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, AND BROOKE FEINSTEIN,
Petitioners,

v.

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

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This case presents a question fundamental to free speech and assembly rights: whether, after allowing individuals to peacefully assemble, officers must provide fair warning prior to arresting individuals for participating in the assembly.

Respondents acknowledge that "police *allowed* this unpermitted protest to proceed" throughout "downtown Manhattan." Opp. 2 (emphasis added). Indeed, escorting officers did not enforce either the permit requirements or the municipal traffic ordinances. In fact, the officers *directed* demonstrators to violate those ordinances, ordering them to cross streets against the light and to walk in vehicular lanes. See Opp. 4; Pet. App. 45a. As the demonstration proceeded, hundreds of people saw that the march was escorted by police and spontaneously joined. Once at the Bridge, the police—not the demonstrators—closed the Bridge to vehicular traffic. Officers then calmly led petitioners onto the Bridge.

The officers thus *knew* that they had "allowed" the demonstration to proceed, sanctioned it via their escort, and ordered demonstrators to violate municipal traffic ordinances throughout. Yet respondents assert—and the Second Circuit held—that officers retained unfettered discretion to arrest any demonstrator, without warning, for violation of those same time, place, and manner restrictions.

As a result, in the Second Circuit, joining an in-progress, police-escorted march now renders one subject to immediate arrest, without warning. Pet. 23-25. The result is a massive chill on the exercise of speech and assembly rights. Pet. 25-27. And, as the Reporters Committee for Freedom of the Press

demonstrates, "[w]hen police engage in mass arrests of peaceful protesters without warning, they impair * * * freedom of the press, as journalists covering the protest are frequently arrested along with the participants in the protest." Reporters Committee *Amicus* at 11-12.

Respondents offer no valid reason to deny review. Their effort to defuse the circuit split (Opp. 22-27) obfuscates the holdings of the other circuits and disregards the record of this case. Respondents assert that the case is fact-dependent (Opp. 13-18), but the court of appeals' requirement of "unambiguous[] authoriz[ation]" (Pet. App. 34a) is at odds with the "fair warning" rule adopted by other circuits. Respondents' arguments on the merits (Opp. 13-18, 18-22) are no reason to deny certiorari in light of the clear circuit split and are, in any event, incorrect.

Given the magnitude of the constitutional rights at stake, review is imperative.

A. The circuits are divided.

The circuits are plainly divided on the question presented. The Second Circuit itself acknowledged the disagreement (Pet. App. 37a n.12), which commentators have likewise recognized (see Pet. 17). Respondents offer no meaningful basis to distinguish contrary decisions from the Seventh, Tenth, and D.C. Circuits—an issue that they tellingly bury at the end of their brief. See Opp. 22-27.

Vodak v. *City of Chicago*, 639 F.3d 738, 745 (7th Cir. 2011), addressed materially indistinguishable circumstances, but the Seventh Circuit reached the opposite result. See Pet. 17-18.

Respondents assert that the *Vodak* "protestors undisputedly had been given advance permission to march on vehicular roadways." Opp. 25. But respondents do not contend that Chicago police had given *explicit* permission. Rather, respondents argue that permission was implicit because "[s]treets were indeed closed to traffic," including "quite major ones." *Ibid.* As a result, respondents reason, "[i]t was thus plain that the general proscription on blocking vehicular traffic had been suspended." *Ibid.*

Respondents fail to appreciate that the allegations here are identical. Prior to arriving at the Bridge, "the police had also blocked vehicular traffic in order to accommodate the march," and police "even directed marchers to violate traffic regulations." Pet. App. 113a. See also *id.* at 45a. And then, once at the Bridge, it was the police—not the demonstrators—who "blocked vehicular traffic" so as "to accommodate the march." *Id.* at 101a. It was thus every bit as "plain" here "that the general proscription on blocking vehicular traffic had been suspended." Opp. 25.

Respondents next assert that Chicago police ordered the crowd to disperse, but the protesters "claimed those directives were inaudible." Opp. 25. So too here. All petitioners allege that any direction to disperse was inaudible. Pet. 8. Thus, in both cases, police arrested protesters "for deviating from the route prescribed by police in the oral directives"—directives that protesters in both cases say they never heard. Opp. 25.

Finally, respondents identify a "crucial[]" supposed distinction—*Vodak*'s recognition that police would have had probable cause if they "had a reason for arresting the crowd" apart from the protesters'

failure to disperse. Opp. 26. The Seventh Circuit was acknowledging that police may arrest protesters who endanger others. There was no such danger there because "[t]he crowd wasn't trying to break through the police barrier" and the protesters "were not threatening to the safety of the police or other people." *Vodak*, 639 F.3d at 745-746. Likewise, respondents do not assert that they arrested any of the petitioners for conduct threatening to the safety of others.

Respondents nonetheless assert that, here, police "had another such reason for the arrests"—petitioners' "obstruction of traffic." Opp. 26. That is obviously no distinction: the protesters in *Vodak* were arrested while similarly obstructing traffic on Chicago Avenue. *Vodak*, 639 F.3d at 745-746. Their arrest reports asserted that they acted illegally in "disrupt[ing] vehicular traffic and pedestrian traffic." *Vodak* v. *City of Chicago*, 624 F. Supp. 2d 933, 949 (N.D. Ill. 2009). The Seventh Circuit acknowledged that "traffic was being impeded." *Vodak*, 639 F.3d at 743. And, in their appellate briefs, the *Vodak* defendants vigorously contended that the arrests were lawful because "[d]emonstrators may be arrested for disorderly conduct and violating laws prohibiting blocking pedestrian and vehicular traffic." *Vodak* v. *City of Chicago*, Br. of Defendants-Appellees Beal et. al, at *5-6, 2010 WL 4621548 (7th Cir.) (No. 09-2768). See also *id*. at *9. Yet the Seventh Circuit held the arrests unlawful.

The Tenth Circuit's decision in *Buck* v. *City of Albuquerque*, 549 F.3d 1269, 1283 (10th Cir. 2008), also squarely conflicts with the decisions below. Here, as in *Buck*, police "closed streets to traffic." Opp. 24. See Pet. App. 45a, 101a, 113a. And, in both cases, police "may have implicitly sanctioned the

march not only by closing off streets to traffic, but also by directing the progress and direction of the procession." *Buck*, 549 F.3d at 1283. Thus, in *both* cases, "police had closed off streets to traffic and were directing the procession prior to the arrest." Opp. 24. See Pet. App. 45a ("The officers blocked vehicular traffic at some intersections and on occasion directed marchers to cross streets against traffic signals.").

In asserting that police in this case did not "close streets to traffic and allow protesters to gather in roadways for quite some time before suddenly making arrests" (Opp. 25), respondents disregard that the allegations, taken as true (and validated by the video evidence), are otherwise. And, while no court has identified the precise duration of police acquiescence as material, it was extensive here: police blocked traffic and directed the protesters from their departure at Zuccotti Park to their arrival, a half-mile later, at the entrance to the Bridge. Pet. App. 45a.

Respondents' assertion that that petitioners "were arrested for blocking traffic" (Opp. 25) is, once again, no distinction. In *Buck*, the defendants likewise asserted that the plaintiff's "marching through the streets during rush hour traffic" was reason enough to arrest. *Buck*, 549 F.3d at 1284. Indeed, their appellate brief argued that arrests were justified because the protesters had "march[ed] through the streets during rush hour traffic and refus[ed] to obey the officers' lawful commands to clear the streets." *Buck* v. *City of Albuquerque*, Br. of Defendants-Appellants, 2007 WL 2426102 (10th Cir.) (No. 07-2118). The Tenth Circuit nonetheless found the arrests unlawful.

Respondents also fail to meaningfully distinguish *Dellums* v. *Powell*, 566 F.2d 167, 173 (D.C. Cir. 1977). They do not demonstrate how the constitutional issue resolved in *Dellums* turned on the particulars of the law for which the protesters were arrested. It did not. *Dellums* announced the governing rule that "no constitutionally valid arrest could have been made until an order to disperse had been given which was itself based on permissible considerations." *Id*. at 182-183.

Respondents assert that, in *Dellums*, there was an "unwritten permit." Opp. 23-24. But there was never any *express* permission granted by police. Rather, it was the *conduct* of police officers that "in effect told the demonstrators that they could meet where they did." *Dellums*, 566 F.2d at 182. The "unwritten permit" stemmed from the fact that officers "allowed" protesters "to enter the [g]rounds," rather than resisting their procession. *Id*. at 173-175. The circumstances here are no different.

Accordingly, in the Seventh, Tenth, and D.C. Circuits, once the police allow a demonstration to proceed, they may subsequently arrest individuals for violations of time, place, and manner restrictions only after providing fair notice. The Second Circuit, however, takes a very different approach to this issue. In that court, even after officers allow a demonstration to proceed, officers retain discretion to arrest individuals for violations of time, place, and manner restrictions, *unless* officers "unambiguously authorized" protesters to engage in the precise conduct at issue. Pet. App. 34a. See also *id*. at 7a.

B. This is an excellent vehicle to resolve an important legal question.

As the petition demonstrated (Pet. 20-27), this holding causes a clear "impair[ment of] cherished First Amendment freedoms" (Opp. 18). When an individual joins an in-progress, police-escorted march, she lacks knowledge of whether or not it is properly permitted. As a result, in the Second Circuit, she subjects herself to immediate arrest, without warning, notwithstanding objective indicia that police have "allowed" (Opp. 2) the demonstration to proceed. See Pet. 23-25.

Respondents do not respond to this argument. They cannot articulate a means by which an individual within the Second Circuit can know whether her participation in an ongoing march will subject her to arrest. The chill to First Amendment rights is apparent. Pet. 25-27, 34-35.

Moreover, the procedural posture of this case—arising on a motion to dismiss devoid of any factual dispute, and involving *Monell* claims that obviate qualified immunity—provides an ideal opportunity to address the underlying constitutional questions. Pet. 27-29.

Respondents nonetheless contend that this is a poor vehicle because the core disputes are factual, rather than legal. They assert that any claim of "implicit police permission" was "rejected as a matter of fact, not on the law." Opp. 15. They repackage this repeatedly. See, *e.g.*, Opp. 2, 22-23. But, especially given the motion-to-dismiss posture, this argument makes little sense. The factual allegations are clear—and undisputed by respondents:

- For a half mile, from Zuccotti Park to the entrance to the Brooklyn Bridge, officers "escorted" the marchers. See Pet. App. 22a.
- Those officers "issued orders and directives to individual marchers, at times directing them to proceed in ways ordinarily prohibited under traffic regulations absent police directive or permission." *Ibid.*
- "The officers blocked vehicular traffic at some intersections and on occasion directed marchers to cross streets against traffic signals." *Ibid.*
- The march paused at the Brooklyn Bridge, and a bottleneck formed. *Id.* at 22a-23a.
- The police, *not* demonstrators, blocked vehicular access to the Bridge. *Id.* at 22a-23a.
- Officers informed some demonstrators at the front not to enter the Bridge, but most demonstrators—including all petitioners—never heard this direction. *Id.* at 50a, 102a-103a.
- "[T]he officers and city officials in the lead group turned around and began walking unhurriedly onto the Bridge roadway with their backs to the protesters." *Id.* at 24a.
- "The protesters began cheering and followed the officers onto the roadway in an orderly fashion about twenty feet behind the last officer." *Ibid.*
- Officers continued to escort the demonstrators onto the Bridge, as they had throughout the streets of lower Manhattan. *Id.* at 24a-25a.

There is, accordingly, no disputed question of historical fact—nor could there be at this juncture. The sole question is whether, in the circumstances alleged, the police have an obligation to provide demonstrators fair warning prior to effectuating an arrest. In materially indistinguishable circumstances, the Seventh Circuit holds that the Constitution does impose such a duty. The Tenth and D.C. Circuits agree. The Second Circuit has reached the opposite conclusion.

C. The decision below is wrong.

Respondents' opposition principally contends that the officers had probable cause to arrest—and thus they did not violate petitioners' constitutional rights. Opp. 13-22. But respondents' disagreement as to the merits is no reason to deny review. Whatever the answer to the question presented, this Court should resolve the conflict among the circuits and bring certainty to an area of law that cannot tolerate ambiguity.

In any event, the decision below is wrong. The court searched for an indication that police officers "unambiguously authorized the protesters to continue to block traffic," and, finding no such unambiguous invitation to walk on the Bridge, it held that the arrests were supported by probable cause. Pet. App. 34a. But First Amendment rights are not so porous.

1. To begin with, respondents repeatedly describe our argument as requiring an officer to "peer into the minds of arrestees" (Opp. 18) or adjudicate protesters' "intent" or "mens rea" (Opp. 22). That is incorrect; the proper test is objective, not subjective.

In our view, the critical inquiry is whether a reasonable individual would believe that police, via their

actions or their words, have allowed a demonstration to proceed. If, to an objective observer, police communicate that they are allowing a demonstration, then police must give fair warning prior to subsequently arresting participants for violating valid time, place, and manner restrictions, including traffic ordinances.[1]

There is nothing subjective about this analysis. And the objective inquiry is easily resolved in this case. Respondents *concede* that police "allowed this unpermitted protest to proceed." Opp. 2. Thus, prior to arresting individuals, police had to give fair warning to arrestees. Yet petitioners were all arrested without any prior warning. Pet. 9.

2. Respondents disregard the implications of *Cox* v. *Louisiana*, 379 U.S. 559, 570 (1965). Respondents describe the contours of the probable cause analysis (Opp. 13-18), and they point to differences between the facts of *Cox* and this case (Opp. 18-22). But this narrow parsing of precedent fails to appreciate that the First Amendment imposes unique duties on officers, duties that are essential to the preservation of core freedoms.

Cox recognized, in the context of First Amendment speech and assembly rights, the "plain requirement for laws and regulations to be drawn so as to give citizens fair warning as to what is illegal." *Cox*, 379 U.S. at 574. This is necessary so that the "regulation of conduct that involves freedom of speech and assembly" is not "so broad in scope as to

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[1] Police always have the authority to arrest, without warning, individuals who threaten persons or property; such conduct is not protected by the First Amendment. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972); *Vodak*, 639 F.3d at 746.

stifle First Amendment freedoms, which 'need breathing space to survive.'" *Ibid.* In particular, *Cox* recognizes that there must be "appropriate limitations on the discretion of public officials where speech and assembly are intertwined with regulated conduct." *Ibid.*

Vodak (639 F.3d at 746-747), and *Dellums* (566 F.2d at 182-183) properly apply *Cox*. They hold that, after allowing a First Amendment demonstration to proceed, officers must provide fair warning prior to arresting individuals for violations of time, place, and manner restrictions. This approach provides citizens crucial "fair warning." And it places an "appropriate limitation[]" on police officer discretion. Respondents, by contrast, do not recognize any limitations that the First Amendment imposes on police authority.

To avoid the clear implications of *Cox*, respondents first assert that it was decided in the context of a criminal conviction. Opp. 20. But that has no bearing as to *Cox*'s recognition that First Amendment freedoms require citizens to have "fair warning" in the enforcement of time, place, and manner restrictions. *Cox*, 379 U.S. at 574. Contrary to respondent's assertion (Opp. 20 n.6), the "fair warning" requirement is not limited to the clarity of statutes; it extends also to exercise of official discretion. See *Cox*, 379 U.S. at 574. Officers may not enforce the laws in a haphazard or arbitrary manner, depriving individuals of advance warning whether their First Amendment conduct will subject them to arrest.

Respondents also contend that the officers in *Cox* provided more express direction to the protesters than occurred here. Opp. 21. But *Vodak* did not find that distinction meaningful. Nor should it be: it

makes no difference whether an officer conveys express permission via words or implied permission via actions. Either way, having allowed a demonstration to proceed, "fair warning" is necessary to legally terminate the conduct.

3. Additionally, the due process violation here is clear—police arrested petitioners for participation in the demonstration that police had admittedly "allowed" (Opp. 2) to progress. See Pet. 32-34.

During the first half-mile of this march, the span from Zuccotti Park to the Brooklyn Bridge, officers escorted the protesters, directed them to violate certain otherwise-applicable traffic ordinances, and never warned them of arrest. See Pet. 7. Respondents suggest that the march somehow changed when it reached the Brooklyn Bridge. Opp. 16-17. But respondents offer no basis in law or record for this distinction. For the majority of the protesters—those who were not in the vanguard, which includes all petitioners—the march was an undifferentiated whole. As they approached the Bridge and marched onto it, officers *continued* to escort demonstrators, continuing to sanction the march. Officers never warned petitioners that *this* conduct—as opposed to all of the substantively identical conduct that preceded it—uniquely subjected them to arrest. See Pet. 32-33.

* * *

Having allowed this march to proceed, the police were constitutionally obligated to provide marchers fair warning prior to subsequently arresting them for violating time, place, and manner restrictions. That is not a significant burden. But it is one essential to the protection of First Amendment freedoms.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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