No. 16-1082

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

ZACHARY W. CARTER
Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007
(212) 356-2500
rdearing@law.nyc.gov
Counsel for Respondents

RICHARD DEARING*
DEBORAH A. BRENNER
MELANIE T. WEST
**Counsel of Record*

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Petitioners are part of a putative class of protesters who were arrested for blocking vehicular traffic on the Brooklyn Bridge during an unpermitted protest march. Undisputed video footage shows hundreds of protesters swarming onto and blocking traffic on the Bridge's roadway. This followed a standoff between protesters and a thin line of police officers stationed at the entrance to the roadway, which ended when officers retreated in the face of the chanting crowd after bullhorn announcements went unheeded, even by protesters right nearby. The United States Court of Appeals for the Second Circuit found that petitioners' § 1983 claims for false arrest were properly dismissed, because police had probable cause to arrest them for obstructing active traffic on a major arterial roadway. The question presented is:

> Were petitioners' arrests supported by probable cause on these distinctive facts, where undisputed video footage showed protesters thronging onto an active vehicular roadway, and where police officers' retreat from the roadway entrance in the face of the insistent, chanting crowd had not clearly conveyed express or implied sanction for doing so?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

This case presents a narrow question of probable cause involving unusual facts. On October 1, 2011, several hundred demonstrators swarmed an active vehicular roadway on the Brooklyn Bridge—one of a handful of crossings over the East River—during an unpermitted protest march originating on sidewalks in downtown Manhattan. They did so after a standoff with a small number of police officers culminated in the officers' retreat from the roadway entrance. The protesters—including petitioners—were arrested for blocking traffic in violation of a New York statute. Crowds of protesters at the same march, who proceeded instead across the Bridge's designated pedestrian walkway, were not arrested. The relevant events were captured on video footage that is unchallenged by any party.

The Second Circuit Court of Appeals reviewed the footage and determined that petitioners' § 1983 claims for false arrest should be dismissed because their arrests were supported by probable cause. That fact-bound ruling applying settled legal principles does not warrant the Court's review.

Nor do the decisions below conflict with the Court's decision in *Cox v. Louisiana*, 379 U.S. 559 (1965), as petitioners contend. *Cox* reviewed a due process challenge to a criminal conviction, not any question of probable cause. And the key fact in *Cox*—that police officers there had given protesters'

express oral permission to demonstrate in the precise location where they were soon after arrested—has no counterpart here.

Petitioners are also mistaken in asserting that the decision here creates a circuit split. The three cases they cite from other circuits resolved different probable cause questions involving different facts. Those decisions do not suggest that the issuing courts would depart from the Second Circuit's result on the facts here.

And contrary to petitioners' claims, the decisions below will not impair First Amendment freedoms regarding demonstrations without a permit. As the complaint expressly alleged, police allowed this unpermitted protest to proceed along the sidewalks and crosswalks of downtown Manhattan. No arrests were made until some protesters stormed the Brooklyn Bridge's roadway, and protesters who continued along the Bridge's pedestrian walkway were not arrested. The Court's intervention is not needed to preserve opportunities for spontaneous protest activity.

STATEMENT

A. Petitioners were arrested for marching into traffic on the Brooklyn Bridge and later brought this action for false arrest.

Petitioners are a putative class of Occupy Wall Street ("OWS") protesters arrested on the Brooklyn Bridge roadway after they blocked vehicular traffic from crossing it. After their criminal cases were dismissed, they brought this action for false arrest under 42 U.S.C. § 1983, naming as defendants the City of New York, former Police Commissioner Raymond Kelly, former Mayor Michael Bloomberg, and forty unidentified police officers.

The Second Circuit described in detail the facts of this case, including the extensive video footage submitted by both parties (Pet. App. at 21a-26a). The basic facts are as follows.

On October 1, 2011, thousands of demonstrators marched through the sidewalks of Lower Manhattan in support of the Occupy Wall Street movement. The march began at Zuccotti Park in Manhattan and was to end in a rally at Brooklyn Bridge Park in Brooklyn (Pet. App. at 21a).

Although protesters did not seek a permit for march, NYPD officials were aware of the planned event in advance, and while they did not approve the march, they also made no effort to forestall it. Police officers were available on the scene. In the

video taken by the NYPD's Technical Assistance Response Unit (TARU), officers can be heard periodically issuing directives to marchers, repeatedly instructing them to keep to the sidewalks (Second Circuit Dkt. # 65, TARU video at 00:15, 00:45, 1:00, 1:54, 2:17). Officers at times briefly stopped traffic to allow the protesters to cross streets against traffic signals, but neither the demonstration, nor the actions of the officers in controlling or facilitating it, caused any significant disruption of ordinary traffic patterns until the march reached the Bridge (Pet. App. at 22a).

At the Manhattan entrance to the Bridge, marchers began funneling onto the Bridge's pedestrian walkway, which is at a different level and physically separated from the Bridge's vehicular roadway. A bottleneck soon developed, creating a large crowd at the entrance to the walkway (Pet. App. at 21a-22a). While most protesters continued onto the walkway, a subset stopped and stood facing a thin line of police officers on the ramp constituting the vehicular entrance to the Bridge, with a growing crowd of demonstrators pooling behind them. Some of the protesters began chanting "Take the Bridge!" and "Whose streets? Our streets!" *Id.*

An officer on the vehicular ramp stepped forward with a bullhorn and made a series of announcements. In the video footage, the officer can clearly be heard repeatedly directing protesters to step back onto the sidewalk, advising that they

were obstructing traffic, and warning that they would be arrested if they continued to do so (Pet. App. at 23a-24a).

Petitioners do not deny that these directives were given, but allege that they were "generally inaudible" (Pet. App. at 23a-24a). While the video footage makes clear that at least some marchers at the front of the crowd heard the announcements, petitioners allege that the officers knew that their warnings and orders to disperse were inaudible to the vast majority of those assembled, due to the protesters' own chanting. *Id.*

But even the protesters at the front of the crowd and right next to the officer with the bullhorn showed no signs of complying. Indeed, as depicted in the video footage, shortly after the bullhorn announcements warning of imminent arrests, a protester at the forefront of the crowd asked an officer: "What is the charge and how long do we have to vacate?" (TARU video at 28:29-28:34). An officer off-screen responded, "now," "disorderly conduct," and "you will be arrested" (28:35-37). The protester replied, "Just disorderly?" and, after apparent confirmation, "OK, no problem." He then remained in his leading position, facing the officers, with his fist extended up and over his head (28:37-47).

The standoff continued for several minutes after the announcements. Protesters continued chanting and began linking arms, signaling their intent to

march onto the Bridge (TARU video at 28:44-29:40; Pet. App. at 78a-79a). Then the thin line of officers who were blocking the vehicular ramp turned and walked away from the protesters, onto the Bridge, without gesturing or saying anything to the protesters. With that, the protesters began cheering and streamed onto the roadway, eventually blocking the second and third ramps and occupying all of the Bridge's eastbound traffic lanes, preventing any Brooklyn-bound cars from moving onto the Bridge (Pet. App. at 24a).

As protesters filled the roadway, additional police officers arrived on the scene (TARU video at 34:28-36:43).[1] Midway across the Bridge, an officer announced through a bullhorn that those on the roadway would be arrested for disorderly conduct. Petitioners allege that this announcement was also inaudible. Officers blocked movement in both directions along the Bridge roadway, using netting and police vehicles, and arrested the approximately 700 people on the Bridge roadway (Pet. App. at 24a-25a).

[1] In deposition testimony incorporated by the petitioners into their amended complaint, Chief Esposito indicated that he had an insufficient number of police officers with him to continue holding the line at the Bridge entry (A151-52).

B. In a first appeal, the Second Circuit found that video footage showed petitioners' arrests were supported by probable cause.

After their criminal cases were dismissed, petitioners filed a complaint in the United States District Court for the Southern District, alleging false arrest in violation of their Fourth Amendment rights. In its first decision, the district court (Rakoff, D.J.) denied in part and granted in part the City's motion to dismiss the complaint under Rule 12(b)(6). The district court denied the branch of the motion seeking to dismiss the claims against the defendant officers on qualified immunity grounds, but dismissed petitioners' municipal liability claims (Pet. App. at 119a).[2]

The individual officers took an interlocutory appeal from the district court's denial of qualified immunity, arguing in relevant part that probable

---

[2] With respect to the *Monell* claim, the court rejected plaintiffs' allegations of a pattern of "indiscriminate mass false arrest," noting that the police had arrested only those 700 protesters who marched onto the Bridge's roadway (Pet. App. 120a-121a). The court also found that plaintiffs had failed to allege facts supporting their claims that Mayor Bloomberg or Police Commissioner Kelly, the policymakers for police-related matters in the City of New York, either ratified or directly participated in the arrests, or failed to train the arresting officers (Pet. App. at 122a-125a).

cause supported the arrests. Initially, on appeal, the United States Court of Appeals for the Second Circuit affirmed the district court's ruling in a split decision (Pet. App. at 42a-98a). The majority held that petitioners' complaint raised a factual issue as to whether the officers' conduct could have been construed as implied permission for protesters to enter the roadway (Pet. App. at 57a-58a). Judge Livingston dissented, noting that the facts had to be considered from the officers' perspective, and that the petitioners' mere belief that they had implied permission could not defeat probable cause (Pet. App. at 86a). At the very least, the officers were entitled to qualified immunity (*id.* at 86a-87a).

The officers petitioned for rehearing en banc on the ground that the decision departed from settled principles of qualified immunity and probable cause. After that petition was granted, but before the case could be reheard, the three-judge panel reversed itself. This time, taking the complaint's allegations as true "to the extent that they [were] not contradicted by the video evidence," the judges unanimously concluded that there could be no "serious dispute" that the officers had probable cause to arrest the petitioners for disorderly conduct under N.Y. Penal Law § 240.20(5), which prohibits the intentional or reckless obstruction of vehicular traffic. Pet. App. at 21a, 31a-32a. The court cited uncontroverted video footage plainly showing that the protesters on the Bridge had gathered in "locations generally reserved for

vehicular traffic, making it impossible for traffic to proceed." *Id*. at 32a.

The only significant question, therefore, was whether the officers had disregarded some clearly established defense that vitiated probable cause. *Id*. The court concluded that there was no such clear defense here on the facts apparent to officers.

First, the court rejected petitioners' contention that the relevant inquiry was whether they reasonably believed they had permission to enter the roadway and therefore lacked the requisite mental state to commit the crime. Pet. App. at 32a-33a. Although petitioners' claimed lack of *mens rea* might constitute a defense to a criminal prosecution, it did not defeat probable cause. *Id*. As the court aptly noted, the law of probable cause did not require that the police officers engage in an "essentially speculative inquiry into the potential state of mind of (at least some of) the demonstrators" (Pet. App. at 38a).

The court noted that officers are not required to "explore and eliminate every theoretically plausible claim of innocence" before effecting an arrest otherwise supported by probable cause. *Id*. at 33a (citing *Curley v. Village of Suffern*, 268 F.3d 65 (2d Cir. 2001) and *Panetta v. Crowley*, 460 F.3d 388, 398 (2d Cir. 2006)). An officer is required to refrain only from "deliberately disregard[ing] facts *known to him* which establish justification" for the arrestee's conduct. Pet. App. at 33a (emphasis in

original) (citing *Jocks v. Tavernier*, 316 F.3d 128, 136 (2d Cir. 2003)).

Second, the court found that the officers had disregarded no such plainly exculpatory facts. The court observed that both the complaint and the video footage were "devoid of any evidence that any police officer made any gesture or spoke any word that unambiguously authorized the protesters to continue to block traffic[.]" Pet. App. at 33a-34a.

Indeed, the court noted, none of the petitioners alleged receiving an express grant of authority to enter the roadway, and most admitted that they could not see or hear the officers at all, but simply "'followed the march' as it proceeded across the Bridge." Pet. App. at 36a (citation omitted). And the court rejected the notion that the officers' "retreat[]" in the face of the throng was anything more than an "inherently ambiguous" action, which under these circumstances "[did] not convey, implicitly or explicitly, an invitation to 'go ahead.'" *Id.* at 37a.

Consequently, the court reversed and remanded the denial of defendants' motion to dismiss with instructions to dismiss the complaint.

C. After remand, petitioners' attempt to amend their complaint was denied as futile.

Thereafter, in a proposed third amended complaint, petitioners inserted an allegation that officers had conveyed "actual or apparent permission or sanction" for them to march onto the Bridge's vehicular roadway through "police direction or escort" (Second Circuit Joint Appendix ["A"] 85). They further charged that the officers did so in furtherance of a de facto City policy to trap and arrest protesters after granting permission to gather in a particular area (A120-122).

But the proposed amendments to the complaint contained no new non-conclusory factual allegations on *how* "police direction or escort" gave petitioners "actual or apparent permission or sanction" to enter the roadway (*see* A85, 88). Nor did petitioners produce any new video footage revealing such permission.

The remainder of petitioners' proposed amendments primarily related to the subjective decision-making of then-NYPD Chief of Department Joseph A. Esposito, based on his deposition testimony in two other matters (A91, 99-101, 122). In particular, they alleged that Esposito was on the scene and knew that many of the marchers did not hear the orders to disperse, and that Esposito "erred" by not blocking off the roadway with police scooters or by other methods

(A98-101). They also alleged that NYPD Commissioner Kelly "actively or tacitly" approved the arrests (A116-117).

The district court denied petitioners leave to amend their complaint, observing that petitioners' new allegations did not overcome the Second Circuit's reasoning for dismissing their false arrest claim (A202).

D. In a second appeal, the Second Circuit affirmed denial of the motion to amend, reiterating that the videos established probable cause for arrest.

Petitioners appealed to the Second Circuit. The Second Circuit affirmed, confirming its prior holding that the arrests were supported by probable cause (and was not limited to qualified immunity, as petitioners then insisted), and concluding that petitioners' new allegations did not support a different result (Pet. App. at 5a-6a). The court emphasized that the video footage "incontrovertibly show[ed]" the lack of a clear police message, express or implied, that the protesters' conduct was lawful. *Id.* at 8a. Specifically, the court reiterated that the officers' "retreat" onto the vehicular roadway in the "chaotic" scene was not an "unambiguous invitation to follow[.]" *Id.* at 7a.

Thus, stripped of its conclusory allegations, the amended complaint did not assert "any facts in support of instructions to follow the officers." *Id.* at

7a-8a. And petitioners' "new" allegations regarding Esposito's understanding of the state of mind of the demonstrators—i.e., whether he realized some demonstrators mistakenly believed that they were allowed to march into active traffic on the Brooklyn Bridge—were "irrelevant to the issue of probable cause" because they did not plausibly allege that Esposito "deliberately ignored facts known to him that justified the marchers' takeover of the roadway." *Id.* at 7a.

Finally, the court found that the lack of any constitutional violation was fatal to petitioners' *Monell* claims. *Id.* at 8a-9a.

REASONS FOR DENYING THE PETITION

A. The Second Circuit's ruling merely applies settled legal principles to resolve a fact-bound question of probable cause.

The Court's review is unwarranted because the Second Circuit's decisions address only the case-specific question of whether probable cause was established on the distinctive facts presented. They break no new legal ground and will not determine the outcome of false arrest claims presenting different facts, whether involving demonstrations or not.

The court of appeals' ruling is rooted in long-settled principles of probable cause. *First*, that the inquiry focuses on "facts and circumstances within

the officer's knowledge," asking whether those facts and circumstances "are sufficient to warrant a prudent person, or one of reasonable caution, in believing … the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979). *Second,* that to determine probable cause is necessarily to "deal with probabilities," not certainties, and to do so based on "the factual and practical considerations of everyday life," not the concerns of "legal technicians." *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949). *Third*, that probable cause analysis does not require an officer to eliminate possible defenses, such as a potential claim of "lack of requisite intent." *Baker v. McCollan*, 443 U.S. 137, 145-46 (1979). As distilled by the Second Circuit long before this case, probable cause prohibits the officer only from "deliberately disregard[ing] facts known to him" that establish a clear defense to the charge. *Jocks*, 316 F.3d at 136; *accord Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048, 1061 (7th Cir. 2004); *Fridley v. Horrighs*, 291 F.3d 867, 873 (6th Cir. 2002).

The Second Circuit's decision simply applies these concepts to the particular offense and particular facts at issue here. The relevant offense is New York Penal Law § 240.20(5), which prohibits the obstruction of vehicular traffic "with intent to cause public inconvenience, annoyance or alarm," or "recklessly creating a risk thereof." The core facts, as shown by the undisputed video evidence

incorporated into the complaint,[3] are that throngs of protesters swarmed up and onto the vehicular roadway of the Brooklyn Bridge, with a line of cars at first slowly inching up on-ramps alongside them and then grinding to a halt. The court of appeals correctly found no "serious dispute" that officers had probable cause to believe that the elements of Penal Law § 240.20(5) were satisfied (Pet. App. at 31a-32a).

The court of appeals further correctly held that officers did not disregard facts known to them that established a clear defense of justification. Contrary to petitioners' contention, the court did not reject the legal premise that police officers who grant protesters permission to break a particular law may not then arrest them without first communicating that permission is being revoked (Pet. at 15-16). Assessing whether that premise applied here was the very point of the court's examination of whether officers disregarded facts known to them that would establish a clear defense (Pet. App. at 32a-40a).

Petitioners' theory that probable cause was defeated by implicit police permission was thus rejected as a matter of fact, not on the law, as they would have it. Indeed, the court reiterated throughout its opinions that police did nothing here

---

[3] *See Scott v. Harris*, 550 U.S. 372, 378-80 (2007).

to convey an unambiguous grant of permission, explicitly *or* implicitly, either under the factual allegations of the complaint or the unchallenged video footage (*id.*).

It is beyond dispute that, as the OWS march wound its way from Zuccotti Park toward the Bridge, officers directed protesters to remain on the sidewalks and crosswalks at all times; and although the officers occasionally stopped traffic to allow the march to proceed, they consistently kept the protesters from blocking traffic at their own discretion (TARU video at 00:15, 00:45, 1:00, 1:54, 2:17; Pet. App. at 22a, 74a). And it is undisputed that officers never told protesters that they could enter the Bridge roadway or waved them onto it. The court of appeals observed that officers' retreat from the entrance to the Bridge roadway after minutes facing an insistent, chanting throng was "inherently ambiguous" (Pet. App. at 37a). Thus, the officers' conduct, viewed as it must be from the officers' perspective (*DeFillippo*, 443 U.S. at 36-37), did not so clearly establish a defense to the charge as to defeat probable cause.

While some protesters might have misinterpreted the officers' retreat from the defiant and chanting crowd as an invitation to follow, those who could actually see the officers were also better positioned to hear the bullhorn announcements warning of imminent arrests. In any case, petitioners themselves merely alleged that they "followed the crowd" or "the march" onto the

roadway (Pet. App. at 36a, quoting the complaint at A169-72). What petitioners do *not* allege are nonconclusory facts showing that they did so in reliance on police permission, express or clearly implied, to enter onto and occupy the Bridge's roadway. Nor could they allege such facts, as the unchallenged video footage confirms. Second Circuit Dkt. # 65 (TARU video); Pet. App. at 21a-26a.

Had they been prosecuted, petitioners' claims that they mistakenly believed they had permission to enter the roadway could have been presented to the jury as a part of a state-of-mind defense. If credited and found reasonable by the jury,[4] such a belief might have succeeded in defeating the charge of obstructing traffic. But it is an entirely different question whether those claims defeat probable cause. As the Second Circuit soundly held, officers cannot be required to speculate as to the protesters' state of mind in determining whether they have

[4] As most New Yorkers would understand, it would be especially unlikely for officers to decide on the spot to suspend the rule against blocking traffic as to the Brooklyn Bridge. The Bridge is one of a handful of heavily trafficked river crossings connecting Manhattan and Brooklyn—more than 120,000 cars and trucks cross it daily. The roadway stretches over a mile between entrance and exit, and about a third of that length lies over the East River. Vehicles already on the span thus could not be rerouted, a relatively simple if sometimes inconvenient option on the ordinary grid of city streets.

probable cause to make arrests (Pet. App. at 38a). Such a requirement would convert a reasonable officer's probable cause inquiry from one focused on the facts and circumstances within his or her knowledge into one requiring the officer to peer into the minds of arrestees—essentially, to try to envision how some might arguably have interpreted events from their vantage points. That, unlike the court's holding here, would be a sharp break from basic precepts of probable cause.

Thus, there is no merit to petitioners' overblown claims that the Second Circuit's decision heralds a sea change impairing cherished First Amendment freedoms. Rather, the court applied settled Fourth Amendment principles to conclude that probable cause was present on the distinctive facts of this case. And because the arrests were supported by probable cause, there can be no municipal liability. *City of Canton v. Harris,* 489 U.S. 378, 385 (1989); *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978).

B. The Second Circuit's ruling presents no conflict with *Cox*.

Petitioners' petition rests largely on a misreading of *Cox*. They maintain that *Cox* created a broad rule of "fair warning" that supplants ordinary principles of probable cause and is triggered whenever police abstain from making otherwise permissible arrests regarding demonstrations. They are mistaken.

Cox concerned a challenge to a criminal conviction under a state statute making it a crime to demonstrate "in or near" a courthouse with the intent of influencing court proceedings. *Cox*, 379 U.S. at 560, 564.[5] The statute did not further specify what constituted "near" a courthouse. *Id*. at 568-69.

The facts of the case were these. The day after a group of students were arrested for illegal picketing, the defendant in *Cox* led a march to protest those arrests, culminating in a protest in the vicinity of the courthouse. Evidence adduced at the criminal trial established that police had consulted with demonstrators and affirmatively given them permission to conduct the protest, provided they stayed in an area across the street from the courthouse—101 feet from the courthouse steps. *Id*. at 570-71. Police also blocked off the roadway and rerouted traffic in advance of the event. *Id*. at 571.

---

[5] Cox's convictions for "disturbing the peace" and "obstructing public passages" under two other statutes were overturned in a companion case decided on the same day as the case discussed in text. *See Cox v. Louisiana*, 379 U.S. 536 (1965). Among other holdings, the companion decision struck down the "disturbing the peace" statute as unconstitutionally vague and held that the "obstructing public passages" statute, as consistently enforced, unconstitutionally placed unfettered discretion in executive officials.

The *Cox* protestors complied with this ad hoc construction of the statutory language and remained on the opposite side of the street at all times. *Id*. at 569-72. Nevertheless, police later changed course and directed the group to disperse—not because they had gathered too near the courthouse, but on the assessment "that what [the protesters] said threatened a breach of the peace" (*id*. at 572)—that is, due to the *content* of their expression. The protesters refused to depart, whereupon the police used tear gas and effected arrests. *Id*. at 569-71.

Cox differs sharply from this case both in its legal context and in its facts. First, on the appeal from the defendant's criminal conviction, the legal question was not whether probable cause supported his arrest. Rather, the question was whether the underlying statute was sufficiently clear and whether the police's express grant of permission had been adequately revoked, under principles of due process, to support the defendant's *conviction*. *Cox*, 379 U.S. at 560. By contrast, the controlling question in this false arrest case is probable cause—meaning, as outlined above, whether facts known to officers supported a reasonable belief that a crime had been or was about to be committed. That simply was not at issue in *Cox*.[6]

---

[6] Nor did the phrase "fair warning," as used in *Cox*, create a rule governing conduct by arresting officers on the scene. To

Second, and more significantly, the facts of *Cox* do not resemble those here. In *Cox*, the underlying statutory proscription was "non-specific," and officers, by express oral direction, had told protesters that protesting in a designated location would comport with the statute. In this case, the New York prohibition against obstructing traffic is clear, and police never varied it by word or deed. No verbal assurances or gestures to enter the roadway were given; no streets were closed to traffic; no suggestion was made that the ordinary rule that roadway lanes are for vehicular travel would be suspended anywhere, much less on the Brooklyn Bridge.

At most, petitioners have alleged that the officers' ambiguous conduct in ceasing attempts to physically block the entrance to the Bridge roadway after the standoff with protesters may have given rise to a genuine—but mistaken—belief on the part of some protesters that they had permission to walk onto the active Bridge roadway.

---

the contrary, it was a rule for courts assessing whether criminal statutes afford adequate notice of criminal behavior to comport with due process. *Cox*, 379 U.S. at 574 ("There is [a] … plain requirement for laws and regulations to be drawn so as to give citizens fair warning as to what is illegal..."). Such questions are *not* among those that arresting officers are charged to resolve when assessing probable cause. *DeFillippo*, 443 U.S. at 37-38 ("A prudent officer … should not have been required to anticipate that a court would later hold the ordinance unconstitutional.").

That claim might have persuaded a criminal jury to accept a mens rea defense to the charge of obstructing traffic. But as this Court has recognized, arresting officers are not expected to adjudicate such questions of intent. *Baker*, 443 U.S. at 145-46. *Cox* raised no similar issue and, for this reason too, is inapposite.

C. There is no circuit split for the Court to resolve.

Petitioners' assertion that the decision below creates a circuit split stems from a mischaracterization of the facts here and a misreading of the cited cases from other circuits.

Petitioners rely on three false arrest cases: *Dellums v. Powell*, 566 F.2d 167, 173 (D.C. Cir. 1977); *Buck v. City of Albuquerque*, 549 F.3d 1269 (10th Cir. 2008), and *Vodak v. City of Chicago*, 639 F.3d 738, 741 (7th Cir. 2011). They claim that these cases address circumstances that are "materially indistinguishable" from those here (Pet. at 4). But the contention rests on their faulty premise that police communicated "implicit" permission for them to enter onto the Bridge's roadway (Pet. at 15-16, 29, 32). That factual assertion was rejected by the Second Circuit, based not only on its review of the undisputed video footage, but also on petitioners' own allegations that they merely followed other protesters onto the Bridge. And since each of the cited cases from other circuits hinges on police

permission, petitioners' assertion of a circuit split is mistaken.

Consistent with the fact-bound nature of probable cause, each of the cited cases is dissimilar from the others, and all three differ sharply from the circumstances of this case. And contrary to petitioners' assertions, the three decisions do not form any uniform jurisprudential doctrine, much less one from which the court of appeals departed here. Rather, each court evaluated the specific facts presented and simply concluded, for one reason or another, that the plaintiff protesters had been arrested without probable cause.

The facts of *Dellums* are quite close to those of *Cox*, so that case is inapposite to this one for reasons discussed above. As in *Cox*, a nonspecific statute was at issue—this one having the effect of barring protests on the steps of the U.S. Capitol. Under an earlier controlling judicial decision, the statute could not constitutionally justify a protester's arrest without prior issuance of an "order to quit." *Dellums*, 566 F.2d at 179-181 (citing *United States v. Nicholson,* Nos. 20210-69A et al. (D.C. Ct. of Gen. Sess. June 19, 1969), *aff'd*, 263 A.2d 56 (D.C. App. 1970). Moreover, on the "facts peculiar to [that] case," the court found that the petitioners had "unquestionably" been granted an "unwritten permit" to demonstrate where they did, when a U.S. congressman told police on the scene that he had invited them to gather there, thereby effectively suspending the statute. *Dellums*, 566

F.2d at 182-83. Indeed, the court noted that persons invited to Congress by members were permitted to come and go freely as a matter of practice, and both police and Congress members believed that individual members of Congress had the power to suspend the statute. *Id.* at 182, n.34.

Officers allowed protesters to gather on the steps, but then they cordoned off the bottom of the steps and arrested them without issuing any order to quit. The D.C. Circuit held that, because police "unquestionably … in effect told the demonstrators that they could meet where they did," they could not effect arrests without first giving orders to disperse. *Dellums*, 566 F.2d at 182. *Dellums* is nothing like this case, where the statutory command against blocking traffic is clear, and no "unwritten permit" was issued to protest on the Bridge's roadway. *See* Pet. App. at 8a.

Buck differs somewhat from *Dellums*, but it, too, has little relevance here. There, police closed streets to traffic and allowed protesters to gather in a particular area, then arrested them in the very same area for marching without a permit. *Buck,* 549 F.3d at 1283; *see also Fogarty v. Gallegos*, 523 F.3d 1147, 1150-52 (10th Cir. 2008) (companion case to *Buck*, containing recitation of relevant facts). The court held that the act of marching without a permit could not support probable cause for arrest where police had closed off streets to traffic and were directing the procession prior to the arrest. *Buck*, 549 F.3d at 1283-84.

Once again, the differences are stark: petitioners in this case were arrested for blocking traffic, not for marching without a permit; indeed, protesters who proceeded along the Bridge's pedestrian walkway were not arrested. This case therefore has nothing to do with restrictions on spontaneous protest activity. Nor did police in this case close streets to traffic and allow protesters to gather in roadways for quite some time before suddenly making arrests.

Vodak presents still different circumstances. There, the relevant charge for assessing probable cause was failure to comply with a dispersal order, not obstruction of traffic. That is because the protesters undisputedly had been given advance permission to march on vehicular roadways. Streets were indeed closed to traffic, and the march proceeded throughout along roadways, including quite major ones. It was thus plain that the general proscription on blocking vehicular traffic had been suspended.

But police gave no advance indication which streets were and were not permissible protest zones. *Vodak*, 639 F.3d 743-45. During the march, police ultimately issued oral directives for the protesters either to disperse or return to their starting point via a specified route. Petitioners claimed those directives were inaudible. *Id.* at 745. Later, numerous individuals were arrested blocks away for deviating from the route prescribed by police in the oral directives. *Id.* at 745-56.

On these facts, the Seventh Circuit held that probable cause was not established, citing the lack of "evidence that the police reasonably believed that the protesters who were arrested, or at least most of them, had heard the orders." *Vodak*, 639 F.3d at 745. But crucially, the court also noted that the question whether police reasonably believed the directives had been heard "would be of no consequence had the police had a reason for arresting the crowd … other than that anyone in that crowd could be assumed to have wilfully violated the return-or-disperse order." *Id.* at 745. Here, of course, police had another such reason for the arrests—obstruction of traffic.

Thus, each of the cases claimed to form the opposing side of the split was decided on its own facts, as questions of probable cause typically are. The cases do not stand for any sweeping legal rule or doctrine regarding the law of probable cause in the context of political demonstrations. Not one of the cited decisions from other circuits articulates a broad "fair warning" requirement applicable to officers before they may arrest protesters who break laws that have not been explicitly or implicitly suspended.[7] Not one suggests that

[7] *Dellums* uses the phrase "fair warning" just as *Cox* does: to describe the standard by which *courts* should assess the vagueness challenge to a statutory prohibition. *Buck* uses it only in discussing an excessive force claim unrelated to any question presented here. *Vodak* (and *Fogarty*) never use it.

ordinary principles of probable cause do not apply. And not one holds that a clear statutory prohibition, especially a commonsense ban on blocking vehicular traffic, may be overridden by ambiguous police conduct, especially not for the limited purpose of determining probable cause. In short, there is no relevant circuit split.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ZACHARY W. CARTER
Corporation Counsel of the
City of New York

Counsel for Respondents

RICHARD DEARING*
DEBORAH A. BRENNER
MELANIE T. WEST
New York City Law
Department
100 Church Street
New York, NY 10007
(212) 356-2500
rdearing@law.nyc.gov

**Counsel of Record*