invs., Inc. v. Nat'l Westminster Bank*, 308 F.3d 169, 176, n.8 (2d Cir. 2002). This

only in a footnote" which is also "inadequately raised for appellate review." *Id.* (citing *U.S. v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993)). Likewise, "merely incorporating by reference an argument presented to the district court," or "stating an issue without advancing an argument. . ." does not suffice. *Id.* at 117 (citation omitted); *See, e.g. Zhang v. Gonzales*, 426 F.3d 540, n.7 (2d Cir. 2005) (on appeal of immigration judge findings, only a single conclusory sentence is devoted to the argument that he met his burden of showing a well-founded fear of persecution based on his political activities since departing China as argued below); *Molinari v. Bloomberg*, 564 F.3d 587, 608-09, n.15 (2d Cir. 2009) (appellants have abandoned their argument concerning sections of the New York Municipal Home Rule Law made in the District Court by failing to make these arguments in their opening brief and merely requesting certification of these issues in an footnote).

CONCLUSION

The District Court's denial of qualified immunity should be affirmed.

Dated: January 14, 2013

Respectfully Submitted,

By: _____
CARL MESSINEO

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limited exception is in applicable here. Moreover, where abandonment or waiver of an argument appears to be a strategic choice, rather than inadvertent error, "[i]t would be particularly unusual" to address it. *Id.*

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains **13,867** words exclusive of those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman type style.

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ADDENDUM

N.Y. Penal Law § 240.20 - Disorderly Conduct

A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. He engages in fighting or in violent, tumultuous or threatening behavior; or
2. He makes unreasonable noise; or
3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or
4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or
5. He obstructs vehicular or pedestrian traffic; or
6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or
7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.

Disorderly conduct is a violation.

New York City Admin. Code § 10-110 - Processions and Parades

a. Permits. 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. Application for such permit shall be made in writing, upon a suitable form prescribed and furnished by the department, not less than thirty-six hours previous to the forming or marching of such procession, parade or race. The commissioner shall, after due investigation of such application, grant such permit subject to the following restrictions:

1. It shall be unlawful for the police commissioner to grant a permit where the commissioner has good reason to believe that the proposed procession, parade or race will be disorderly in character or tend to disturb the public peace;
2. It shall be unlawful for the police commissioner to grant a permit for the use of any street or any public place, or material portion thereof, which is ordinarily subject to great congestion or traffic and is chiefly of a business or mercantile character, except, upon loyalty day, or upon those holidays or Sundays when places of business along the route proposed are closed, or on other days between the hours of six-thirty post meridian and nine ante meridian;

3. Each such permit shall designate specifically the route through which the procession, parade or race shall move, and it may also specify the width of the roadway to be used, and may include such rules and regulations as the police commissioner may deem necessary;

4. Special permits for occasions of extraordinary public interest, not annual or customary, or not so intended to be, may be granted by the commissioner for any street or public place, and for any day or hour, with the written approval of the mayor;

5. The chief officer of any procession, parade or race, for which a permit may be granted by the police commissioner, shall be responsible for the strict observance of all rules and regulations included in said permit.

b. Exemptions. This section shall not apply:

1. To the ordinary and necessary movements of the United States army, United States navy, national guard, police department and fire department; or

2. To such portion of any street as may have already been, or may hereafter be duly, set aside as a speedway; or

3. To processions or parades which have marched annually upon the

streets for more than ten years, previous to July seventh, nineteen hundred fourteen.

c. Violations. Every 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.

Title 38 R.C.N.Y. § 19-02

§19-02 Definitions.

For purposes of these rules, the following terms shall have the following meanings:

a. A "parade" is any procession or race which consists of a recognizable group of 50 or more pedestrians, vehicles, bicycles or other devices moved by human power, or ridden or herded animals proceeding together upon any public street or roadway.

b. "Same date or time" shall mean the same actual time period or hours.

c. "Same location" shall mean the location identified in the permit application.

d. "Demonstration" shall mean a group activity including, but not limited to, a meeting, assembly, protest, rally or vigil, moving or otherwise, which involves the expression of views or grievances, involving more than 20 people.

e. "Fifth Avenue" shall mean Fifth Avenue in the borough of Manhattan south of 114th Street and north of 15th Street.

f. "Applicant" shall mean the person or entity that applies for a permit authorizing a parade. Any person or entity responsible for organizing a parade, or any person or entity that publicizes a parade through advertisements or other means of mass communication, is authorized to act as the applicant.

g. "Charitable Athletic Parade" shall mean an athletic parade which is open to the public, the organizers of the event charge no fee or only an administrative fee for participation in the event and the proceeds of the event must be donated to a not-for-profit/charitable organization.

h. "Non-Charitable Athletic Parade" shall mean an athletic parade designed for public participation for which a fee is paid to the organizers by individual members of the public to participate. Payments required from participants to participate in the event by organizers shall be considered a

fee. Non-Charitable Athletic Parades shall be subject to fees pursuant to § 19-05(c).

i. "Administrative Fee" shall mean a fee collected by the organizers of a Charitable Athletic Parade which is intended solely to defray the administrative costs of the event.

Fed. R. App. P. 28

a. Appellant's Brief.

The appellant's brief must contain, under appropriate headings and in the order indicated:

1. a corporate disclosure statement if required by Rule 26.1;
2. a table of contents, with page references;
3. a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;
4. a jurisdictional statement, including:
    A. the basis for the district court's or agency's subject matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

B. the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

C. the filing dates establishing the timeliness of the appeal or petition for review; and

D. an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

5. a statement of the issues presented for review;

6. a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below;

7. a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e));

8. a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

9. the argument, which must contain:

A. appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

B. for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

10. a short conclusion stating the precise relief sought; and

11. the certificate of compliance, if required by Rule 32(a)(7).

b. Appellee's Brief.

The appellee's brief must conform to the requirements of Rule 28(a)(1)–(9) and (11), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

1. the jurisdictional statement;

2. the statement of the issues;

3. the statement of the case;

4. the statement of the facts; and

5. the statement of the standard of review.

c. Reply Brief.

The appellant may file a brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the reply brief where they are cited.

d. References to Parties.

In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore."

e. References to the Record.

References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. For example:

Answer p. 7;

Motion for Judgment p. 2;

Transcript p. 231.

Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

f. Reproduction of Statutes, Rules, Regulations, etc.

If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.

g. [Reserved]

h. [Reserved]

i. Briefs in a Case Involving Multiple Appellants or Appellees.

In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

j. Citation of Supplemental Authorities.

If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.