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

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2012

(Argued: April 22, 2013 Decided: August 21, 2014)

Docket No. 12-2634-cv

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

Plaintiffs-Appellees,

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

Plaintiff,

— v. —

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

Defendants-Appellants,

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

Defendants.[*]

B e f o r e:

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

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

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

arguable probable cause to arrest plaintiffs for disorderly conduct. We disagree, and affirm the judgment of the district court.

AFFIRMED.

Judge Livingston dissents in a separate opinion.

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

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

GERARD E. LYNCH, *Circuit Judge*:

Defendants-appellants ask us to definitively conclude, on the limited record before us on their motion to dismiss for failure to state a claim, that they are entitled to qualified immunity for their arrest of a group of demonstrators. Because we cannot resolve at this early stage the ultimately factual issue of whether certain defendants implicitly invited the demonstrators to walk onto the roadway of the Brooklyn Bridge, which would otherwise have been prohibited

by New York law, we AFFIRM the judgment of the United States District Court for the Southern District of New York (Jed S. Rakoff, *Judge*).

BACKGROUND

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

I. The Protest and Plaintiffs' Arrests

On October 1, 2011, thousands of demonstrators marched through Lower Manhattan to show support for the Occupy Wall Street movement. The march began at Zuccotti Park in Manhattan and was to end in a rally at Brooklyn Bridge Park in Brooklyn. Although no permit for the march had been sought, the New York City Police Department ("NYPD") was aware of the planned march in advance, and NYPD officers escorted marchers from Zuccotti Park to the

Manhattan entrance to the Brooklyn Bridge (the "Bridge"), at times flanking the marchers with officers on motorscooters or motorcycles. Those officers issued orders and directives to individual marchers, at times directing them "to proceed in ways ordinarily prohibited under traffic regulations absent police directive or permission." J. App'x at 165. The officers blocked vehicular traffic at some intersections and on occasion directed marchers to cross streets against traffic signals.

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

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

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

Plaintiffs, ten protesters who purport to represent the class of all protesters arrested that day, allege that the officers knew that these statement were "generally inaudible." J. App'x at 166. In a video provided by plaintiffs, recorded from roughly the second row of protesters, it is clear that protesters even at the front of the crowd twenty feet away could not make out the words of this announcement over the noise of the demonstration. Two minutes later the same officer announced into the bullhorn: "You are obstructing vehicular traffic. If you refuse to move, you are subject to arrest," and "If you refuse to leave, you will be placed under arrest and charged with disorderly conduct." While it is clear that at least one marcher at the front of the crowd heard this announcement, plaintiffs allege that the officers knew that they had not given any warnings or orders to disperse that would have been audible to the vast majority of those assembled.

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

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

Plaintiffs allege that the officers "led the march across the bridge," and that the marchers saw the officers' movement onto the roadway as an "actual and apparent grant of permission to follow." J. App'x at 168. They allege that the combination of those officers in front "leading" the protesters onto the roadway and the officers on the side escorting them along the roadway led them to believe that the NYPD was escorting and permitting the march to proceed onto the roadway, as it had escorted and permitted the march through Lower Manhattan earlier in the day. Officers at the roadway entrance did not instruct the ongoing flow of marchers not to proceed onto the roadway. Other officers walked calmly alongside the protesters in the roadway and did not direct any protesters to leave the roadway. The named plaintiffs allege that they did not hear any warnings or orders not to proceed on the roadway, and understood their passage onto the Bridge roadway to have been permitted by defendants.[2] Several allege that they did not even realize they were on the roadway until they were already on it. Plaintiffs allege that "[p]rior to terminating the march when it was mid-way across the bridge, the police did not convey that they were going to revoke the actual and apparent permission of the march to proceed," and that the officers therefore did not have probable cause to arrest them for disorderly conduct. Id. at 173.

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

II. District Court Proceedings

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

The district court denied the motion to dismiss the claims against the individual officers and granted the motion to dismiss the claims against the City,

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

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

Bloomberg, and Kelly.[5] Garcia v. Bloomberg, 865 F. Supp. 2d 478 (S.D.N.Y. 2012). The district court held that the allegations of the Complaint, if true, established that a reasonable officer would have known that he did not have probable cause to arrest plaintiffs. The district court further held that while plaintiffs had clearly violated the law by entering the Bridge roadway and blocking vehicular traffic, based on the facts alleged, no reasonable police officer could believe that plaintiffs had received fair warning that their behavior was illegal, as required by law. The district court concluded that while New York's disorderly conduct statute would normally have given protesters fair warning not to march on the roadway, it did not do so here, where defendants, who had been directing the march along its entire course, seemed implicitly to sanction the protesters' movement onto the roadway.[6]

Defendants now appeal the denial of their motion to dismiss on qualified immunity grounds, arguing that under the circumstances, "an objectively

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

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

reasonable police officer would not have understood that the presence of police officers on the Bridge constituted implicit permission to the demonstrators to be on the Bridge roadway in contravention of the law."[7] Appellants' Br. at 3.

DISCUSSION

I. Appellate Jurisdiction

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

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

of the qualified immunity defense can be decided as a matter of law in light of the record on appeal" (emphasis in original)).

II. Standard of Review

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

III. Qualified Immunity

"Qualified immunity protects public officials from liability for civil damages when one of two conditions is satisfied: (a) the defendant's action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe that his action did not violate such law." Russo v. City of Bridgeport, 479 F.3d 196, 211 (2d Cir. 2007) (internal quotation marks omitted). Defendants bear the burden of establishing qualified immunity. Vincent v. Yelich, 718 F.3d 157, 166 (2d Cir. 2013). "Even if this or other circuit courts have not explicitly held a law or course of conduct to be unconstitutional, the unconstitutionality of that law or course of conduct will nonetheless be treated as clearly established if decisions by this or other courts clearly foreshadow a particular ruling on the issue, even if those decisions come from courts in other circuits." Scott v. Fischer, 616 F.3d 100, 105 (2d Cir. 2010) (citation and internal quotation marks omitted).

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

Under both federal and New York law, an officer "has probable cause to arrest when he or she has knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." Dickerson v. Napolitano, 604 F.3d 732, 751 (2d. Cir. 2010) (internal quotation marks omitted); see also Michigan v. DeFillippo, 443 U.S. 31, 37 (1979) (holding that a police officer has probable cause to arrest when the "facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense"). Where an arrest is made without warrant, "the

defendant in a false arrest case bears the burden of proving probable cause as an affirmative defense." Dickerson, 604 F.3d at 751.

IV. Probable Cause and the First Amendment

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

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

protesters' conviction for picketing where directed by officials therefore violated due process.

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

The Seventh and Tenth Circuits have applied Cox's requirement of fair warning before revoking permission to protest to situations similar to the protest here. In Vodak v. City of Chicago, protesters were arrested after walking down a street that officers arguably led them to think was a permitted route along their

march. 639 F.3d 738, 743-44 (7th Cir. 2011). While officers had ordered protesters not to march westward from their planned route, on one street they stood aside and permitted protesters to march westward, then moved in behind the protesters and arrested them. Some marchers alleged that they believed that the police were directing them to proceed west on the road. Id. at 744. The court denied qualified immunity to the officers, finding that while the officers did not give explicit permission to move west down the street, "their presence, not blocking the avenue, might have made the marchers think it a permitted route west for them." Id. In Buck v. City of Albuquerque, a protester was arrested for marching without a permit and walking in the street. 549 F.3d 1269, 1283 (10th Cir. 2008). The Tenth Circuit denied qualified immunity to the arresting officers, holding that taking facts in the light most favorable to the plaintiff, the police officers' "street closures and direction of the procession sanctioned the protesters walking along the road and waived the permit requirement." Id. at 1284.

V. Probable Cause to Arrest Plaintiffs

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

onto the roadway "may have sanctioned the demonstration . . . so long as the parameters of the implied permission were complied with and the demonstrators remained on the sidewalk." Appellants' Br. at 28-29.

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

Defendants have identified the relevant inquiry: not whether plaintiffs will ultimately prevail, or whether a reasonable demonstrator would have understood the police's actions as an invitation to enter the roadway, but rather whether a reasonable police officer (in the position of the officers who decided to arrest plaintiffs) should have known that under the totality of the circumstances, the conduct of the police could have been reasonably understood by plaintiffs as an implicit invitation to enter the Bridge roadway, and thus should have known that additional, louder, or clearer instructions were required. But defendants' assertions of what the officers understood are unsupported by the Complaint or the record, which do not provide any details as to what any individual defendant knew or saw of the events leading up to the arrests.[8] Further, to the extent that defendants' arguments rest on a markedly different characterization of the events of the protest than those alleged by plaintiffs, we are unable to consider the

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

resulting factual dispute at this stage. We must take the Complaint's allegations as true when considering defendants' motion to dismiss, as they are not "blatantly contradicted" or "utterly discredited" by the submitted videos and still images, Scott v. Harris, 550 U.S. 372, 380 (2007).[9]

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

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

The facts of this case are of course far more complicated than this simple example. Although we have recounted the facts by referring to "the police" and "the demonstrators," we have done so only because the record is so undeveloped that we cannot specify the conduct or knowledge of particular named defendants. Ultimately, to recover damages, the plaintiffs will need to establish that particular defendants acted unreasonably in arresting them (or directing their arrest). Just as some demonstrators (but not others) might be convicted of disorderly conduct because it can be proven that they had heard and defied a clear warning that they were obstructing traffic and needed to move, so discovery might reveal that some police officers (but not others) were fully aware of facts that would lead reasonable officers to know that many of the demonstrators reasonably understood that they had been granted permission to proceed across the bridge, just as plaintiffs allege.

Given this standard, plaintiffs may have a difficult time establishing liability or avoiding the qualified immunity defense at a later stage of litigation.[10] In order to have a reasonable belief that probable cause exists, an officer need not anticipate or investigate every possible defense that a person suspected of violating the law may have, and an officer may have probable cause despite knowledge of facts that create an arguable defense. On the other hand, as Cox

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

and Papineau clearly establish, an officer may not constitutionally arrest a demonstrator when he is personally aware that responsible officials have implicitly or explicitly authorized the very conduct for which he seeks to make the arrest. As the Seventh Circuit has held, "[o]nce a police officer discovers sufficient facts to establish probable cause, she has no constitutional obligation to conduct any further investigation in the hope of discovering exculpatory evidence," but "[a] police officer may not ignore conclusively established evidence of the existence of an affirmative defense." Hodgkins ex rel. Hodgkins v. Peterson, 355 F.3d 1048, 1061 (7th Cir. 2004); see also Fridley v. Horrighs, 291 F.3d 867, 873 (6th Cir. 2002) (holding that an officer, when assessing probable cause, "is not required to inquire into facts and circumstances in an effort to discover if the suspect has an affirmative defense," but may not "ignore information known to him which proves that the suspect is protected by an affirmative legal justification" (emphasis and internal quotation marks omitted)).

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

the warning could have believed was audible beyond the first rank of the protesters at the front of the crowd.[11] According to plaintiffs' account, the police then retreated back onto the Bridge in a way that would reasonably have been understood, and was understood, by the bulk of the demonstrators to be a continuation of the earlier practice of allowing the march to proceed in violation of normal traffic rules.

We emphasize that the procedural posture of this case presents a formidable challenge to defendants' position. They urge us to find that qualified immunity is established for all defendants based on *plaintiffs'* version of events (plus a few inconclusive photos and videos). The evidence, once a full record is developed, may contradict plaintiffs' allegations, or establish that some or all of the defendants were not aware of the facts that plaintiffs allege would have alerted them to the supposed implicit permission. We express no view on

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[11] The fact that some protesters clearly heard the warning does not establish probable cause to arrest the entire group, when defendants knew that the vast majority had *not* heard the warning. See Papineau, 465 F.3d at 59-60 (holding that officers could not engage in "indiscriminate mass arrests" of a group where a few unidentified individuals from the group had violated the law). Nor would any warning the officers gave after demonstrators had already proceeded halfway across the bridge qualify as "fair warning." At that point, the police had allegedly blocked off any avenues of retreat. As the district court noted, "[i]mplicit in the notion of 'fair warning' is an opportunity for plaintiffs to conform their conduct to requirements." Garcia, 865 F. Supp. 2d at 488 n.7; see also Morales, 527 U.S. at 58 (noting that "the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law").

whether some or all of the defendants may be entitled to qualified immunity at a later stage of the case. Cf. Pena v. DePrisco, 432 F.3d 98, 111-12 (2d Cir. 2005) (affirming denial of application for qualified immunity at motion to dismiss stage without prejudice to renew application at a later stage). But to reverse the district court's denial of qualified immunity on a motion to dismiss, we would have to say that on the basis of plaintiffs' account of events, no officer who participated in or directed the arrests could have thought that plaintiffs were invited onto the roadway and then arrested without fair warning of the revocation of this invitation.[12] Since we cannot do so on this limited record, we affirm the judgment of the district court.[13]

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

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

VI. The Dissent

We add a few words in response to Judge Livingston's dissent, which seems to us to ignore the procedural context of this decision, and accordingly to draw unwarranted conclusions about the nature and consequences of our holding today. We emphatically do *not* hold that – and have no occasion to decide whether – any police officer acted unlawfully, is liable for damages, or lacks qualified immunity for his or her actions on the day in question. As we have clearly stated, upon the development of an appropriate factual record, any or all of the police officer defendants may well properly be found entitled to qualified immunity at the summary judgment stage, or after trial. The dissent, however, engages in a lengthy description of various inflammatory facts gleaned from a viewing of some of the videotapes submitted by the parties, all taken from differing and partial perspectives, and treats its factual conclusions as established facts about what "the police" were aware of. If it turns out, after discovery, that no reasonable factfinder could see the evidentiary record differently than the dissent does, qualified immunity may well prove appropriate.

Even at the summary judgment stage, however, it is well established that dismissal on qualified immunity grounds may not be granted when factual disputes exist, unless the defendants concede the facts alleged by the plaintiffs for purposes of the motion. Loria v. Gorman, 306 F.3d 1271, 1280 (2d Cir. 2002), citing Coons v. Casabella, 284 F.3d 437, 440 (2d Cir. 2002). Here, we are at an even earlier stage, at which defendants, in order to prevail, must be entitled to

qualified immunity *based on the very facts alleged by the plaintiffs*. While we agree that a motion to dismiss on such grounds can lie, success on such a motion must be limited to situations where immunity is clear based on the allegations in the complaint itself. As is evident from the dissent, defendants here do not rest their claim to immunity on the allegations of the complaint, but rather on an extensive analysis of "facts" asserted by the defendants. The existence of videotapes depicting *some* of the events from the perspectives of *some* of the participants does not establish those facts; a comparison of the tapes recording the police announcement to the protesters to disperse makes entirely apparent how different the events could appear from different vantage points.

To take only a few examples: the dissent suggest that some protesters lawfully headed onto the pedestrian walkway of the Bridge while others unlawfully headed for the roadway. But that is hardly established fact. The pedestrian walkway is narrow, and large numbers of demonstrators appear to have pooled on Centre Street, near the entrance to both the roadway and the walkway, as they approached the bottleneck at the Bridge entrances. Defendants do not argue that they had probable cause to arrest these demonstrators, who were already in the roadway of Centre Street. Indeed, the complaint implies that the police themselves had blocked off traffic at that point. And, according to the complaint, the police alleviated congestion at the base of the bridge by inviting protesters to ignore traffic laws and stream across Centre Street regardless of walkway signals and standard right-of-way rules. Given police tactics that day,

officers could quite plausibly have decided to channel the ballooning mass of protesters onto the Bridge roadway in order to keep the march moving towards its end on the other side of the East River, and, thus, protesters may have reasonably believed that officers were doing so whether that was their true motive or not.[14] It is hardly apparent that many of the protesters who eventually entered the Bridge roadway did so knowing that they were eschewing a concededly lawful alternative and taking an illegal turn onto that road.

Similar questions of fact undermine the dissent's conclusion that the officers on the scene all made objectively reasonable decisions. Contrary to the dissent's suggestion, it is not clear that "it was anything *but* reasonable for any officer – named or John Doe – to conclude that each of the plaintiffs on the roadway of the Bridge (among the thousands who did not take to the roadway and were not arrested) was obstructing traffic." (Dis. Op. at 25). At the time the district court decided the motion in question, essentially all of the defendants

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[14] The dissent states that neither the complaint, photos, or videos support this narrative. But this conclusion reflects the Rashomon-like quality of this case. Photos attached as Exhibits, B, C, and D to the Second Amended Complaint depict throngs of people pooling on Centre Street, the entrance to the bridge's pedestrian path, and the plaza to the east of City Hall. In each, members of the crowd stand shoulder to shoulder. And at 23:12, the video focuses on a crowd of people waiting at a standstill on Centre Street, looking around as if unsure where to go and what to do. Perhaps the dissent believes that the befuddled crowd had no reason to think that it should migrate onto the roadway. That may be true. But at this stage in the litigation it is but one view of facts that can be arranged and understood in multiple ways, including along the lines asserted by plaintiffs in their complaint.

were sued as John Does. While some officers participating in the arrest have now been identified, there is no clear record yet of who made the decision to arrest the protesters on the roadway, where the decisionmakers were stationed, what those decisionmakers observed, and what reasoning process they followed. We do not know why the officers at the front of the march chose to retreat onto the bridge, and what if anything they intended to convey.[15] As noted above, we share the dissent's expectation that many individual officers participating in the arrests, based on their perspective on the events, will have had every reason to believe that the protesters were acting unlawfully, and will have reasonably participated in the arrests. It does not follow, however, that those who made the command decisions for the police to retreat onto the Bridge (and thus to create a situation in which the protesters moved forward and eventually blocked traffic from other eastbound entrance ramps that may have been unimpeded before the police moved back), and then to arrest the protesters who predictably followed them, would have been similarly unaware that the protesters' actions had previously been condoned and that no adequate warning had been given. Based on the

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

allegations of the Complaint, and the confused images from the videos submitted, the experienced district judge correctly ruled that discovery should go forward.

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

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

CONCLUSION

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