United States Court of Appeals
for the Second Circuit

August Term 2019

(Argued: April 13, 2020 Decided: March 18, 2021)

No. 19-1360

MARY M. TARDIF,

Plaintiff-Appellant,

— v. —

CITY OF NEW YORK, SERGEANT THOMAS MCMANUS, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,

Defendants-Appellees,

NEW YORK CITY POLICE DEPARTMENT, DEPUTY COMMISSIONER JOHN O'CONNELL, DEPUTY INSPECTOR DANIEL MULLIGAN, DEPUTY INSPECTOR EDWARD WINSKI, POLICE OFFICER JAMES MCNAMARA, POLICE OFFICER ALENA AMINOVA, POLICE OFFICER KENDAL CREER, POLICE OFFICER MARSHA RUMBLE, POLICE OFFICER FELIX SCHMIDT, JOHN DOE, NYPD OFFICERS #1-13, JOHN DOE, NYPD OFFICERS #1-11, JOHN DOE, NYPD OFFICERS #1-9, JOHN DOE, NYPD OFFICER #11,

Defendants.[*]

[*] The Clerk of Court is respectfully directed to amend the caption as set forth above.

Before: LIVINGSTON, *Chief Judge*, PARKER and BIANCO, *Circuit Judges*.

Following confrontations with New York City police officers during Occupy Wall Street demonstrations at Union Square Park in the spring of 2012, Mary M. Tardif brought suit against the City of New York, the New York City Police Department, and various officers and officials. As relevant on appeal, Tardif alleged that (1) the City violated the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, in failing to reasonably accommodate her epilepsy by timely administering medication during her pre-arraignment detention following her arrest, and that (2) Sergeants Giovanni Mattera and Thomas McManus committed assault and battery under New York law when, during separate demonstrations, each officer used force against Tardif. The United States District Court for the Southern District of New York (Wood, *J.*) granted summary judgment to the City on Tardif's ADA claim and, following a six-day trial, a jury returned a verdict in favor of the City and the individual officers on all the remaining claims. We conclude that the district court properly granted summary judgment on the ADA claim because there was no evidence demonstrating the City delayed administering medication "by reason of" Tardif's disability, as required under the statute. With respect to the state law assault and battery claims, we hold that the district court correctly determined, contrary to Tardif's contention, that a justification instruction was warranted on those claims because New York law permits a police officer, even in a non-arrest situation, to use an objectively reasonable degree of force in the performance of a public duty, including crowd control. However, we conclude that the district court, in providing that justification charge, erroneously instructed the jury that it could consider an officer's subjective intent, which is contrary to New York's objective reasonableness inquiry. We further conclude that, although the error was prejudicial as it relates to the assault and battery claims involving Sergeant Mattera and warrants a new trial, the error was harmless as to the claims against Sergeant McManus given that his subjective good faith was never raised, or even at issue, during the trial.

Accordingly, we **AFFIRM** the judgment in part, **VACATE** in part, and **REMAND** the case for further proceedings consistent with this opinion.

STEFAN H. KRIEGER (Gabriella MP. Klein, Lindsay A. Wasserman, James P. Stevens, Law Students, *on the brief*), Hofstra Law Clinic, Maurice A. Deane School of Law at Hofstra University, Hempstead, NY; Gideon Orion Oliver, New York, NY, *on the brief*, *for Plaintiff-Appellant*.

JONATHAN A. POPOLOW, Assistant Corporation Counsel (Richard P. Dearing, Aaron M. Bloom, *on the brief*), *for* James E. Johnson, Corporation Counsel for the City of New York, New York, NY, *for Defendants-Appellees*.

JOSEPH F. BIANCO, *Circuit Judge*:

Following confrontations with New York City police officers during Occupy Wall Street demonstrations at Union Square Park in the spring of 2012, Mary M. Tardif brought suit against the City of New York ("the City"), the New York City Police Department ("NYPD"), and various officers and officials. As relevant on appeal, Tardif alleged that (1) the City violated the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, in failing to reasonably accommodate her epilepsy by timely administering medication during her pre-arraignment detention following her arrest, and that (2) Sergeant Giovanni Mattera ("Sergeant Mattera") and Sergeant Thomas McManus ("Sergeant McManus") committed assault and battery under New York law when, during

separate demonstrations, each officer used force against Tardif. The United States District Court for the Southern District of New York (Wood, *J.*) granted summary judgment to the City on Tardif's ADA claim and, following a six-day trial, a jury returned a verdict in favor of the City and the individual officers on all the remaining claims.

We conclude that the district court properly granted summary judgment on the ADA claim because there was no evidence demonstrating the City delayed administering medication "by reason of" Tardif's disability, as required under the statute. With respect to the state law assault and battery claims, we hold that the district court correctly determined, contrary to Tardif's contention, that a justification instruction was warranted on those claims because New York law permits a police officer, even in a non-arrest situation, to use an objectively reasonable degree of force in the performance of a public duty, including crowd control. However, we conclude that the district court, in providing that justification charge, erroneously instructed the jury that it could consider an officer's subjective intent, which is contrary to New York's objective reasonableness inquiry. We further conclude that, although the error was prejudicial as it relates to the assault and battery claims involving Sergeant Mattera

and warrants a new trial, the error was harmless as to the claims against Sergeant McManus given that his subjective good faith was never raised, or even at issue, during the trial. Accordingly, we affirm the judgment in part, vacate in part, and remand the case for further proceedings consistent with this opinion.

BACKGROUND

I. The March 17, 2012 Arrest and Epileptic Seizure[1]

In September 2011, protestors took to the streets of New York City's Financial District in a demonstration against rising economic inequality in America. Those protesting as part of Occupy Wall Street, as the movement became known, encamped in Zuccotti Park in Lower Manhattan until NYPD officers cleared the site in November 2011. On March 17, 2012, protestors returned to Zuccotti Park to commemorate the six-month anniversary of the Occupy Wall Street movement. In the early afternoon, Tardif and approximately thirty other protestors were participating in call-and-response chants on the north sidewalk of Zuccotti Park along Liberty Street. Speaking over a bullhorn, an NYPD official

[1] Because Tardif's ADA claim stemming from her March 17, 2012 arrest was dismissed at summary judgment, we must "accept as true the facts that were sworn to or undisputed," *Green v. Town of East Haven*, 952 F.3d 394, 407 (2d Cir. 2020), "examining the evidence in the light most favorable to, and drawing all inferences in favor of" Tardif, *Williams v. Annucci*, 895 F.3d 180, 186 (2d Cir. 2018) (internal quotation marks omitted).

ordered the crowd to clear the sidewalk because it was blocking pedestrian traffic. In response, Tardif and other protestors did not move but began jumping, yelling, and dancing in place. After additional orders to clear the sidewalk were ignored, police officers arrested multiple protestors, including Tardif.[2]

Following her arrest, Tardif was transported to a local precinct at around 3:30 p.m., where she was searched, processed, and placed in a holding cell. During her processing, Tardif informed Officer Victor Lara ("Officer Lara") that she had epilepsy and that her medication (Lamictal) was among the over 100 medical supplies in her backpack, which she carried as a volunteer "street medic" during the protests. App'x at 451. Officer Lara told Tardif that all of her personal items would need to be inventoried unless Tardif had someone pick up her belongings. Tardif agreed to have a friend collect her possessions and signed a form authorizing her friend to collect "all of her belongings," *id.* at 378, but informed Officer Lara that her friend was only authorized to collect her backpack and that her epilepsy medication should remain with her at the precinct. Her epilepsy medication was located in a small bag inside her backpack. At around 8:30 p.m., Tardif's friend arrived at the precinct to collect her belongings.

[2] Tardif was later charged and pleaded guilty to disorderly conduct in violation of New York Penal Law § 240.20.

After learning of Tardif's medical condition during processing, Officer Lara informed Tardif that she would be taken to the 20th Precinct, a special medical precinct where her medicine could be administered. Following NYPD procedures, Officer Lara filled out a medical treatment form used for detainees with medical needs, noting that Tardif had self-administered her epilepsy medication prior to her arrest. Officer Lara also assured Tardif that her medication would follow her to the 20th Precinct.

Tardif, who had a history of epileptic seizures, maintained a schedule where she took Lamictal at 10:00 a.m. and 10:00 p.m. daily. Tardif asserts that, at around 5:00 p.m., she told an unidentified officer that she needed to take her medication at 10:00 p.m., who responded, "Yeah, sure." *Id*. at 456. Tardif further alleges that, from 7:00 p.m. to 10:00 p.m., she repeatedly informed two unidentified male officers that she needed to take her medication, but they did not respond to her repeated requests for the medication.

At around 11:00 p.m., Tardif and other detainees were transferred to Manhattan Central Booking where an emergency medical technician ("EMT") determined whether the detainees had medical conditions requiring special attention. Tardif told an EMT about her epileptic condition, which, under NYPD

policy, required her to be medically cleared by a health professional before arraignment.

Then, at around 1:30 a.m., on what was then March 18, 2012, Officer Lara transported Tardif to Bellevue Hospital for medical clearance due to her history of epileptic seizures and use of epilepsy medication. After Officer Lara informed medical staff that Tardif required epilepsy medication, Tardif's attending physician provided her with a generic version of Lamictal (although her prescription was for Lamictal XR) and documented in her medical records that Tardif reported "no physical or medical complaints." *Id*. at 142. After being cleared medically, Tardif was ultimately transported by Officer Lara to the 20th Precinct around 4:30 a.m.

Officer Cystallee Otero ("Officer Otero"), the cell attendant that morning, was assigned to monitor Tardif and five other female detainees with medical needs. At around 7:00 a.m., after Officer Otero introduced herself, Tardif informed Officer Otero that she had epilepsy and needed her medication. Officer Otero responded that "she would speak to a supervisor to ensure that [Tardif] got [her] medication." *Id*. at 460. Officer Otero left and returned, telling Tardif that "it generally takes about an hour to get a prisoner medication" and that "they would

try to get [Tardif her] medication soon." *Id*. According to Tardif, Officer Otero checked on her "regularly" for the next three to four hours and "expressed her concern" for Tardif's epileptic condition. *Id*. During this time, Officer Otero also "repeatedly told [Tardif] that she was trying to obtain attention for [Tardif], but she was not getting a response from her superiors." *Id*.

In the early afternoon, Officer Otero observed Tardif begin to shake, lose consciousness, and collapse to the floor of her cell. Officer Otero retrieved the keys to the cell, turned Tardif on her side, and held her until she regained consciousness. Shortly after being dispatched, EMTs arrived at around 2:00 p.m. and transported Tardif to Bellevue Hospital by 2:15 p.m., where she received a dose of Lamictal and was again medically cleared for arraignment. Tardif was transferred back to the 20th Precinct, arraigned that evening, and released on her own recognizance.

II. The Two Police Confrontations on March 21, 2012

A. The Early Morning Incident

At trial, the parties testified regarding two confrontations between Tardif and NYPD officers that occurred during Occupy Wall Street demonstrations in the early morning and afternoon of March 21, 2012. The previous evening, around

eighty to one-hundred protestors encamped inside Union Square Park, and about seventy police officers in the area monitored the demonstration. Around midnight, a line of police officers moved southward through the park ordering, and sometimes physically moving, protestors out. After clearing the area, officers placed metal barricades along the park's southern stairs, with about forty police officers stationed on the inside of the barricades and the group of eighty to one-hundred protestors congregated outside along the 14th Street plaza. The remaining thirty or so officers stationed themselves about ten feet to the east and west of the protestors. Among these officers was Sergeant (now Lieutenant) Mattera, who was deployed to Union Square Park for crowd control.

After being removed from the park, the demonstrators, including Tardif, began shaking the metal barricades and yelling at the officers. At around 2:00 a.m., police officers told protestors that sanitation workers would confiscate and discard any unattended property. Daniel Shockley, a volunteer legal observer with a non-profit organization, and Stephanie Shockley, his wife, testified that officers moved into the crowd and, in some cases, confiscated items that people were standing next to and, in other cases, grabbed items out of people's hands and passed them

to sanitation workers for disposal. According to Tardif, one officer confiscated her backpack.

Tardif testified that, after confiscating unattended property, the officers on both sides of the protestors moved their lines inward, causing the protestors to back into each other. According to Tardif, an unidentified officer then came through the police line and shoved her in the chest with his baton, causing her to hit the ground. Tardif testified that, as she rose to her feet and "took a couple of steps," Sergeant Mattera "quickly" approached her and grabbed her shirt. *Id*. at 893-94. Tardif—then a 23-year-old, standing 5'1'', and weighing 175 pounds—testified that Sergeant Mattera "twisted and threw [her] away from him" onto the ground. *Id*. at 894. As Tardif hit the ground, her head struck the pavement, causing her to sustain a concussion and lose consciousness. Tardif testified that, prior to her interaction with Sergeant Mattera, she "had not put [her] hands on any other officer" and was six or seven feet from the closest officer when he grabbed her. *Id*. at 897.

Daniel Shockley testified similarly. He stated that, about ten feet from him, he observed Tardif "just standing with other protestors a few feet away from the police" and that he "saw an officer lunge out of the group of police officers and

grab" Tardif. *Id*. at 703-04. According to Shockley, Sergeant Mattera "spun [Tardif] around" and "threw her backwards." *Id*. at 704. He further testified that Tardif "landed on her back" and the back of her head "hit the sidewalk." *Id*. at 705-06. Shockley then stated that, after this confrontation, protesters began yelling for a medic, but Sergeant Mattera did not move toward Tardif or attempt to render any aid after pushing her.

For his part, Sergeant Mattera testified to a different version of events. According to Sergeant Mattera, Tardif suddenly appeared in his field of vision and "looked as if she was about to run into the back of [another] police officer." *Id*. at 797. It also "looked like she had her hands on the back of [a] police officer." *Id*. at 776. In an effort to "prevent the situation from further escalating," *id*. at 801, he "instinctively" grabbed Tardif and "pull[ed] her off to the side," *id*. at 797, causing her body to "twist[] around" toward him, *id*. at 781. Sergeant Mattera further testified that his "intention was to pull her off to the side and get her away from the police officer that she was running into," *id*. at 800, but "she was a lot heavier than [he] expected" and, during this motion, he "lost grip of her and she fell down," *id*. at 797. According to Sergeant Mattera, he did not intend for Tardif to fall to the ground and was unable to break her fall. He also testified that he did

not believe that he "could have used less force to accomplish [his] goal." *Id*. at 802-03. He further explained that he did not place Tardif under arrest because he "didn't feel like she knew what she was doing." *Id*. at 801. He thought "she was running up to see what was going on" and it was a "coincidence that . . . the one person that she ran behind was a uniformed police officer."[3] *Id*. at 801.

Shortly after the incident, an ambulance arrived and Tardif was thereafter transported to Beth Israel Hospital at 4:00 a.m., where she was diagnosed with and treated for a concussion, and given a soft cast and crutches for a sprained ankle.

B. The Afternoon Incident

After receiving treatment at Beth Israel Hospital, Tardif returned to Union Square Park later that same morning in order to confront the then-unidentified officer with whom she had the earlier incident. At that time, there were around forty to fifty protestors inside the park and an estimated sixty to seventy-five police officers stationed in the park for crowd control. According to Sergeant McManus, the protestors in the park were taunting the police.

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[3] Frame-by-frame video footage of the encounter, although not capturing the lead-up, shows Sergeant Mattera's left hand clenched onto the back of Tardif's shirt near her midsection. Tardif is subsequently seen falling backwards. Tardif lands several feet from where Sergeant Mattera contacted her. Protestors in the background can then be heard shouting for a medic. Daniel Shockley can be seen in the video watching the encounter as it transpired.

Sometime that afternoon, Sergeant McManus and ten to fifty other officers formed a police line around one of the protestors who was being arrested in order to prevent others from interfering with the arrest. Tardif testified that, when she arrived at the park, she walked up and down the police line with her crutches from a few feet away. According to Tardif, while she was moving, Sergeant McManus came "through the line . . . and pushed" her. *Id.* at 905. Tardif fell backwards off of her crutches and hit the ground, although two bystanders broke her fall. Tardif further testified that Sergeant McManus then "turned and walked back behind the police line." *Id.* at 907. Tardif was not arrested.

However, during Sergeant McManus's testimony, he categorically and repeatedly denied using any force against Tardif. In particular, Sergeant McManus explained that, while standing in the police line, he thought one protestor "was going to try to go by [him], and then [he] looked to [the] left and saw Mary Tardif on the ground." *Id*. at 825. Thus, according to Sergeant McManus, the first time he saw Tardif was when he "turned around and saw her

. . . on the floor" approximately ten to fifteen feet from him. *Id*. at 826. He emphasized that his hand never touched Tardif.[4]

III. Procedural History

Tardif brought this action in the Southern District of New York on June 13, 2013 and, following discovery, filed the operative complaint on January 15, 2016. As relevant here, Tardif alleged that the City violated the ADA in failing to reasonably accommodate her epilepsy by providing access to her epilepsy medication while in police custody on the morning of March 18, 2012. She also alleged that Sergeants Mattera and McManus, in the course of their employment as police officers, committed assault and battery against her in violation of New York law.

A. Summary Judgment

On June 1, 2016, the City moved for summary judgment on, *inter alia*, Tardif's ADA claim, her assault and battery claims against Sergeant McManus individually, and her *respondeat superior* claim against the City arising from the alleged assaults and batteries, in separate incidents, by Sergeants Mattera and

[4] During his testimony, Sergeant McManus was shown a photograph of the incident and he asserted that it showed at least three people between Sergeant McManus and Tardif as she was falling.

McManus.[5] Tardif opposed the motion. On February 6, 2017, the magistrate judge issued a report and recommendation on the City's motion.

On March 22, 2017, the district court conducted a *de novo* review of the report and recommendation, adopting some of the recommendations but not others. The district court, *inter alia*, granted summary judgment on the ADA claim, concluding that "[m]ere failure [to] attend to the medical needs of a person in custody does not in itself violate the ADA." Special App'x at 53. The district court denied summary judgment on the assault and battery claims against Sergeant McManus individually, finding that there was a genuine dispute of material fact as to whether his use of force was reasonable. The district court granted summary judgment on the *respondeat superior* claim against the City.

On August 23, 2017, following cross-motions for reconsideration, the district court adhered to its ruling on the ADA claim and explained that, to the extent Tardif was also attempting to assert the claim under a "reasonable accommodation" theory, there was no evidence that any failure by the City to provide Tardif with her epilepsy medication "was due to her disability." *Id*. at 64-

[5] Unlike Sergeant McManus, Tardif did not name Sergeant Mattera as a defendant in her lawsuit, but rather only sought to hold the City liable for his alleged assault and battery under a *respondeat superior* theory of liability.

65. The district court, however, granted Tardif's motion for reconsideration to the extent that it had granted summary judgment to the City with respect to the *respondeat superior* claim that was based on her assault and battery claims under New York law (which had survived summary judgment), and it allowed that *respondeat superior* claim to also proceed to trial. The district court also denied the defendants' motion for reconsideration on Tardif's underlying assault and battery claims against Sergeant McManus.

B. The Trial

As relevant here, three claims proceeded to trial arising from Tardif's two encounters with police on March 21, 2012, neither of which resulted in her arrest: (1) a Fourteenth Amendment excessive force claim under 42 U.S.C. § 1983 against Sergeant McManus individually; (2) assault and battery claims under state law against Sergeant McManus individually; and (3) a *respondeat superior* claim against the City predicated on the alleged assaults and batteries by Sergeant Mattera and Sergeant McManus in different incidents. Tardif also proceeded to trial on, *inter alia*, her *respondeat superior* claim predicated on additional assaults and batteries allegedly committed by several officers during a separate protest near Federal Hall in the Financial District on April 16, 2012, which resulted in her arrest.

With respect to the jury instructions, the district court gave a justification instruction for the assault and battery claims, over Tardif's objection, that allowed the jury to consider the reasonableness of the officer's force, including the officer's subjective intent. The justification instruction focused on the use of force to effect an arrest. During deliberations, in response to a juror note regarding the applicable standard in a non-arrest context, the district court provided the same justification instruction, again over Tardif's objection. The jury subsequently reached a verdict in favor of the City and the individual officers on all of Tardif's claims.

This appeal followed.

DISCUSSION

I. The ADA Claim

Tardif asserts that the City failed to provide a reasonable accommodation under the ADA by not adequately responding to her requests for medication for her disability (epilepsy) while she was in police custody prior to her arraignment, and that the district court erred in granting summary judgment for the City on that claim.

We review *de novo* a district court's grant of summary judgment, resolving all ambiguities and drawing all permissible factual inferences in favor of the non-moving party. *See Garcia v. Hartford Police Dep't*, 706 F.3d 120, 126-27 (2d Cir. 2013). Summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Where the non-movant bears the burden of proof at trial, the movant's initial burden at summary judgment can be met by pointing to a lack of evidence supporting the non-movant's claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

More than thirty years ago, Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The Act's first three titles prohibit discrimination against individuals with disabilities "in three major areas of public life": employment and hiring (Title I); public services, programs, and activities (Title II); and public accommodations (Title III). *Tennessee v. Lane*, 541 U.S. 509, 516-17 (2004).

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied

the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131(2). A "public entity" includes "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government."[6] *Id.* § 12131(1)(A)-(B).

To establish a claim under Title II, a plaintiff must demonstrate "(1) that she is a qualified individual with a disability; (2) that she was excluded from participation in a public entity's services, programs or activities or was otherwise discriminated against by a public entity; and (3) that such exclusion or discrimination was due to her disability." *Davis v. Shah*, 821 F.3d 231, 259 (2d Cir.

[6] The term "'discrimination,' which is not defined in Title II, may take its meaning from Title I." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273 n.7 (2d Cir. 2003) (citation omitted). Title I of the ADA states, in relevant part, that the term "discriminate against a qualified individual on the basis of disability" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . , unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation . . . of such covered entity." 42 U.S.C. § 12112(b)(5)(A).

2016) (internal quotation marks omitted). A plaintiff may base her Title II claim on any of three theories of liability: disparate treatment (intentional discrimination), disparate impact, or failure to make a reasonable accommodation. *See Fulton v. Goord*, 591 F.3d 37, 43 (2d Cir. 2009); *accord Nunes v. Mass. Dep't of Corr.*, 766 F.3d 136, 144-45 (1st Cir. 2014) (detailing the three theories).

Here, Tardif proceeded solely under a reasonable accommodation theory. There is no dispute that Tardif, who suffers from epilepsy, qualifies as an "individual with a disability" under Title II. *See* 42 U.S.C. § 12102(1)(A) (defining "disability" under the ADA as "a physical or mental impairment that substantially limits one or more major life activities of [an] individual"); 28 C.F.R. § 35.108(b)(2) (classifying epilepsy as a "[p]hysical or mental impairment"). Nor is there a dispute that the City constitutes a "public entity" under Title II. Moreover, it is clear that access to custodial medical services available throughout an arrestee's pre-arraignment detention constitutes "services, programs, or activities" of the City.[7] *See United States v. Georgia*, 546 U.S. 151, 157 (2006) (noting that "medical

[7] In her reply brief, rather than continuing to link the application of the ADA to custodial medical services, Tardif seeks to extend her legal claim by arguing more broadly that "a safe custodial environment" was the "benefit" that the City denied her under the ADA by failing to timely provide medication for her epilepsy. Reply Br. at 4-5. We decline to address the broader issue because "[i]ssues raised for the first time in a reply brief are generally deemed waived," *Conn. Bar Ass'n v. United States*, 620 F.3d 81, 91 n.13 (2d Cir.

care" constitutes part of a prison's "services, programs, or activities" (quoting 42 U.S.C. § 12132 and citing *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998))); *see also Wright v. N.Y. State Dep't of Corr.*, 831 F.3d 64, 72 (2d Cir. 2016) (stating that prison medical services constitute "programs, services, or activities" under Title II).

This case thus presents the following legal question for this Court to resolve: whether the alleged failure by the police to provide custodial medical services to Tardif in a timely and adequate manner prior to her arraignment, by itself, constitutes a failure to make a reasonable accommodation "by reason of" an individual's disability under the ADA. We hold that it does not.

In *Henrietta D. v. Bloomberg*, we addressed the proper standard of causation for a reasonable accommodation claim. 331 F.3d 261, 278-80 (2d Cir. 2003). There, a New York City agency dedicated to assisting HIV-positive residents routinely failed to provide such residents with adequate access to public assistance benefits and services due, in part, to "systemic breakdowns" and bureaucratic dysfunction. *Id.* at 264, 273, 278. In determining whether plaintiffs had established that the

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2010), but note that whether Title II applies more broadly in arrest situations has divided our sister circuits, *see City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1772-74 (2015) (dismissing the question as improvidently granted); *see also id.* at 1778-79 (Scalia, J., concurring in part and dissenting in part) (noting circuit split).

agency had denied them public services "by reason of" their disabilities where there were multiple potential causes of the denial, we held that, "[i]n assessing whether one cause among many constitutes [a] proximate cause," *id.* at 278, plaintiffs must establish that their "disabilities were a substantial cause of their inability to obtain services," rather than "so remotely or insignificantly related to their disabilities as not to be 'by reason' of them," *id.* at 279. "Quite simply," we concluded, "the demonstration that a disability makes it difficult for a plaintiff to access benefits that are available to both those with and without disabilities is sufficient to sustain a claim for a reasonable accommodation." *Id.* at 277.[8]

Applying that standard here, there is no evidence (or even an allegation) that Tardif's disability made it difficult in any way for her to access benefits—namely, medical services—that were available to all pretrial detainees. In other words, Tardif's epilepsy did not interfere with her ability to access medical services, and not even her operative complaint alleges a connection between the City's alleged delay in administering epilepsy medication and any disability-based reason on the City's part. In the complete absence of evidence that Tardif's

[8] Although "the basic analytical framework of the ADA includes . . . a comparative component," "[i]t does not follow . . . from this framework that a plaintiff must also demonstrate disparate impact in all cases," including reasonable accommodation claims. *Henrietta D.*, 331 F.3d at 276.

epilepsy caused a deprivation of medical services, the fact that her disability was her motivation for seeking out such services does not suddenly transform her allegations regarding the inadequate medical treatment into a "failure to accommodate" claim. At its core, the issue here is not whether Tardif was denied medical services *because* she has a disability. Instead, her claim relates solely to whether she received adequate medical treatment in police custody *for* her disability, and such a claim is not cognizable under the ADA. To hold otherwise would allow inmates to litigate in federal court virtually every medical malpractice claim arising in a custodial setting under the auspices of the ADA. Such a result is entirely at odds with the statutory language of Title II and its purpose.[9]

Our holding is consistent with prior case authority in this Circuit addressing analogous situations. For example, in *Doe v. Pfrommer*, we held that where an individual challenges "the substance of the services provided"—rather than

[9] We note that this holding does not leave pretrial detainees, such as Tardif, without a remedy; rather, such a claim for a denial of medical treatment can be pursued under 42 U.S.C. § 1983, as a due process claim under a deliberate indifference standard (as Tardif alternatively asserted in her complaint). *See, e.g.*, *Weyant v. Okst*, 101 F.3d 845, 856 (2d Cir. 1996) ("[T]he official custodian of a pretrial detainee may be found liable for violating the detainee's due process rights if the official denied treatment needed to remedy a serious medical condition and did so because of his deliberate indifference to that need.").

"illegal discrimination"—there is no ADA violation. 148 F.3d 73, 84 (2d Cir. 1998). Similarly, in *United States v. University Hospital*, we noted that "where medical treatment is at issue, it is typically the [disability] itself that gives rise to, or at least contributes to, the need for services" and thus held that Section 504 of the Rehabilitation Act "prohibits discrimination against a [disabled] individual only where the individual's [disability] is unrelated to, and thus improper to consideration of, the services in question."[10] 729 F.2d 144, 156 (2d Cir. 1984). Moreover, in *Cushing v. Moore*, we held that the Rehabilitation Act "does not create a cause of action based on a [disability] that is directly related to providing the very services at issue." 970 F.2d 1103, 1109 (2d Cir. 1992); *see also Schnauder v. Gibens*, 679 F. App'x 8, 10 (2d Cir. 2017) (summary order) (rejecting the assertion by an inmate that "denial of timely and meaningful medical treatment for his [broken] nose constituted a failure to provide a 'reasonable accommodation'").[11]

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[10] "Because the standards imposed by Title II on public entities are generally equivalent to those of § 504" of the Rehabilitation Act, "we treat claims under the two statutes identically in most cases." *Davis*, 821 F.3d at 259 (internal quotation marks omitted).

[11] Tardif's reliance on our decisions in *Wright*, 831 F.3d at 64, as well as *McGugan v. Aldana-Bernier*, 752 F.3d 224 (2d Cir. 2014), is entirely misplaced. *Wright* involved a claim that, because of the plaintiff's mobility issues resulting from his disabilities, the prison denied the plaintiff meaningful access to programs and services that were routinely accessed by other inmates. 831 F.3d at 73. In *McGugan*, we addressed a claim of intentional discrimination, and held that an actionable Rehabilitation Act claim existed for the denial of medical treatment "dictated by bias rather than medical knowledge." 752 F.3d at 231.

Several of our sister circuits have reached the same conclusion. *See, e.g.*, *Simmons v. Navajo County*, 609 F.3d 1011, 1022 (9th Cir. 2010) ("[T]o the extent that the [plaintiffs] argue that [the jail] violated the ADA by depriving [the inmate] of 'programs or activit[ies] to lessen his depression,' such argument is not actionable under the ADA. The ADA prohibits discrimination because of disability, not inadequate treatment for disability." (fifth alteration in original)), *overruled in part on other grounds by Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (*en banc*); *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996) ("[T]he Act would not be violated by a prison's simply failing to attend to the medical needs of its disabled prisoners. . . . The ADA does not create a remedy for medical malpractice.").

Tardif attempts to support her position by relying substantially on *Kiman v. New Hampshire Department of Corrections*, where a former inmate asserted violations of Title II based upon the prison's alleged failure to properly treat his disease (amyotrophic lateral sclerosis), and failure to accommodate his resulting disability. 451 F.3d 274, 276 (1st Cir. 2006). We find Tardif's reliance on *Kiman*

Therefore, neither of these holdings can be construed to eliminate the statutory requirement, in a reasonable accommodation case, that a plaintiff demonstrate that the treatment or services were denied because of a disability, rather than for a disability. In fact, in *McGugan*, we even warned against allowing "plaintiffs an almost unfettered ability to re-frame claims of medical malpractice into federal claims of discrimination on the basis of disability." *Id*. at 234.

unpersuasive. As a threshold matter, we note that the First Circuit affirmed summary judgment on the portion of the plaintiff's claim related to the prison's "actions regarding his diagnosis, medical consultations, physical therapy, or medical dosages" because the plaintiff failed to establish that such actions were "so unreasonable as to demonstrate that they were discriminating against him *because* of his disability." *Id*. at 285 (emphasis added). Moreover, although the court allowed the claim to survive summary judgment as to the alleged failure to provide adequate medications, the court noted that there was evidence that the corrections officers "routinely" failed to provide those medications "throughout [the plaintiff's] time in prison." *Id*. at 286. Thus, the court's reasoning suggested that, under the facts of that case, the "outright denial of medical services" to a disabled inmate over several months "despite his repeated requests" could allow the inmate to demonstrate at trial that such denial was because of his disability. *Id*. at 286-87. Here, by contrast, there is no evidence that the delay in providing Tardif's medication was more than an isolated and temporary incident; nor is there any indication that the City systematically delays or denies pre-arraignment detainees reasonable medical services for their disabilities.[12] Thus, *Kiman* is

[12] In fact, notwithstanding the alleged denial of medication, there is uncontroverted evidence of the City's utilization of various standard procedures to address Tardif's

factually distinguishable. In any event, to the extent that the language in *Kiman* could be construed as providing a more general avenue to sue under the ADA any time there is an allegation by an inmate of a denial of medical services without the support of a "medical 'judgment'" by the prison, *Kiman*, 451 F.3d at 287, we respectfully disagree with such a holding.

Finally, apparently recognizing the deficient record, Tardif attempts to shift her burden to the City, arguing that the City's unexplained inaction following her requests for medication is sufficient evidence for her claim to go to a jury. But this *unexplained* failure to provide medication, by itself, does not allow for a reasonable inference that it was "by reason of" the individual's disability. At summary judgment, it is not the City's burden to proffer a justification for the delay or denial where the record is otherwise silent. Instead, Tardif bears the burden of

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disability. Officer Lara documented Tardif's medical condition upon learning of her epilepsy. The City also transported Tardif to Manhattan Central Booking where she spoke with EMTs regarding her condition. Tardif was then transferred to Bellevue Hospital where medical professionals evaluated her condition. After Officer Lara informed medical staff that Tardif required epilepsy medication, her attending physician provided her with a generic version of Lamictal (although her prescription was for Lamictal XR), documented in her medical records that Tardif reported "no physical or medical complaints," and medically cleared her for arraignment. App'x at 142. The City then, as Tardif concedes, "transported her to the special medical precinct, precisely so she could access all the benefits available to those with medical conditions." Reply Br. at 5. Thus, despite Tardif's efforts to classify this case as involving the "knowing failure to provide *any* services" for her disability, *id*. at 8 (emphasis added), it is, at best, a claim of inadequate medical services due to an alleged delay in providing medication.

establishing causation at trial, and it was thus entirely proper for the City to merely note the lack of evidence of causation supporting her reasonable accommodation claim. *See Celotex Corp.*, 477 U.S. at 325. Because Tardif was unable to point to any facts in the record from which a reasonable jury could conclude that Tardif's epilepsy substantially caused the City's delay in administering medication, the district court correctly concluded that "[m]ere failure [to] attend to the medical needs of a person in custody does not in itself violate the ADA" under a reasonable accommodation theory. Special App'x at 53.

In sum, the record presents no facts from which a reasonable jury could infer that there was a disability-based reason for the delay in Tardif's medical services. Any shortcomings that existed in the provision of medical services *for* Tardif's epilepsy provide no basis to conclude that she was denied meaningful access to such services *because of* her disability, and thus the ADA claim fails as a matter of law. Accordingly, the district court properly granted summary judgment on the ADA claim.

II. The Assault and Battery Claims

With respect to her assault and battery claims relating to Sergeants Mattera and McManus, Tardif argues that she is entitled to a new trial on several grounds.

As to the trial testimony, Tardif argues that the district court erred in restricting the questions that could be asked on her direct examination regarding her personal background. Tardif's remaining two grounds focus on the district court's instructions to the jury on the defense of justification—that is, assessing the reasonableness of the officer's use of force. In particular, Tardif contends that a justification defense by a police officer is applicable under New York law only in an arrest situation and, thus, the district court erred in applying that instruction to the use of force by officers against her on March 21, 2012, because no arrest was being made. Moreover, Tardif asserts that the justification instruction erroneously advised the jury that the officer's subjective intent was a permissible factor in assessing the reasonableness of the officer's conduct.

As set forth below, the district court did not abuse its discretion in sustaining objections to certain questions regarding Tardif's background. We also conclude that the district court correctly determined that a justification defense exists under New York law for police officers utilizing force in a non-arrest situation. However, as the defendants concede, the instruction given to the jury was erroneous because it suggested that there was a subjective element to the reasonableness analysis, even though New York law (like federal law) uses an objective standard to assess

an officer's use of force. We further conclude that, although the error was harmless as to the claim against Sergeant McManus (and the related *respondeat superior* claim against the City arising from Sergeant McManus's alleged conduct) because justification was not at issue with respect to the claims against him, the error likely prejudiced Tardif as to the jury's assessment of Sergeant Mattera's conduct and warrants a new trial on the *respondeat superior* claim against the City arising from his alleged assault and battery.

A. The Evidentiary Challenge

Tardif contends that, during trial, the district court erred in limiting testimony regarding her personal background. Specifically, she contends that such testimony was necessary to demonstrate her commitment to social justice in order to rebut the City's opening argument that she had exaggerated her story and was only suing for the money.

In the City's opening argument, defense counsel contended that Tardif was "inventing and exaggerating" the events surrounding each of her claims at trial, App'x at 679, and that she "want[ed the jury] to give her money for those inventions and exaggerations," *id*. at 686. During Tardif's direct examination, in addition to other background testimony regarding her involvement in the Occupy

Wall Street movement, her counsel attempted to elicit testimony regarding the fact that Tardif adopted two children from Honduras who were refugees, that Tardif herself was adopted from Peru, and that she worked as a sign language interpreter for hearing-impaired children. Following multiple, sustained objections by defense counsel, the district court at side bar instructed Tardif's counsel that it did not "want [him] to elicit anything that plays upon the sympathy of jurors" but instead "to get right to the heart of matters." *Id*. at 879.

At the end of Tardif's direct testimony, plaintiff's counsel submitted an offer of proof as to how additional background testimony was necessary in order to rebut the City's theory that her lawsuit was simply motivated by money. The district court declined the request to elicit such additional evidence, concluding that Tardif's testimony had made clear "that her motives are pure and that she's trying to make the world a better place" by making sure that "people who are arrested [are] treated appropriately." *Id.* at 925-26. Tardif now challenges that evidentiary ruling.

We review evidentiary rulings for abuse of discretion and reverse only for manifest error. *See Manley v. AmBase Corp.*, 337 F.3d 237, 247 (2d Cir. 2003). Although relevant evidence is generally admissible, Fed. R. Evid. 402, district

courts "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence," Fed. R. Evid. 403. Background evidence may provide necessary context to a witness's substantive testimony, but district courts have "wide discretion concerning the admissibility of background evidence." *United States v. Blackwell*, 853 F.2d 86, 88 (2d Cir. 1988).

Here, we conclude that the district court operated well within its broad discretion in limiting the scope of the testimony regarding Tardif's personal background. More specifically, the district court determined that the proffered testimony—namely, Tardif's adoption of two refugee children, her own adoption as a child, and her work as a sign language interpreter for hearing impaired children—might prejudice the jury by playing upon their sympathies and would waste time. Moreover, to the extent Tardif sought to introduce these details of her "social justice commitment" to rebut the City's accusation that she was motivated by money in making the allegations in the lawsuit, App'x at 879, Tardif was permitted to testify to other facts establishing her concerns for social justice. For example, Tardif testified about the purpose of the Occupy Wall Street movement,

why she became involved with the movement, how she remains a member of Occupy Wall Street, how she feels about being part of the movement, why she continued to participate in protests after November 2011, and how she contributed to the protests by "tend[ing] to" protestors injured during marches as a "street [medic]." *Id*. at 884-85. The district court also, over defense counsel's objection, allowed Tardif to testify as to why she brought this lawsuit. *See id*. at 924 ("I had originally wanted to make things better for people in custody that had disabilities so that there would be a standard protocol to treat people instead of just throwing them to the side."). Thus, contrary to Tardif's argument, the district court permitted Tardif, through her testimony, to rebut any suggestion by the City that she brought this action for financial reasons. Under these circumstances, it is well within a district court's discretion to determine, under Rule 403, that the probative value of any additional background testimony is substantially outweighed by the danger of unfair prejudice to the defendants because of juror sympathy and by the additional time that would be necessary to explore that background, especially where the district court concluded that there had already been "so much wasted time from [Tardif's] side." *Id.* at 879. Accordingly, we conclude that this

evidentiary determination by the district court was not an abuse of discretion and provides no basis for a new trial.

B. Justification under New York Law

Tardif also contends that the district court erred by instructing the jury on the availability of a justification defense to assault and battery claims under New York law. "We review a claim of error in the district court's jury instructions *de novo* . . . ." *Sheng v. M&TBank Corp.*, 848 F.3d 78, 86 (2d Cir. 2017) (quoting *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 152 (2d Cir. 2014)). "A jury charge is erroneous if it misleads the jury as to the correct legal standard, or if it does not adequately inform the jury of the law." *Dancy v. McGinley*, 843 F.3d 93, 116 (2d Cir. 2016) (quoting *Hathaway v. Coughlin*, 99 F.3d 550, 552 (2d Cir. 1996)).

In describing the purported error in this case, Tardif takes the position that under state law, "any force used" in a non-arrest context "*must* give rise to a claim for assault and battery," and no justification is permitted. Appellant's Br. at 38-39. Contrary to Tardif's contention, New York courts have never articulated such a sweeping theory of assault-and-battery liability and we decline to do so here. Instead, as set forth below, we hold that New York law—consistent with federal Section 1983 excessive force jurisprudence—permits a police officer to use an

objectively reasonable degree of force in the performance of a public duty, including a non-arrest situation.

The elements of New York assault and battery and Section 1983 excessive force claims are "substantially identical." *Posr v. Doherty*, 944 F.2d 91, 94-95 (2d Cir. 1991). Under New York law, civil assault "is an intentional placing of another person in fear of imminent harmful or offensive contact." *Charkhy v. Altman*, 678 N.Y.S.2d 40, 41 (1st Dep't 1998) (internal quotation marks omitted); *accord Girden v. Sandals Int'l*, 262 F.3d 195, 203 (2d Cir. 2001). Civil battery "is an intentional wrongful physical contact with another person without consent." *Charkhy*, 678 N.Y.S.2d at 41 (internal quotation marks omitted); *accord Girden*, 262 F.3d at 203. To succeed on assault or battery claims in the law enforcement context, a plaintiff must also demonstrate that the defendant officer's conduct "was not reasonable within the meaning of the New York statute concerning justification of law enforcement's use of force in the course of their duties." *Nimely v. City of New York*, 414 F.3d 381, 391 (2d Cir. 2005); *accord Jamison v. Metz*, 541 F. App'x 15, 20 (2d Cir. 2013) (summary order).

New York Penal Law § 35.30 establishes a justification defense for an officer's use of force in the performance of several enumerated public duties. The statute states, in relevant part, that:

> A police officer . . . may use physical force when and to the extent he or she reasonably believes such to be necessary to effect [an] arrest, or to prevent [an] escape from custody, or in self-defense or to defend a third person from what he or she reasonably believes to be the use or imminent use of physical force.

N.Y. Penal Law § 35.30(1).[13] Section 35.30(1) "requires the jury to conduct precisely the same analysis as does the reasonableness standard" under the Fourth Amendment. *Heath v. Henning*, 854 F.2d 6, 9 (2d Cir. 1988). Indeed, per the text of the statute, the use of physical force "when and to the extent [the officer] reasonably believes such to be necessary," is the "functional equivalent" of an objective reasonableness standard. *Id.* (alteration in original) (quoting N.Y. Penal Law § 35.30(1)). Although Tardif argues that this justification defense is limited to

[13] Although codified in New York's penal law compilation, New York courts have applied Section 35.30 to both civil and criminal claims against police officers. *Compare Brunelle v. City of New York*, 702 N.Y.S.2d 648, 648-49 (2d Dep't 2000) (applying the justification statute to civil action against the City by police officer seeking to recover damages from injury sustained from fellow officer in the course of performing their duties), *with People v. Colecchia*, 674 N.Y.S.2d 10, 11 (1st Dep't 1998) (applying the justification statute to manslaughter charge against police officer).

the circumstances enumerated in Section 35.30(1), and thus cannot apply to a non-arrest situation involving crowd control, we disagree for several reasons.

First, we have never limited public authority defenses under New York law to arrest situations. To the contrary, as noted above, we held in *Nimely* that, even though justification is a defense under New York Penal Law, a lack of justification is part of a plaintiff's burden of demonstrating the unreasonableness of an officer's action "in the course of their duties." 414 F.3d at 391.

Second, both the penal law and case authority in New York make clear the limited grounds for justification articulated in Section 35.30 are not meant to be exhaustive as it relates to any police action. With respect to the statutory framework, New York Penal Law § 35.05(1) states, in relevant part, that "use of physical force . . . is justifiable and not criminal when . . . [it] is performed by a public servant in the reasonable exercise of his *official powers, duties or functions*." *Id*. (emphasis added); *see also People v. Mattison*, 428 N.Y.S.2d 355, 357 (3d Dep't 1980) ("[Section 35.05(1)] is chiefly meant to afford limited protection when provisions defining malum prohibitum offenses are violated in the performance of official responsibilities.").[14] The New York Court of Appeals likewise, without

[14] Tardif's assertion that the New York Pattern Jury Instructions ("PJI") on a justification defense support her interpretation of New York law is also unavailing. Appellant's Br.

any reference to limitations on the use of force to arrest situations, has described the analysis of a police officer's use of force as more broadly focusing upon whether such force was "more than necessary under all the circumstances." *Jones v. State*, 33 N.Y.2d 275, 280 (1973) (analyzing force used by corrections officer during a riot at a prison under the same standard as would be used by the police in "making an arrest, maintaining someone in custody or investigating a traffic infraction"); *see also Kline v. State*, 278 N.Y. 615, 616 (1938) (finding that liability existed for an assault on plaintiff by troopers during a clash with a group of people on a highway trying to block a truck, where the force was "without cause or provocation and unjustifiable"); *Disla v. City of New York*, 986 N.Y.S. 2d 463, 465 (1st Dep't 2014) (stating that "battery committed in the performance of a public duty" requires "excessive force").

Pursuant to this legal framework, New York courts have dismissed assault and battery claims in non-arrest situations where it was clear from the record that

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at 37 (citing 2A N.Y. PJI–Civil 3:4). The pattern instruction is based upon New York Penal Law § 35.30 and discusses the circumstances enumerated in that section, including an arrest. However, nothing in the PJI suggests that such situations are exclusive. To the contrary, the instruction at issue is broadly entitled "Battery Committed in *Performance of Public Duty or Authority*." 2A N.Y. PJI–Civil 3:4 (emphasis added). Moreover, the comment for this instruction also broadly references "performance of a public duty," which would undoubtedly include crowd control by a police officer. *See id.* cmt. at 24-25.

the use of force was justified and reasonable. In *Harris v. City of New York*, for example, the Second Department affirmed the dismissal of assault and battery claims because officers, while executing a search warrant for the plaintiff's house, used "reasonable force to effectuate the detention of the occupants" by handcuffing them for the duration of the search. 62 N.Y.S.3d 411, 413-14 (2d Dep't 2017) (internal quotation marks omitted). Likewise, in *Ahmad v. City of New York*, the First Department held that "minor contact between plaintiff's and the officer's hands did not constitute excessive force," where an officer effecting a traffic stop on foot made contact with the plaintiff while reaching into the car for the gear shift.[15] 101 N.Y.S.3d 48, 49 (1st Dep't 2019).

Finally, we note that Tardif's position would render a police officer incapable of performing some of his or her most basic functions and responsibilities using reasonable force, without being subject to civil liability for

[15] In this regard, New York law is entirely consistent with the scope of the analysis of a police officer's use of force under the Fourth Amendment in both arrest and non-arrest situations. More specifically, in *Graham v. Connor*, the Supreme Court recognized that, where the use of force occurs "in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen," courts should analyze the reasonableness of the use of force, which generally requires "a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." 490 U.S. 386, 395-96 (1989) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)).

assault or battery. In other words, if an officer's ability to lawfully use any force is constrained to the narrow contours of Section 35.30, a police officer would have no authority to make any degree of physical contact in the performance of a plethora of non-arrest duties, such as patting down a suspect during a traffic stop, stopping a distracted pedestrian from walking into oncoming traffic, or engaging in basic crowd control on New Year's Eve in a packed Times Square or at a large demonstration. Thus, Tardif's interpretation of New York law is not only contrary to the relevant case authority, but also defies logic from a practical standpoint. *See Jones v. Parmley*, 465 F.3d 46, 56-57 (2d Cir. 2006) (Sotomayor, J.) ("It is axiomatic, for instance, that government officials may stop or disperse public demonstrations or protests where 'clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears.'" (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940))); *see also Edrei v. Maguire*, 892 F.3d 525, 541-42 (2d Cir. 2018) ("Our sister circuits and district courts in this Circuit have routinely applied excessive force principles to crowd control situations. Training our focus on controlling authority, we see that this Court has repeatedly emphasized that officers engaging with protesters must

comply with the same principles of proportionality attendant to any other use of force." (citations omitted)).

Accordingly, although neither of the two police encounters at issue on March 21, 2012 involved Tardif's arrest, we hold that the district court correctly determined, under New York law, that the jury should be given an instruction regarding justification in connection with Tardif's assault and battery claims involving Sergeants Mattera and McManus as it related to their alleged use of force on that date.

C. The Justification Instruction

Tardif further argues that the justification instruction that the district court provided to the jury on the assault and battery claims was erroneous because it included a subjective element in the jury's assessment of the reasonableness of the officers' use of force. We agree.

When charging the jury regarding the assault and battery claims prior to the commencement of deliberations, the district court instructed that assault is "the intentional placing of another person in fear of imminent harmful or offensive conduct," and that battery occurs when a person "intentionally touches another person without that person's consent and thereby causes an offensive bodily

contact." App'x at 1076-77. The district court explained that, when an alleged assault or battery occurred during a lawful arrest, a plaintiff must prove that the police conduct or use of force was "unreasonabl[e] under the circumstances." *Id*. at 1077; *see also id.* at 1078 ("If the alleged battery occurred during a lawful arrest, plaintiff must also prove that the officers' use of force was unreasonable in light of the circumstances."). The district court further instructed—over Tardif's objection—that, in determining whether the officers "acted unreasonably under the circumstances," the jury "may consider the need for the application of force, the relationship between the need and the amount of force that was used, the extent of any injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline, or maliciously for the very purpose of causing harm." *Id*. at 1077 (instruction concerning assault); *see also id.* 1078 (same with respect to battery). The district court failed to provide additional instructions regarding assault and battery claims in a non-arrest context.

On the morning the deliberations began, the jury sent a note, requesting to view all video evidence involving Sergeant Mattera at standard speed and in slow motion, and asking whether there is "anything unique about a police [officer] carrying out a law enforcement function (but not a lawful arrest) that should be

considered when assessing an assault and battery claim." *Id*. at 1203. The district court—again over Tardif's objection—responded with a supplemental instruction that repeated the initial charge that was given for an arrest situation:

> The answer to your question is that because police have the obligation to maintain the public peace and to keep individuals safe, you can determine whether they acted reasonably, and in determining that . . . you may consider the need for the application of force, the relationship between the need and the amount of force that was used, the extent of any injury inflicted, whether the force was applied in good faith—in a good faith effort to maintain or restore discipline—or maliciously for the very purpose of causing harm.

Id. at 1105. The district court's instruction was based upon our decision in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973), *partially rejected by Graham v. Connor*, 490 U.S. 386 (1989), where we addressed the relevant factors for a Fourteenth Amendment-based excessive force analysis for pretrial detainees.

We conclude, as the City concedes, that the subjective intent language in the initial instruction, as well as in the supplemental instruction, was erroneous. It is well settled under New York law, with respect to assault and battery claims, that the use of force by a police officer is analyzed "under the Fourth Amendment and its standard of objective reasonableness." *Hernandez v. Denny's Corp*., 114 N.Y.S.3d 147, 151 (4th Dep't 2019) (internal quotation marks omitted); *accord Harris*, 62 N.Y.S.3d at 414. Thus, New York law is consistent with the Supreme Court's

Fourth Amendment jurisprudence, as set forth in *Graham*, which explicitly rejected the argument that the use of *Glick*'s "malicious and sadistic" factor is "merely another way of describing conduct that is objectively unreasonable under the circumstances." 490 U.S. at 397. The *Graham* Court explained that "[w]hatever the empirical correlations between 'malicious and sadistic' behavior and objective unreasonableness may be, the fact remains that the 'malicious and sadistic' factor puts in issue the subjective motivations of the individual officers, which our prior cases make clear has no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment." *Id*. Thus, the Court emphasized that "[t]he Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances, and subjective concepts like 'malice' and 'sadism' have no proper place in that inquiry." *Id*. at 399; *accord Heath*, 854 F.2d at 9 ("There is no room for consideration of the officer's motives or intent under this standard . . . and no requirement that an officer have acted with an improper motive in order to have acted unreasonably.").[16]

[16] We also note that, even with respect to excessive force claims under the Fourteenth Amendment (from which the *Glick* framework derived), the Supreme Court has limited the application of the *Glick* factors and clarified the applicable standard for such claims brought by pretrial detainees. More specifically, in *Kingsley v. Hendrickson*, although noting that the fourth *Glick* factor (*i.e.*, a malicious and sadistic purpose to cause harm) "might help show that the use of force was excessive," 576 U.S. 389, 402 (2015), the

In short, the jury should not have been told that, in assessing the reasonableness of the police officer's use of force, they could consider "whether the force was applied in good faith—in a good faith effort to maintain or restore discipline—or maliciously for the very purpose of causing harm." App'x at 1105 (supplemental jury instruction); *see also id.* at 1077-78 (initial jury instruction). Once it is demonstrated that an individual police officer intended to use force of some kind, the subjective motivations of that officer simply have no bearing on whether the particular degree of force used is unreasonable and excessive under the Fourth Amendment or New York law. Accordingly, because the district court's initial instruction and supplemental instruction on the assault and battery claims incorporated a subjective element, those instructions were erroneous.

C. Harmless Error Analysis

Although conceding that the district court incorrectly charged the jury on the officers' subjective intent, the City argues that Tardif has failed to demonstrate sufficient prejudice warranting a new trial on her assault and battery claims. We

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Supreme Court emphasized that "the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one," *id*. at 397; *see also Edrei*, 892 F.3d at 537 (describing *Kingsley*'s "new formulation" of an excessive force claim under the Fourteenth Amendment as "a modest refinement of *Glick*'s four-factor test" because "our own precedents . . . have repeatedly assessed excessive force claims without looking to subjective intent").

hold that the charging error prejudiced Tardif's assault and battery claims involving Sergeant Mattera (as asserted against the City), but that the error was harmless as to her claim against Sergeant McManus, as well as the corresponding *respondeat superior* claim against the City.

An erroneous instruction requires a new trial if we find that the error is not harmless. *See Uzoukwu v. City of New York*, 805 F.3d 409, 418 (2d Cir. 2015). Error in a jury instruction is not harmless "when an appellant can show that the instructions considered as a whole prejudiced [her]." *Holzapfel v. Town of Newburgh*, 145 F.3d 516, 521 (2d Cir. 1998); *see also Cobb v. Pozzi*, 363 F.3d 89, 118 (2d Cir. 2003) (erroneous instruction not harmless when "th[e] evidence could support a jury's reaching the opposite conclusion" had it been instructed correctly).

With respect to Sergeant Mattera, there are several factors that collectively preclude us from finding that the erroneous instruction was harmless. As a threshold matter, this is not a situation where the jury was initially provided with a correct instruction, and the district court then misspoke in re-stating the law at some other juncture in the charge. The jury was given the erroneous instruction on subjective intent during the initial charge when the elements of the assault and

battery claims were set forth, and that same erroneous instruction was reiterated in response to a jury note. Thus, the jury was *never* provided with the correct instruction on those claims. The City points to a portion of the initial charge where the district court discussed how the plaintiff must show that "any force used was objectively unreasonable" and "without regard to his underlying intention or motivation." App'x at 1069. Importantly, however, that instruction related to the excessive force claim under Section 1983 against Sergeant McManus. We have no reason to believe that the jury would have assumed that such language would apply to a different defendant on different claims, especially where the actual instruction on the assault and battery claims not only omitted the critical language as it relates to this issue (that is, "objectively" and "without regard to his underlying intention or motivation") but also affirmatively told them that good faith *did* apply to those claims. *See, e.g.*, *Hudson v. New York City*, 271 F.3d 62, 69-70 (2d Cir. 2001) (holding that, even though the district court referenced "objective reasonableness" at some point in its instruction, it did not cure the defect caused by earlier reference to defendant's intent because it made it "confusing as to whether intent to do wrong was required to find a violation of [plaintiff's] Fourth

Amendment rights"). Therefore, we disagree with the City's assessment that the error in the instruction was "technical[]" or "minor." Appellee's Br. at 2, 18.

Moreover, we need not guess as to whether the jury was focused upon this particular instruction during their deliberations as it relates to the assault and battery claims involving Sergeant Mattera, because there was a note during deliberations that makes that focus abundantly clear. As noted above, at around 10:20 a.m. on the first day of deliberations, the jury sent a note, requesting to view all video evidence involving Sergeant Mattera at standard speed and in slow motion, and asking whether there is "anything unique about a police [officer] carrying out a law enforcement function (but not a lawful arrest) that should be considered when assessing an assault and battery claim." App'x at 1203. Tellingly, because the initial charge only referenced the reasonableness standard in the context of an arrest situation, the jury astutely sent this note asking what standard applied when the officer used force in a non-arrest situation, as they were simultaneously seeking to review evidence regarding Sergeant Mattera. In response to that note, the district court again repeated the erroneous instruction, thus advising the jury that the analysis included "whether the force was applied in good faith—in a good faith effort to maintain or restore discipline—or

maliciously for the very purpose of causing harm." *Id*. at 1105. The district court then replayed the requested videos for the jury. At around 2:15 p.m., after several additional hours of deliberation, the jury again requested to review video recordings of the incident with Sergeant Mattera and also requested to review transcripts of both Sergeant Mattera's and Tardif's testimony regarding their encounter. After viewing the video of the encounter with Sergeant Mattera multiple times and conducting additional deliberations over the course of the next ninety minutes, the jury reached a verdict in favor of the City and the individual defendants. In short, the substance and timing of the note, in the overall context of the jury's undeniable focus on the evidence involving Sergeant Mattera, together raise a substantial concern that the jury's decision on the assault and battery claims involving Sergeant Mattera may have been impacted by the erroneous instruction. *See, e.g.*, *Heath*, 854 F.2d at 8-9 (new trial required where the district court gave an instruction when initially charging the jury, and again when receiving a note, erroneously stating that a finding of malice was required for plaintiff to prove the officer's unreasonable use of deadly force).

The receipt of the note and the potential effect of the erroneous instruction are further magnified by the nature of the proof that the jury was considering as

to Sergeant Mattera's conduct, which could have naturally placed his intent at the forefront of the jury's discussions. Although the parties provided different accounts regarding the lead-up to Sergeant Mattera's grabbing of Tardif, Sergeant Mattera admitted that he "grabbed" Tardif, "pull[ed] her off to the side," which caused her body to "twist[] around," and that he then "lost grip of her and she fell down." App'x at 781, 797. A frame-by-frame video recording of the incident, although evolving rapidly, also shows Sergeant Mattera grabbed her. However, a significant portion of Sergeant Mattera's testimony related to his motivations and good faith, thereby implicating the erroneous instruction. For example, Sergeant Mattera testified that Tardif suddenly appeared in his field of vision and it looked like she was about to run into the back of another police officer. To "prevent the situation from further escalating," he "instinctively" used force against her in order to prevent a possible collision. *Id*. at 801. Sergeant Mattera further stated that he did not intend for Tardif to fall to the ground and that he was unable to break her fall. He also testified that he believed that he had used "the minimal amount of force that [he] needed to use."[17] *Id*. at 803.

[17] Although the City's summation primarily focused on the reasonableness of the officers' conduct without reference to mental state, we note that there was a reference in the summation to the officers not being "these cruel, violent monsters" as plaintiff implied, *id.* at 1050-51, which also could have, in combination with Sergeant Mattera's testimony

Given Sergeant Mattera's testimony, even if the jury credited Tardif's and Daniel Shockley's testimony and found that the degree of force employed by Sergeant Mattera was excessive under the circumstances, they could have also credited Sergeant Mattera's testimony and concluded that he had no bad motive in using the excessive force. Such findings, if considered in the context of the erroneous instruction, could have led the jury to find in Sergeant Mattera's favor because, even though he applied objectively *unreasonable* force, he did so "in a good faith effort to maintain or restore discipline" and not "maliciously for the very purpose of causing harm." *Id.* at 1105 (supplemental jury instruction). That verdict, if based on those findings and the erroneous instruction, would have been contrary to New York law and thus prejudiced Tardif. *See Dancy v. McGinley*, 843 F.3d 93, 119-20 (2d Cir. 2016) (holding that erroneous instruction that allowed consideration of subjective intent of the police officer was not harmless because "[u]nder the district court's instruction, the jury could have concluded that there was no violation because [the officer] did not intend to use enough force to break [plaintiff's] jaw"); *see also Callahan v. Wilson*, 863 F.3d 144, 152 (2d Cir. 2017)

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and the faulty instruction, erroneously (though perhaps inadvertently) further focused the jury on the issues of subjective intent, such as good faith or malice. We further note that the City's summation was silent on whether the reasonableness standard was objective or subjective.

(holding that erroneous instruction on the use of deadly force was not harmless because it "allowed the jury to decide the case on different grounds than [the law] permits").

In reaching this decision, we recognize that it is also entirely possible that the jury's verdict in favor of the City on Sergeant Mattera's conduct could have been based upon a finding, entirely independent of his motive, that his use of force was objectively reasonable under the circumstances. To find harmless error, however, we must be "convinced that the error did not influence the jury's verdict." *Gordon v. N.Y.C. Bd. of Educ.*, 232 F.3d 111, 116 (2d Cir. 2000). That standard has simply not been met as it relates to the assault and battery claims pertaining to Sergeant Mattera when the erroneous instruction is considered, in light of the substance of the jury note and the nature of the proof surrounding his conduct. *See Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 67 F.3d 435, 439 (2d Cir. 1995) (holding that charging error required retrial because "[w]e d[id] not know what the jury would have done had it received a correct instruction"). Accordingly, Tardif is entitled to a new trial on the *respondeat superior* claim against the City based upon Sergeant Mattera's alleged assault and battery.

With respect to the assault and battery claims against Sergeant McManus, the focus of the evidence and issues were entirely different, and we thus find that the district court's charging error was clearly harmless. Unlike the testimony regarding the force used by Sergeant Mattera, the jury was presented with no evidence regarding Sergeant McManus's subjective intent for using force because he testified that he never used *any* force against Tardif. Sergeant McManus testified that he first noticed Tardif when she was on the ground approximately fifteen feet from him. He categorically and repeatedly denied having any physical contact with Tardif. *See, e.g.*, App'x at 827 ("Q. You didn't shove her in her chest while she was on crutches? A. No."); *id*. at 833 ("Q. But it's possible you made contact with her, isn't that right? A. No."); *id*. at 837-38 ("Q. Would you push a woman off of her crutches simply because she was asking you for the name of another officer? A. Absolutely not.").

To be sure, Tardif testified that Sergeant McManus came "through the [police] line . . . and . . . pushed" her off of her crutches while she was attempting to locate the officer from the incident earlier that morning. *Id.* at 905. However, if the jury credited Tardif's testimony, that gratuitous use of force would have been unreasonable no matter what the circumstances. In fact, in the City's summation,

Tardif's testimony was summarized as claiming "for no reason at all Sergeant McManus comes running out of the police line, his brow is furrowed, his skin is blazing red, and he is filled with rage, and he pushes her off her crutches like some villain from a Charles Dickens novel." *Id.* at 1037-38. The City, in addition to questioning Tardif's credibility as to whether any officer did that at all, argued to the jury (from the testimony and photos) that it could not have been Sergeant McManus.

Therefore, even in the face of these starkly different versions of events, the jury would have had no occasion under either version to consider whether Sergeant McManus subjectively used force in good faith, and thereby rely on the incorrect elements of the instruction. The only question—assuming the jury found that a police officer had gratuitously pushed Tardif off of her crutches—would have been whether Sergeant McManus was that officer or not. Given the limited nature of the evidentiary dispute regarding the claims against Sergeant McManus, we are confident that the erroneous instruction regarding subjective intent could not possibly have influenced the jury's verdict in Sergeant McManus's favor on those claims and, therefore, the error was harmless. *See, e.g.*, *Hill v. Kemp*, 833 F.2d 927, 930 (11th Cir. 1987) (holding that erroneous instruction on intent was harmless

where alibi defense was asserted and there was no argument that a lack of intent existed for the person who committed the offense); *Hill v. Quigley*, 784 F. App'x 16, 20 (2d Cir. 2019) (summary order) (holding that any error from reference to intent in a use of lethal force instruction was harmless because "intent was not at issue at trial"). Accordingly, no new trial is warranted as to the assault and battery claims against Sergeant McManus and the *respondeat superior* claim against the City related to his conduct based upon the erroneous instruction.

CONCLUSION

For the reasons stated, we **AFFIRM** the judgment of the district court as to the ADA claim, as well as the assault and battery claims against Sergeant McManus and the related *respondeat superior* claim against the City arising from Sergeant McManus's alleged conduct, but **VACATE** the judgment as to the *respondeat superior* claim against the City relating to Sergeant Mattera's alleged assault and battery, and **REMAND** the case for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of April, two thousand twenty.

PRESENT:

RALPH K. WINTER,
RICHARD C. WESLEY,
RICHARD J. SULLIVAN,
Circuit Judges.

Charles Meyers, John Baker, Justin Strekal,
Miles Walsh,

Plaintiffs-Appellants,

v. 19-892

City of New York, Michael R. Bloomberg,
individually and in his official capacity as
former Mayor of the City of New York,
Chief of Department Joseph J. Esposito,

individually and in his official capacity, NYPD Commissioner Raymond Kelly, individually and in his official capacity, NYPD Patrol Officer Freddy Ynoa, Shield # 18851, Hans Francois, Shield # 25825, John Zaranis, Shield # 09645, Vasile Dubovici, Shield # 28892,

Defendants-Appellees

Officer Does 1–100

Defendants.

FOR PLAINTIFFS-APPELLANTS: PAUL L. MILLS, Law Office of Paul L. Mills, New York, NY.

FOR DEFENDANTS-APPELLEES: ZACHARY S. SHAPIRO, Assistant Corporation Counsel (Richard Dearing, Devin Slack, Assistant Corporation Counsels, *on the brief*), *for* James E. Johnson, Corporation Counsel of the City of New York, New York, NY.

Appeal from the United States District Court for the Southern District of New York (Carter, *J.*).

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

Plaintiffs-Appellants appeal the district court's orders and judgment dismissing Plaintiffs' 42 U.S.C. § 1983 claims in favor of the City of New York (the "City"), former mayor Michael Bloomberg (the "Mayor"), former New York Police Department ("NYPD") Commissioner Raymond Kelly, former Chief of Department of the NYPD Joseph J. Esposito, and individual officers employed by the NYPD (collectively with the City, the Mayor, Kelly, and Esposito, "Defendants"). We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision.

Between September 2011 and November 2011, a group of protestors known as "Occupy Wall Street" started a demonstration to protest what they saw as rising economic inequality and the improper influence of corporations on government. To amplify that message, hundreds of protestors, Plaintiffs among them, took up residence in Zuccotti Park (the "Park"), a privately-owned plaza in Manhattan's Financial District.

Over the course of many weeks, the protestors erected tents and other structures – which Defendants say violated the City's sanitation laws – and limited

the public's access to the Park. In time, crime and hazardous conditions began to proliferate, including the use of gasoline and diesel generators near large quantities of flammable materials.

On November 15, 2011, NYPD officers ordered all persons present in the Park to leave with their personal belongings or face arrest. While many protestors complied with the dispersal order, approximately 150 (including Plaintiffs) refused to leave and were subsequently arrested. Plaintiffs thereafter sued, alleging violations of their First, Fourth, and Fourteenth Amendment rights. Ultimately, the district court entered judgment on the pleadings in favor of Defendants, finding that Plaintiffs had failed to allege a constitutional violation. This appeal followed.

"We review *de novo* a district court's decision on a motion to dismiss or for judgment on the pleadings, accepting all factual allegations as true and drawing all reasonable inferences in the plaintiff's favor." *Hogan v. Fischer*, 738 F.3d 509, 515 (2d Cir. 2013). In so doing, we may consider "the complaint, the answer, any written documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case." *L-7 Designs, Inc. v. Old*

Navy, LLC, 647 F.3d 419, 422 (2d Cir. 2011) (quoting *Roberts v. Babkiewicz*, 582 F.3d 418, 419 (2d Cir. 2009)). "A complaint is [also] deemed to include . . . materials incorporated in it by reference[] and documents that, although not incorporated by reference, are integral to the complaint." *Id.* (internal quotation marks omitted).

Discussion

Though Plaintiffs set forth a number of different grounds for relief, the gravamen of their claims is that the NYPD's dispersal order, and the arrests that followed, were part of an unlawful scheme to muzzle the protestors and deprive them of their right to remain in the Park. Upon review, we conclude that the district court properly granted judgment on the pleadings in favor of Defendants because Plaintiffs have failed to plead any cognizable constitutional violations.

I. False Arrest and Malicious Prosecution

"Probable cause is a complete defense to a constitutional claim of false arrest" and "continuing probable cause is a complete defense to a constitutional claim of malicious prosecution." *Betts v. Shearman*, 751 F.3d 78, 82 (2d Cir. 2014). "Probable cause exists when 'the facts and circumstances within . . . the [police]

officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested.'" *Kass v. City of New York*, 864 F.3d 200, 206 (2d Cir. 2017) (quoting *Marcavage v. City of New York*, 689 F.3d 98, 109 (2d Cir. 2012)). To determine whether probable cause exists, we must "examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *Marcavage*, 689 F.3d at 109 (quoting *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)).

The record makes plain that the NYPD officers had probable cause to arrest Plaintiffs for, among other offenses, disorderly conduct under N.Y. Penal Law § 240.20(6) and trespass under N.Y. Penal Law § 140.05, after Plaintiffs refused to leave the Park following the dispersal order.

As an initial matter, we conclude that the dispersal order was lawful because it was intended to promote several legitimate governmental goals and was therefore not arbitrary. *See Kass*, 864 F.3d at 212; *see also Crenshaw v. City of Mount Vernon*, 372 F. App'x 202, 206 (2d Cir. 2010). The City had a legitimate

interest in ensuring that the Park remained accessible to all members of the public – not just the protestors – and free of congestion. *See Kass*, 864 F.3d at 208; *Int'l Action Ctr. v. City of New York*, 587 F.3d 521, 527 (2d Cir. 2009); *see also Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 298 (1984) (acknowledging that "the Government [need not] tolerate" demonstrations that render parks "partial[ly] inaccessib[le] to other members of the public"). In addition, the City had a significant interest in clearing the Park of unlawful structures, *Betancourt v. Bloomberg*, 448 F.3d 547, 553–54 (2d Cir. 2006); *see also Gersbacher v. City of New York*, No. 14-cv-7600 (GHW), 2017 WL 4402538, at *7–8 (S.D.N.Y. Oct. 2, 2017) (acknowledging that N.Y.C. Admin. Code § 16-122(b), which prohibits the erection of "shed[s], building[s] or other obstruction[s]" in public spaces, applies to the Park), and mounting fire hazards, *Marcavage*, 689 F.3d at 105 ("The government interest in security is . . . significant.").

Plaintiffs' refusal to comply with that lawful dispersal order supplied probable cause to arrest them for disorderly conduct. Even in the early morning, it was entirely reasonable for the arresting officers to assume that nearly 150 protestors refusing to leave a public area in downtown Manhattan would risk

"public inconvenience." *Kass*, 864 F.3d at 211; *see also People v. Weaver*, 16 N.Y.3d 123, 128 (2011) ("We have made clear that a defendant may be guilty of disorderly conduct regardless of whether the action results in public inconvenience, annoyance or alarm if the conduct recklessly creates a risk of such public disruption."). In any event, the NYPD also had probable cause to arrest Plaintiffs for trespassing once they refused to leave the Park after being ordered to do so. *See Williams v. Town of Greenburgh*, 535 F.3d 71, 79 (2d Cir. 2008); *Berger v. Schmitt*, 91 F. App'x 189, 190 (2d Cir. 2004) ("[U]nder New York law it is unlawful to remain on the premises after being personally given a lawful order to depart.").

II. Retaliatory Arrest and First Amendment Discrimination

"The existence of probable cause defeats a First Amendment claim premised on the allegation that defendants arrested a plaintiff based on a retaliatory motive." *Caravalho*, 732 F. App'x at 23 (citing *Fabrikant v. French*, 691 F.3d 193, 215 (2d Cir. 2012)). Though a narrow exception exists where there is "objective evidence" that the police refrained from arresting similarly situated people not engaged in speech, *Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019), no such facts were alleged here. As Plaintiffs admit, the NYPD arrested "everyone who remained in

the [P]ark" following the dispersal order. Pls.' Br. at 35.

Plaintiffs fair no better in trying to classify the City's temporary closure of the Park as discriminatory. In public fora, "the government may apply content-neutral time, place, and manner restrictions . . . [that] are 'narrowly tailored to serve a significant government interest'" so long as "'ample alternative channels of communication' are available." *Kass*, 864 F.3d at 208 (quoting *Zalaski v. City of Bridgeport Police Dep't*, 613 F.3d 336, 341 (2d Cir. 2010)). Assuming that the Park is such a public forum, the City's temporary closure satisfied these requirements.

First, the order was content neutral; just because protestors were the only ones impacted does not change that fact. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 762–63 (1994). Second, as described above, the dispersal order was motivated by significant City interests, including the need to address mounting fire hazards and reduce congestion. Third, the dispersal order was appropriately tailored to achieve those interests and the City was not required to use the absolute "least restrictive or least intrusive means" possible. *Caravalho*, 732 F. App'x at 23 (quoting *Marcavage*, 689 F.3d at 106). Lastly, the dispersal order left open ample alternative channels for speech: the protestors were free to exercise their rights

in any other public area within the vicinity of the Park (or even to return to the Park after it was cleaned).

III. Eviction from the Park Without Due Process

To assert a due process claim, a plaintiff must show that he has been "deprived of a protected interest in 'property' or 'liberty.'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) (quoting U.S. Const. amend. XIV § 1). Such an interest must be "*individual* in nature." *Harrington v. County of Suffolk*, 607 F.3d 31, 34 (2d Cir. 2010). "Thus, where the 'intended beneficiaries' of a particular law 'are entirely generalized,' . . . the law does not create a property interest protected by the Due Process Clause." *Id.* at 34–35.

Here, Plaintiffs claim that they had a protected interest to remain in the Park because of an "easement" created by a City zoning resolution, Pls.' Reply at 11, and because the Mayor "publicly announced that so long as the camping demonstrators continued to obey the law they must and would be allowed to stay in the [P]ark," App'x 89. Neither source created an individualized right to remain in the Park, let alone to do so while flouting City rules.

The City's zoning laws granting access to the Park "run[] to the public generally;" "[s]uch universal benefits are not property interests protected by the Due Process Clause." *Harrington*, 607 F.3d at 35 (internal quotation marks omitted). And setting aside whether the Mayor's general statement could even create an individualized entitlement, Plaintiffs ignore the Mayor's qualification that they could remain in the Park only so long as they obeyed the law. Since Plaintiffs refused to comply with a lawful dispersal order – necessitated in part by the protestors' own habitual violation of City rules – the Mayor's statement provides them with no basis for asserting a property interest in remaining permanently at the Park.

Conclusion

We have reviewed the remainder of Plaintiffs' arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

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

In the
United States Court of Appeals
For the Second Circuit

August Term, 2017

Argued: October 4, 2017
Decided: July 25, 2018

Docket No. 16-3146-cv

PHOEBE BERG, individually and on behalf of a class of all others similarly situated, TOSHIRO KIDA, individually and on behalf of a class of all others similarly situated, JOHN RIVERA, individually and on behalf of a class of all others similarly situated, DAYNA ROZENTAL, individually and on behalf of a class of all others similarly situated, JONATHAN JETTER, individually and on behalf of a class of all others similarly situated,

Plaintiffs - Appellees,

V.

NYCP COMMISSIONER RAYMOND KELLY, CHIEF OF NYC P.D. JOSEPH ESPOSITO, JAMES MCNAMARA, DEPUTY CHIEF, in his individual and official capacities, PETER LOEHLE, INSPECTOR, in his individual and official capacities, STEPHEN LATALARDO, LIEUTENANT, in his individual and official capacities,

JOHN DOE, NEW YORK CITY POLICE DEPARTMENT, (whose identity is not currently known but who are known to be police officers and/or supervisory personnel of the New York City Police Department); in his individual and official capacities,[1]

Defendants - Appellants.

Appeal from the United States District Court
for the Southern District of New York
No. 12-cv-3391 – Thomas P. Griesa, *Judge*.

Before: RAGGI, HALL, and CARNEY, *Circuit Judges*.

Members of Occupy Wall Street ("OWS protesters" or "protesters") assert that a group of New York City Police Officers (the "Officers") unlawfully detained them during a protest outside the Sheraton Hotel where President Obama was attending a fundraising dinner. The protesters claim that this detention violated their First, Fourth, and Fourteenth Amendment rights. Concluding that the Officers' motivation for the detention was a material fact in dispute and that a finding as to the Officers' motivation affected the determination of the objective reasonableness of the Officers' actions, the district court denied the Officers summary judgment on the protesters' First, Fourth, and Fourteenth Amendment claims, and denied the Officers qualified immunity. The Officers appealed. This court denied the protesters' motion to dismiss this appeal for lack of subject matter jurisdiction. The Officers argue before us that the limited detention that occurred was permissible under the special needs exception to the Fourth Amendment so as not to violate the protesters' constitutional rights and, in any event, they are entitled to qualified immunity.

[1] The Clerk of Court directed to amend the official caption in this case as set forth above.

We identify disputes of fact that do not permit a court to conclude as a matter of law that the protesters' two-hour detention was permissible under the special needs exception to the Fourth Amendment's warrant requirement. We nonetheless conclude that the officers are entitled to qualified immunity. The district court erred in concluding that the Officers' subjective intent in temporarily detaining the protesters was relevant to whether the Officers are entitled to qualified immunity. Considered objectively, we conclude that, at the time of the challenged actions, reasonable officers could have believed that the approximately two-hour detention of the protesters in response to concerns for the President's security was justified in light of then established law. Because the Officers could have reasonably believed the temporary detention was lawful, they are also entitled to qualified immunity on the OWS protesters' First Amendment and Fourteenth Amendment claims.

REVERSED AND REMANDED.

KATHY CHANG PARK, Assistant Corporation Counsel (Richard Dearing and Claude S. Platton, *on the brief*), *on behalf of* Zachary W. Carter, Corporation Counsel of the City of New York, New York, New York, *for Defendants-Appellants*.

DAVID B. RANKIN, Beldock Levine & Hoffman LLP, New York, New York, *for Plaintiffs-Appellees*.

HALL, *Circuit Judge*:

This is an appeal from an order entered on August 10, 2016, in the Southern District of New York (Griesa, *J.*), denying summary judgment in

part to Defendants-Appellants Police Officers (the "Officers"), who claimed qualified immunity from suit by Plaintiffs-Appellees, participants in an Occupy Wall Street protest.[2] The named protesters assert that the Officers unlawfully detained them and other putative class members during a protest outside the Sheraton Hotel where President Obama was attending a fund-raising dinner on November 30, 2011. Before us on appeal are the protesters' claims that this detention violated their Fourth Amendment rights, that the detention was in retaliation for their exercise of First Amendment rights, that they were subjected to selective enforcement in violation of the Fourteenth Amendment, and that certain officers failed to intervene to protect their constitutional rights.[3] The Officers argue that they are entitled to summary judgment based on qualified immunity because: (1) under the special needs exception to the Fourth Amendment, there was no constitutional violation; and (2) even if the detention that occurred were determined to be

[2] The Plaintiffs-Appellees will be referred to as "OWS protesters" or "protesters."

[3] The OWS protesters assert failure to intervene claims against Defendants James McNamara, Peter Loehle, and Stephen Latalardo. McNamara was the officer in command in the area of the Sheraton. Loehle was the sector commander for the area encompassing the Sheraton. And Latalardo admits he may have been the officer that actually closed and opened the press pen where the OWS protesters was detained.

unconstitutional, there was no clearly established law doing so at the time their actions were taken.

On the record before us, we conclude that the Officers have not demonstrated that, as a matter of law, the protesters' two-hour detention was justified under the "special needs" exception to the Fourth Amendment's warrant requirement. This is not to dismiss the possibility of additional evidence being introduced at a trial to support such a conclusion. But no such trial is warranted here because, as to the second argument, we conclude that the Officers are entitled to qualified immunity. At the time of the detentions at issue, it was not clearly established that the Fourth Amendment did not permit officers protecting the President of the United States to detain protesters as occurred in this case. We further conclude that because the Officers have qualified immunity from the OWS protesters' Fourth Amendment claims, they are also entitled to qualified immunity on the OWS protesters' related First Amendment and failure to intervene claims. As to the OWS protesters' Fourteenth Amendment claims for selective enforcement, the Officers are entitled to qualified immunity because reasonable officers could disagree as to whether the plaintiffs' status as protesters

presented unique concerns that non-protesters on the scene did not. We proceed to explain these conclusions.

I.

On the night of November 30, 2011, the OWS protesters planned to protest a fundraising dinner for President Obama at the Sheraton Hotel in midtown Manhattan. Because part of the protesters' message was aimed at keeping money out of politics, the point of that night's protest was to bring attention to the President's fundraiser. Through various social media accounts, the OWS protesters had advertised the protest using hashtags such as #OccupyObama and #DinnerWithBarack.

The President's visit occurred the same night as the annual Christmas tree lighting at Rockefeller Center, less than a quarter mile from the Sheraton. The New York City Police Department ("N.Y.P.D.") had responded to a bomb threat at Rockefeller Center approximately one hour prior to President Obama's arrival at the Sheraton.

The OWS protest began in Bryant Park, at 42nd Street and 6th Avenue. The protesters intended to march about ten blocks northwest toward the Sheraton Hotel at 53rd Street and 7th Avenue to confront the President.

As the protesters marched toward the Sheraton, they first stopped on 51st Street and 7th Avenue, in an area the N.Y.P.D. had previously designated as the "demonstration area." The protesters, however, opted not to remain in the demonstration area, but continued to march toward the Sheraton, ultimately stopping at approximately 8:00 p.m., on the southwest corner of 53rd Street and 7th Avenue. The protesters stopped there because the N.Y.P.D. had restricted pedestrian traffic any closer to the Sheraton. This landed the OWS protesters directly across the street from the hotel and within the President's line of sight as he entered and exited.

According to the N.Y.P.D. plans, the area near the southwest corner of 53rd Street and 7th Avenue was designated the "press pen." Partially enclosed by barriers on three sides, the press pen was reserved for individual press members holding certain security credentials. Although not members of the press, much less credentialed, OWS protesters chose to gather in the press pen because it was closer to the President than their designated demonstration area at 51st Street and 7th Avenue.

Shortly before the President's arrival at approximately 8:50 p.m., the N.Y.P.D. established a "frozen zone" for a period of time during which vehicular and pedestrian traffic was restricted in the area surrounding the hotel. The "frozen zone" extended from 6th Avenue to Broadway and from West 52nd Street to West 53rd Street. Dump trucks were also placed in front of the Sheraton to prevent cars from driving into the hotel and to protect against explosives.

At some point, the Officers placed an additional barricade on the "press pen," enclosing it on all four sides. It is unclear whether this closure occurred before or after the President's arrival, and the Officers cannot identify who ordered the closure. After the last barricade was put in place, OWS protesters learned that they were not permitted to leave the area because the area had been ordered "frozen." The Officers advised the protesters that they could expect to be released from the press pen once President Obama was safely inside the Sheraton. Subsequently, the Officers advised the protesters that they would be released after President Obama left the vicinity.

The protesters could not leave the press pen until the N.Y.P.D. permitted them to do so.[4]

After the President arrived at the Sheraton and while he was inside the hotel, the Officers allowed traffic and pedestrians to flow freely on 7th Avenue. The OWS protesters, however, were required to remain in the press pen. Indeed, the Officers threatened to arrest any OWS protesters who tried to leave the press pen. Meanwhile, tourists and journalists in the press pen were allowed to leave. During the President's time at the Sheraton, two protesters in the press pen developed health issues, and the Officers offered to call for an ambulance. One of those protesters chose to stay; the other left by ambulance. Shortly after the President departed the hotel at 10:25 p.m., the protesters were permitted to leave the press pen.

The OWS protesters filed this lawsuit asserting federal claims under 42 U.S.C. § 1983 that the Officers had violated their First, Fourth, and Fourteenth Amendment rights, both directly by detaining them and indirectly by failing to intervene to stop the constitutional violations. The protesters further asserted state law claims based on the same conduct. The Officers

[4] Undisputedly authentic video evidence, part of the record on appeal, captured much of the scene.

moved for summary judgment on the grounds that the protesters' constitutional challenges failed as a matter of law and that, even if they did not fail, the Officers were entitled to qualified immunity.[5]

The district court determined there was a dispute of material fact with respect to the Officers' motive for fully enclosing the press pen. On the basis of that factual dispute, which the court determined precluded recognition of qualified immunity, it denied the Officers summary judgment on the OWS protesters' federal claims. According to the district court, if the Officers had detained the protesters due to a motivation "more sinister" than "presidential security," a proposition the court had to assume on summary judgment, then "clearly established law at the time of [the] detention could support" each of the OWS protesters' § 1983 claims. *Berg et al. v. New York City Police Comm'r Raymond Kelly et al.*, No. 12-cv-3391 (TPG), 2016 WL 4257525, at *6 (S.D.N.Y. Aug. 10, 2016).

[5] The district court dismissed the protesters' claims against Raymond Kelly, Commissioner of the N.Y.P.D., and Joseph Esposito, Chief of Department of the N.Y.P.D. Because the protesters' complaint barely mentioned these defendants, and neither was present at the protest, the district court concluded the protesters' claims against these officers failed as a matter of law. It also dismissed the protesters' state law claims as duplicative of its federal claims. Neither of these rulings are at issue on this appeal.

The Officers appealed from the district court's ruling denying them qualified immunity. Before this Court the protesters moved to dismiss for lack of appellate jurisdiction. We denied the OWS protesters' motion and concluded that we have jurisdiction over this appeal "to the extent that [the Officers] can support their defense on [the protesters'] 'version of the facts that the district judge deemed available for jury resolution.'" Order, No. 16-3146 (Jan 11, 2017) (quoting *Lynch v. Ackley*, 811 F.3d 569, 576 (2d Cir. 2016)).

The gravamen of Appellant Officers' argument is that the special needs exception applicable to the analysis of Fourth Amendment seizures, s*ee Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 449 – 50 (1990), justified their almost two-hour-long detention of the OWS protesters in the vicinity of where the President was attending a fundraising dinner. According to the Officers, the circumstances requiring them to focus their attention on the President's security were a sufficient basis to except the detention of the protesters from the Fourth Amendment's requirement that their seizure be supported by probable cause, and in any event, it was reasonable for the Officers to believe that their actions were lawful given existing precedent. Appellee OWS protesters, on the other hand, would have us ignore whether it was

objectively reasonable for the Officers to believe, under the circumstances, that they were acting within the dictates of the law. Instead, the protesters want this Court to hold, regardless of the objective reasonableness of the Officers' actions, that the Officers are not entitled to qualified immunity once we determine they violated a clearly established right. In so urging, Appellees argue that the Officers' subjective intent in applying the special needs exception is in dispute, and thus the Officers are not entitled to qualified immunity on summary judgment. The OWS protesters dispute, in any event, whether a special needs exception should apply in the context of what occurred in this case.

In the analysis that follows, we address first the question of jurisdiction and conclude that we have jurisdiction to resolve the Officers' appeal in the procedural posture presented. We then consider whether the Officers are entitled to summary judgment because there was no violation of the protesters' Fourth Amendment rights. Because that conclusion cannot be reached as a matter of law on the present record, we proceed to consider whether the Officers are entitled to qualified immunity in any event because then-existing law did not clearly establish the unconstitutionality of the

challenged detentions. We conclude that the Officers do have qualified immunity from the protesters' Fourth Amendment claims and that such immunity also bars the OWS protesters' remaining claims under the First and Fourteenth Amendments.

III.

We have appellate jurisdiction under the collateral order doctrine to hear an interlocutory appeal from the district court's denial of qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Where, as here, denial of qualified immunity turns on questions of law, the court's decision constitutes a final appealable order under 28 U.S.C. § 1291 that we review *de novo*. *Clubside, Inc. v. Valentin*, 468 F.3d 144, 151 – 52 (2d Cir. 2006). The Officers having moved for summary judgment, we construe the evidence in the light most favorable to the OWS protesters. *See id*. Summary judgment may be granted only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

IV.

In *Saucier v. Katz*, 533 U.S. 194, 200 (2001), the Supreme Court held that, when confronted with a question of law regarding the applicability of

qualified immunity in a Section 1983 suit, federal courts should first determine "whether a constitutional right would have been violated on the facts alleged," proceeding to the question of whether the right was clearly established only if they answer the first question in the affirmative. The Court altered that framework eight years later in *Pearson v. Callahan*, 555 U.S. 223 (2009), holding that "courts should have the discretion to decide whether [the *Saucier*] procedure is worthwhile in particular cases." *Id.* at 242. Because the question presented here "do[es] not frequently arise in cases in which a qualified immunity defense is unavailable," *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014), we think it will be "worthwhile" to exercise that discretion here, *Pearson*, 555 U.S. at 242. Accordingly, we first address whether, taking the facts in the light most favorable to the protesters, the Officers are entitled to summary judgment because no constitutional violation occurred. We decide that we cannot reach that conclusion as a matter of law on the present record.

A.

The OWS protesters assert they were falsely arrested in violation of their Fourth Amendment right to be free from unreasonable seizures when

they were detained in the press pen for approximately two hours while the President was across the street and inside the Sheraton Hotel. To establish a § 1983 claim for false arrest, the OWS protesters must adduce evidence that: (i) the Officers intended to confine them; (ii) OWS protesters were conscious of the confinement and did not consent to it; (iii) the OWS protesters did not consent to being confined; and (iv) the confinement was not otherwise privileged. *Jocks v. Tavernier*, 316 F.3d 128, 134 – 35 (2d Cir. 2003) (citation omitted). The protesters' ability to satisfy the first three requirements is not disputed; what is at issue is whether the detention was privileged under the "special needs" exception to the Fourth Amendment's general probable cause requirement. *See, e.g.*, *City of Indianapolis v. Edmond*, 531 U.S. 32, 54 (2000).

The special needs exception recognizes as constitutionally reasonable limited searches or temporary seizures that serve "special needs beyond the normal need for law enforcement," where "the warrant and probable-cause requirement [are] impracticable." *Skinner v. Railway Labor Execs. Ass'n*, 489 U.S. 602, 619 (1989) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)); *see also Ferguson v. City of Charleston*, 532 U.S. 67, 79 – 85 (2001) (explaining,

in the search context, that the special need must be separate from the general interest in crime control); *Edmond*, 531 U.S. at 37 (collecting special needs cases). After a court determines whether the search or seizure served a "special need" distinct from "the ordinary evidence gathering associated with crime investigation," it must evaluate whether the search or seizure was "reasonable" in light of competing governmental and individual considerations. *MacWade v. Kelly*, 460 F.3d 260, 268 – 69 (2d Cir. 2006) (quoting *Nicholas v. Goord*, 430 F.3d 652, 663 (2d Cir. 2005)).

B.

Here, the professed special need is protecting the President of the United States. As the Supreme Court has recognized, even in cases where the special needs doctrine was not involved, the "Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats." *Watts v. United States*, 394 U.S. 705, 707 (1969); *see also Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (the principle of qualified immunity—that "officials should not err always on the side of caution" for "fear of being sued"—is "nowhere more important than when the specter of Presidential

assassination is raised"); *id.* at 229 – 30 (Stevens, *J.*, dissenting) ("Those who guard the life of the President properly rely on the slightest bits of evidence—nothing more than hunches or suspicion—in taking precautions to avoid the ever-present danger of assassination." (internal quotation marks and citation omitted)).

This precedent informed the District of Columbia Circuit's rejection of a Fourth Amendment challenge to the Office of Management and Budget's policy requiring those of its employees with access to areas frequented by the President or Vice President to undergo random drug testing. *Stigile v. Clinton*, 110 F.3d 801, 802 (D.C. Cir. 1997). In concluding that "the random drug testing at issue here is justified as a means of protecting the safety of the President and the Vice President," the Court recognized the special need to protect the President and Vice President, which was "clearly beyond the normal need for law enforcement" but of the "utmost importance" because "[f]ew events debilitate the nation more than the assassination of a President." *Id.* at 802 – 03 (internal quotation marks omitted).

In recent years, the Supreme Court has emphasized the importance of Presidential safety in the context of granting qualified immunity to officers

sued for actions taken to protect the President or Vice President. In *Saucier*, the Court ruled that a military police officer was qualifiedly immune from suit for using excessive force against a person protesting a speech by Vice President Gore. 533 U.S. at 208 – 09. The Court observed that the officer "did not know the full extent of the threat respondent posed or how many other persons there might be who, in concert with respondent, posed a threat to the security of the Vice President," and, given that "[t]here were other potential protesters in the crowd," the officer "was required to recognize the necessity to protect the Vice President by securing respondent and restoring order to the scene." *Id.* at 208. Thus, the Court concluded that "[i]t cannot be said there was a clearly established rule that would prohibit using the force petitioner did . . . ." *Id.* at 208 – 09.

In *Reichle v. Howards*, 566 U.S. 658, 660 (2012), the Court held Secret Service agents immune from suit for the retaliatory arrest of a person protesting Vice President Cheney because they had probable cause to think the protester had committed a federal crime. Justice Ginsburg, concurring in that decision, observed that "[o]fficers assigned to protect public officials must make singularly swift, on the spot, decisions whether the safety of the

person they are guarding is in jeopardy." *Id.* at 671. Most recently, in *Wood v. Moss*, 134 S. Ct. 2056 (2014), the Supreme Court granted Secret Service agents qualified immunity from a First Amendment suit by persons asserting their opposition to President George W. Bush. The protesters complained that, after the President made an unplanned stop at a restaurant, they were moved to a site further away from him while Bush supporters were not. *Id.* at 2061– 64. There was no claim of probable cause to think the protesters planned to commit any crime. Nevertheless, the Supreme Court concluded that the agents' actions were objectively reasonable in light of a valid security concern that the anti-Bush protesters, before they were relocated, were within "weapons range" of the President dining on the patio. *Id.* at 2070. The Secret Service's maps and travel plans, moreover, refuted arguments that the basis for relocating the protesters was their political viewpoints. *Id.* at 2069.

Of this precedent, only *Stigile* directly identifies protection of the President as a "special need," and it does so in the context of a search, not a seizure. Nonetheless, these cases all generally recognize protection of the

President as a special need apart from routine law enforcement. *See Ferguson*, 532 U.S. at 79 (identifying special needs as those "divorced from the State's general interest in law enforcement").

In light of the Supreme Court's long recognition of the importance of protecting the President of the United States, we conclude that, as a matter of law, the circumstances of November 30, 2011, presented Officers with a special need.

C.

Having identified a special need, to assess the reasonableness of the Officers' detention actions we must weigh the public interest served by those actions against the intrusion on the OWS protesters' Fourth Amendment right to be free from unreasonable seizures. *See Skinner*, 489 U.S. at 619; *cf. Terry v. Ohio*, 392 U.S. 1, 16 (1968) ("[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."). We have identified four "balancing factors" that are relevant to the reasonableness inquiry in the "special needs" context:

> (1) the weight and immediacy of the government interest;
> (2) the nature of the [liberty] interest allegedly compromised

> by the [detention]; (3) the character of the [deprivation] imposed by the [detention]; and (4) the efficacy of the [detention] in advancing the government interest.

MacWade, 460 F.3d at 269 (internal quotation marks and citations omitted).

For the reasons explained above, protecting the President's safety is a uniquely important government interest. *See Wood*, 134 S. Ct. at 2067 (recognizing the "overwhelming[] interest in protecting the safety of [the] Chief Executive" (quoting *Watts*, 394 U.S. at 707)). But the liberty interest compromised by the protesters' detention is not to be dismissed out of hand, particularly given that its almost-two hours' duration is a far cry from the *de minimis* vehicle detentions that have previously been approved under the special needs exception. *See, e.g.*, *Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (police information checkpoint regarding hit-and-run required "only a brief wait in line—a very few minutes at most" and "only a few seconds" of police contact); *Sitz*, 496 U.S. at 448 (average delay for each vehicle at sobriety checkpoint was approximately 25 seconds); *United States v. Martinez-Fuerte*, 428 U.S. 543, 547 (1976) (average length of inspection at vehicle checkpoint near border was three to five minutes). Moreover, for the two hours they were detained, the protesters could not use a restroom. And those who felt

ill were forced to choose between waiting out the detention period and departing by ambulance.

We recognize, as the Officers argue, that the protesters' loss of liberty was limited to their freedom to depart the area for the two hours at issue. Specifically, the protesters were not handcuffed, searched, questioned, or transported to a police station. But this does not allow a court to conclude as a matter of law that the two-hour detention was a reasonable means of meeting the special need presented. Non-protesters, for example, were permitted to leave the area after President Obama entered the Sheraton and was no longer in the line of sight of those on Seventh Avenue. The Officers contend that the protesters presented unique security concerns because of the size of their group (more than 50), but no evidence was adduced as to why, after the President had entered the hotel and for the two hours he remained there, the protesters could not have been released from the press pen to proceed out of the area in smaller groups over time.

The record evidence regarding relevant police practices is sparse. What there is does not compel the legal conclusion of special needs urged

by the Officers. To the contrary, the NYPD's own Patrol Guide advises officers to permit demonstrators "to leave a barriered area at any time." Appendix at 572. To be sure, this advice pertains to protesters generally, not to circumstances involving the President. But no record evidence identifies a risk to President Obama's safety if the protesters were permitted to leave in small groups, as provided in the Guide.[6] Accordingly, on the record at summary judgment, we cannot conclude as a matter of law that there was "'a close and substantial relationship' . . . between the degree of intrusiveness [on the protesters' liberty interests] and the governmental need asserted." *Cassidy v. Chertoff*, 471 F.3d 67, 81 (2d Cir. 2006) (quoting *United States v. Lifshitz*, 369 F.3d 173, 186 (2d Cir. 2004).

V.

Qualified immunity protects officers from suit so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). We "do[ ] not require a case directly on point for a right

[6] This is not to say that the Officers could not introduce evidence to support a finding of efficacy. But, in the absence of such evidence, we cannot conclude on summary judgment that the protesters' detention advanced President Obama's physical safety so as to be reasonable in light of the special need presented.

to be clearly established"; nevertheless, "existing precedent must have placed the statutory or constitutional question beyond debate." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (citation and internal quotation marks omitted). This is because qualified immunity "protects all but the plainly incompetent or those who *knowingly* violate the law." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (citation and internal quotation marks omitted) (emphasis added).

Thus, "the qualified immunity defense . . . protects an official if it was 'objectively reasonable' for him at the time of the challenged action to believe his acts were lawful." *Taravella v. Town of Wolcott*, 599 F.3d 129, 134 (2d Cir. 2010) (citation omitted). "[W]hether a defendant official's conduct was *objectively* reasonable, *i.e.*, whether a reasonable official would reasonably believe his conduct did not violate a clearly established right, is a mixed question of law and fact." *Id.* (citation and internal quotation marks omitted) (emphasis added). Even so, the objective legal reasonableness of an officer's action can be decided as a matter of law "in those cases where the facts con-

cerning the availability of the defense are undisputed" or viewed most favorably to plaintiffs. *Higazy v. Templeton*, 505 F.3d 161, 170, 174 (2d Cir. 2007) (citation and internal quotation marks omitted).

In applying these principles here, we begin with the district court's conclusion that "*why* the protesters were detained" presented a genuine issue of material fact that precluded summary judgment. *Berg*, 2016 WL 4257525, at *4 (emphasis in original) (noting that even the N.Y.P.D. sector commander "admitted that he was unaware of any reason why his officers closed the press pen"). The conclusion runs afoul of existing precedent, which holds that "determining whether official conduct was objectively reasonable requires examination of the information possessed by the officials at that time (without consideration of subjective intent)." *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 106 (2d Cir. 2003) (alteration, citation, and internal quotation marks omitted); *accord Garcia v. Does*, 779 F.3d 84, 92 (2d Cir. 2015). In *Crotty*, we held that the "intent, motive or beliefs" of officials in enforcing the Nonresident Lobster Law (which was subsequently found to be unconstitutional) were irrelevant to the qualified immunity analysis. 346 F.3d at 106. This is because "[i]nclusion of a subjective component, as

the Supreme Court instructed, produces inconsistent results and defeats the purpose of the doctrine by creating a factual issue requiring resolution by a jury." *Id*. (citing *Harlow*, 457 U.S. at 815–16). In *Garcia*, we held that officers were entitled to qualified immunity against a suit for false arrest brought by a group of plaintiffs who had been arrested during a demonstration in support of Occupy Wall Street. There it was undisputed that the defendants "had, from their personal observations, sufficient evidence to establish probable cause on each of the elements of a disorderly conduct violation." 779 F.3d at 92. In such circumstances, it was objectively reasonable for defendants to arrest the protesters. In urging otherwise, the *Garcia* plaintiffs argued that they reasonably believed the defendants had given them permission to cross the Brooklyn Bridge on the vehicular roadway. *Id*. at 93. The court explained that the plaintiffs' beliefs were not relevant to the qualified immunity analysis. *Id.* And further, the defendant police officers were entitled to qualified immunity because even in the "confused and boisterous situation" in which they found themselves, it was objectively reasonable for them to think that the plaintiffs were illegally blocking a roadway and that

"no official had expressly authorized the protesters to cross the Bridge via the roadway." *Id.* at 93.

The OWS protesters here argue that because "the [Officers] cannot identify the individual who made the decision, much less a non-speculative justification for the decision to trap the demonstrators," the Officers are not entitled to qualified immunity. Appellees' Br. at 19. That reasoning is misguided.[7] In a court's analysis of probable cause for an arrest, it is clear that "an arresting officer's state of mind . . . is irrelevant to the existence of probable cause"; indeed, the officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts [objectively] provide probable cause." *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004). Stated differently, "a claim for false arrest turns only on whether probable cause existed to arrest a defendant, and . . . it is not relevant whether probable cause existed with respect to each individual charge, or, indeed, any charge actually invoked by the arresting officer at the time of the arrest." *Jaegly v. Couch*, 439 F.3d 149, 154 (2d Cir. 2006). In both *Devenpeck* and *Jaegly* it was

[7] Although the protesters did not raise this specific argument before the district court, the district court did consider its substance as one of the factors in determining that the Officers were not entitled to qualified immunity. *Berg*, 2016 WL 4257525, at *4.

held that officers who had objective probable cause to arrest individuals for *any* crime—whether or not that particular crime was closely related to the offense the officers said was the reason for arrest—were not subject to damages for false arrest under § 1983.

A.

We have applied an objective analytical framework when assessing qualified immunity based on special need. *See Moore v. Vega*, 371 F.3d 110, 116 (2d Cir. 2004) (stating that where qualified immunity is based on claimed special need to search parolee's residence, the issue "is whether, in light of clearly established law and the information they possessed, the defendants could have reasonably believed their search of plaintiff's home to be lawful"). So here, we ask whether, under well-established law at the time, and based on these facts, an officer could reasonably have believed that the actions taken to detain the OWS protesters were lawful in light of the special need to protect the President. *Saucier*, 533 U.S. at 202. We answer that inquiry in the affirmative.

Few cases address the manner in which a *detention* (as opposed to a search) should be balanced against a governmental interest in the "special

needs" context. Nevertheless, the cases addressing the particular special need at issue here have emphasized the critical importance of protecting Presidential safety. *See Hunter*, 502 U.S. at 229 (noting that qualified immunity's tolerance for reasonable error "is nowhere more important" than when protecting the life of the President).

In light of the government's well-recognized "overwhelming" interest in the President's safety, *Wood*, 134 S. Ct. at 2067, an objectively reasonable officer could have thought that the temporary detention here offered a permissible method of serving the heightened security need that exists during a Presidential visit.

Protecting the President in New York City routinely involves closing streets and cutting off traffic. *See, e.g.*, Sarah Maslin Nir, *One-Man Traffic Jam Will Hit City When Trump Visits*, N.Y. Times, Jan. 28, 2017, at A18; *Obama in NYC Thursday for Fundraisers; Traffic Alerts*, NBC New York, June 22, 2011. We have also observed, even in the First Amendment context, that "the government ha[s] a significant interest in ensuring that [a] protest remain[s] within [a designated area]." *Kass v. City of New York*, 864 F.3d 200, 208 (2d Cir. 2017). In *Kass*, the applicable interest was "maintaining public safety and

order" and keeping public spaces "safe and free of congestion." *Id.* (internal quotation marks omitted). The interest in protecting the President can be seen as of even greater public importance. *See Watts*, 394 U.S. at 707. Officers charged with the duty of protecting the President reasonably could have concluded that—where OWS protesters had left the unrestricted designated protest area and entered an area set aside not for them but for the press—a reasonable way to allow the protesters to pursue their protest without risk that they would attempt to get closer still to the President was to require them to remain in the press pen until the President departed the area. With the benefit of hindsight, other means might be imagined to safeguard the President while also allowing plaintiffs to protest with less restriction on their freedom of movement. But the officers were balancing a number of legitimate concerns, including consideration for First and Fourth Amendment rights, in a dynamic situation. At the time in question no clearly established law signaled that the Officers' conduct fell outside the special needs doctrine.

Indeed, in the context of a routine law enforcement stop, a police officer with reasonable suspicion of criminal activity can detain a person for such time as is reasonably necessary to resolve that suspicion. *See Terry*, 392

U.S. at 21; *Grice v. McVeigh*, 873 F.3d 162, 167 – 68 (2d Cir. 2017). Police officers charged with protecting the President thus might have reasonably believed that they could temporarily deny freedom of movement to persons on the scene, perhaps even until the President had departed. In short, while the present record does not permit us to conclude, as a matter of law, that the Officers' actions went no further than the special need to protect the President warranted, no then clearly established law would have alerted reasonable officers that their actions did not fall within the special needs exception.

Nor is a different conclusion warranted because the police did not deny all pedestrians and traffic movement to the same degree as the protesters. Reasonable officers might have been particularly alert to risks posed by the Occupy Wall Street protesters, whose professed intent was to "#OccupyObama." *See Reichle*, 566 U.S. at 672 (Ginsburg, *J.*, concurring) (finding that Secret Service agents were "duty bound" to take into account the content of an anti-Iraq-War protester's statement to the Vice President when assessing whether he posed a threat). That a reasonable officer might objectively think that OWS protesters would not leave the area upon release but,

rather, would attempt to approach or gain access to the hotel and the President found some support in other OWS protesters' actions only weeks earlier in shutting down the Brooklyn Bridge. *See Garcia*, 779 F.3d at 88 (describing Occupy Wall Street October 1, 2011 demonstration precluding traffic moving on Brooklyn Bridge).

In sum, in the absence of clearly established law prohibiting the challenged detentions in the circumstances presented, the Officers are entitled to qualified immunity. *See Pauly*, 137 S. Ct. at 552 (requiring that "clearly established law" be "particularized to the facts of the case" (internal quotation marks omitted)).

B.

The OWS protesters also assert that they were unlawfully detained for the duration of the President's visit in retaliation for exercising their First Amendment rights. Because the Officers have qualified immunity from suit based on their temporary detention of the protesters, these claims also fail.

In *Singer v. Fulton County Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995), we concluded that "if [an] officer either had probable cause or was qualifiedly immune from subsequent suit (due to an objectively reasonable belief that

he had probable cause), then we will not examine the officer's underlying motive in arresting and charging the plaintiff." The same reasoning applies to qualified immunity based on an objectively reasonable belief of special needs. We have determined above that officers in the position of protecting the President, as here, would have an objectively reasonable belief under the circumstances that the special needs presented in this case justified their limited detention of the protesters. Our rationale in *Singer* thus accords the Officers qualified immunity from the protesters' retaliation claims.

C.

The protesters' claim that certain officers failed to intervene to protect constitutional violations likewise fails. To recover on a claim for "[f]ailure to intercede to prevent an unlawful arrest," plaintiffs "must still overcome the hurdle of qualified immunity." *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 129 (2d Cir. 1997). A non-intervening police officer becomes liable when "such failure permitted fellow officers to violate . . . clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* (citation and internal quotation marks omitted). For the same reasons the Officers have qualified immunity for OWS's detention, it was

not "objectively unreasonable" for Officers McNamara, Loehle, and Latalardo to conclude that their "fellow Officers' conduct did not violate" OWS's rights. *Id.*

D.

The Officers are also entitled to qualified immunity on OWS's selective enforcement claim. To assert a claim for selective enforcement, a plaintiff must allege: "(1) [that] the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as . . . the exercise of constitutional rights . . . ." *LaTrieste Rest. & Cabaret Inc. v. Vill. of Port Chester*, 40 F.3d 587, 590 (2d Cir. 1994) (quoting *LeClair v. Saunders*, 627 F.2d 606, 609 – 10 (2d Cir. 1980)).

The Officers argue that in light of *Marcavage v. City of New York*, 689 F.3d 98 (2d Cir. 2012) and *Wood*, it is unclear that protesters are similarly situated to the general public when Presidential security is concerned. We agree.

In *Marcavage*, we held that officers' establishment of a "no-demonstration zone," which permitted pedestrians and ordinary traffic but not protesters on the sidewalk in front of Madison Square Garden, was a reasonable time, place, and manner restriction, narrowly tailored to the security risks raised by a large group of protesters. 689 F.3d at 104 – 05. The officers had blocked off the sidewalk in response to a convention that both the President and the Vice President were attending. Under *Marcavage*, it is clear reasonable officers could proceed on the understanding that the presence of protesters on a sidewalk outside a building where the President was located raised unique concerns that are not raised by the presence of ordinary (non-protester) pedestrians. *Id.* at 105.

In *Wood*, the anti-Bush protesters argued that "had the agents' professed interest in the President's safety been sincere, the agents would have directed all persons present . . . to be screened or removed from the premises." 134 S. Ct. at 2069. Important to our analysis here, the Court in *Wood* concluded that the individuals dining in the restaurant did not pose the same type of security risks as a group of 200 to 300 people standing outside the restaurant. *Id.* That the members of the public dining in the restaurant

did not choose that location to confront the President, and "could not have had any expectation that they would see the President that evening," rendered the security concerns raised by the protesters distinct from average diners. *Id.*

It is undisputed that the OWS protesters had pre-planned their protest to challenge the President's fundraising dinner, promoted the event through social media, and adapted their plan to be as close to the President as possible. The size of the protest, which, according to the protesters, consisted of anywhere from 75 to 200 people, presented unique security concerns. *See Wood*, 134 S. Ct. at 2069 (explaining that "[t]he Secret Service . . . could take measures to ensure that the relatively small number of people already inside the Inn were kept under close watch; no similar surveillance would have been possible for 200 to 300 people congregating in front of the Inn"). At bottom, a reasonable officer could believe that the OWS protesters were engaged in conduct different from that of regular pedestrians and that the protesters therefore were not similarly situated to those pedestrians. *See Marcavage*, 689 F.3d at 106 – 07. The Officers are thus entitled to qualified immunity on OWS's selective enforcement claims.

VI.

Protecting the President's safety is among the most important of law enforcement duties. The assassination of a President does violence not only to the individual who occupies the office and to the stability of the nation but also to the democratic ideals that guide our system of government. At the same time, the Constitution guarantees citizens freedom from unwarranted infringement of their rights to freedom of expression and movement.

For the reasons stated, we cannot conclude that the Officers balanced those competing considerations here in a way that violated clearly established law. We thus decide that they are entitled to qualified immunity on the claims asserted against them. The decision of the district court denying the Officers qualified immunity is reversed. The case is remanded with instructions to dismiss the complaint with prejudice.

16-1258-cv
Imani Brown v. City of NY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2016

(Argued: March 10, 2017 Decided: July 5, 2017)

Docket No. 16-1258-cv

IMANI BROWN,

Plaintiff-Appellant,

v.

CITY OF NEW YORK, a municipal entity, JUSTIN NAIMOLI, New York City Police Officer, Shield 26063, in his individual capacity, THEODORE PLEVRITIS, in his individual capacity,

Defendants-Appellees.

Before:

JACOBS and DRONEY, *Circuit Judges*, and STANCEU, *Judge*.[*]

Appeal of judgment for defendants entered by the U.S. District Court for the Southern District of New York (Forrest, *Judge*) in an action claiming false arrest,

[*] Timothy C. Stanceu, Chief Judge, United States Court of International Trade, sitting by designation.

unnecessary use of force, and First Amendment retaliation. Because the District Court did not err in granting defendants' motion for summary judgment on the ground of qualified immunity, the judgment is AFFIRMED.

JOSHUA S. MOSKOVITZ, Beldock Levine & Hoffman LLP, New York, NY, *for Plaintiff-Appellant*.

DEVIN SLACK (Richard Dearing and Julie Steiner, *on the brief)*, Zachary W. Carter for Corporation Counsel of the City of New York, *for Defendants-Appellees*.

STANCEU, *Judge*:

Plaintiff-appellant Imani Brown appeals an April 21, 2016 judgment of the United States District Court for the Southern District of New York ("District Court") (Forrest, *Judge*) in favor of defendants Justin Naimoli and Theodore Plevritis, New York City police officers, on her federal and state law claims of excessive force stemming from her arrest on November 15, 2011. The District Court granted defendants' motion for summary judgment on the federal claims on the ground of qualified immunity and dismissed the state law claims. We affirm the judgment of the District Court.

BACKGROUND

Brown brought this action on February 13, 2013 in the District Court against the City of New York, and against defendants Naimoli and Plevritis in their individual capacities, following her arrest near Zuccotti Park in lower Manhattan. She asserted

Fourth Amendment claims for false arrest and excessive use of force, and a First Amendment retaliation claim, under 42 U.S.C. § 1983 and also brought parallel claims under New York state law. In its first dispositive decision, the District Court granted summary judgment for defendants on all of Brown's § 1983 claims and dismissed the state law claims on jurisdictional grounds. *Brown v. City of New York*, No. 13-cv-1018, 2014 WL 2767232 (S.D.N.Y. June 18, 2014) ("*Brown I*"). On Brown's first appeal, this Court vacated the judgment entered by the District Court as to the excessive force claims and affirmed the judgment as to all other claims before it. *Brown v. City of New York*, 798 F.3d 94 (2d Cir. 2015) ("*Brown II*"). Brown did not appeal the District Court's judgment with respect to any of her claims against the City of New York. *Id.* at 95. On remand, the District Court awarded summary judgment to defendants Naimoli and Plevritis on the § 1983 excessive force claims, holding that qualified immunity insulated these officers from liability, and dismissed the remaining state law claims. *Brown v. City of New York*, 13-cv-1018, 2016 WL 1611502 (S.D.N.Y. Apr. 20, 2016) ("*Brown III*").

DISCUSSION

Because this Court affirmed the District Court's disposition of all of Brown's claims except the excessive force claims, as to which the judgment of the District Court was vacated, *see Brown II*, 798 F.3d at 95, the only claims remaining in this litigation are the excessive force claims brought under 42 U.S.C. § 1983 and under state law. Further, because Brown did not appeal the District Court's final decision on any of her

claims against the City of New York, *id.*, the only claims remaining are the excessive force claims brought against Officers Naimoli and Plevritis in their individual capacities.

Brown raises three arguments on appeal. Pointing to language in this Court's opinion in *Brown II* remanding the case "for trial," she argues, first, that under this Court's mandate the District Court was required to hold a trial and, therefore, lacked discretion on remand to grant summary judgment. Second, she argues that the two defendant police officers waived any defense of qualified immunity. Finally, she argues that the District Court erred on the merits in holding that qualified immunity shielded the officers from liability.

We determine *de novo* the meaning of a previous mandate of this Court. *Carroll v. Blinken*, 42 F.3d 122, 126 (2d Cir. 1994). In doing so, we reject Brown's first argument, i.e., that the mandate required the District Court to preside over a trial rather than resolve the excessive force claims on a second summary judgment motion.

Plaintiff-appellant's argument relies on language in the opinion in *Brown II* stating that Brown's claim against the officers "for use of excessive force must be remanded for trial," *Brown II*, 798 F.3d at 95, that "[t]he assessment of a jury is needed in this case," and that "a jury will have to decide whether Fourth Amendment reasonableness was exceeded . . . ," *id.* at 103. Brown interprets this language as a directive to the District Court to conduct an actual trial, but this interpretation fails to

construe the references to a "trial" and a "jury" in the context of the issue this Court was deciding. That issue was whether the District Court erred in granting summary judgment to defendants on the ground that the force used in arresting Brown was not excessive. In considering the issue of whether excessive force was used, this Court applied the "objective reasonableness" standard as explicated in *Graham v. Connor*, 490 U.S. 386, 392 (1989). The references to "trial" and "a jury" in the opinion are properly understood in the context of the requirements a movant must meet to obtain summary judgment. *See* Fed. R. Civ. P. 56(a) (requiring movant to show absence of a genuine issue of material fact and entitlement to judgment as a matter of law). On the record before it in *Brown II*, this Court viewed the question of whether the force used in arresting Brown was reasonable under the *Graham* factors as a question to be decided by a jury rather than by the trial court on a summary judgment motion. *Brown II*, 798 F.3d at 102-03.

As the opinion in *Brown II* explained, the objective reasonableness standard governs whether the force an officer used to make an arrest was excessive and therefore in violation of rights protected by the Fourth Amendment. *Brown II*, 798 F.3d at 100 ("The Fourth Amendment prohibits the use of excessive force in making an arrest, and whether the force used is excessive is to be analyzed under that Amendment's '"reasonableness" standard.'" (citing *Graham*, 490 U.S. at 395)). The *Brown II* opinion discussed the three factors the Supreme Court identified specifically, i.e., severity of the

crime at issue, whether the suspect poses an immediate threat to safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to flee. *Id.* (citing *Graham*, 490 U.S. at 396). The District Court erred, this Court concluded in *Brown II*, because "[a]n aggregate assessment of all three relevant *Graham* factors would seem to point toward a determination of excessive force and, at a minimum, to preclude a ruling against the victim on a motion for summary judgment." *Id.* at 102 (footnote omitted).

Following this Court's vacatur of the judgment the District Court entered in *Brown I*, the excessive force claims on remand reverted back to the prior, pre-trial status. A trial court generally must have discretion to rule on matters prior to presiding over an actual trial, including dispositive motions, and an appellate court vacating an award of summary judgment ordinarily would not confine the discretion of a district court as to how to proceed from that point unless doing so was necessary to correct the error determined to have occurred below. Here, a trial was not necessary to correct the error the District Court was held to have committed. That error was corrected by vacating the summary judgment disposing of the § 1983 excessive force claims against the two officers on the ground that excessive force was not used in Brown's arrest. Consistent with the mandate, the District Court was not free to entertain a second summary judgment motion on the same ground, but it was not constrained from considering a second summary judgment motion raising the issue of whether the § 1983 excessive

force claims were defeated by qualified immunity, an issue that neither *Brown I* nor *Brown II* decided. Therefore, we decline to interpret the *Brown II* mandate to have required a trial on the issue of objective reasonableness under the *Graham* standard. The District Court retained its ordinary, and necessary, discretion to manage the remainder of the litigation consistent with the mandate, which addressed only the question of the reasonableness of the force used by the officers, not the question of qualified immunity.

Brown argues that the issue of qualified immunity, if not explicitly decided, was "implicitly" decided in the previous appeal, maintaining that "[i]t was not necessary for this Court to expressly address qualified immunity for that issue to be subsumed in the mandate and foreclosed on remand." Br. for Pl.-Appellant with Special App. 19 (Aug. 12, 2016), ECF No. 32 ("Pl.-Appellant's Br."). The District Court concluded in *Brown III* that the issue of qualified immunity was not implicitly decided in *Brown II*, and we agree. *Brown II* mentioned the qualified immunity defense in analyzing plaintiff-appellant's false arrest claims, *see* 798 F.3d at 99, but it did not do so in addressing the excessive force claims. As to the latter claims, we can be sure that *Brown II* did not intend to rule on them implicitly: the issue was not decided in the District Court's initial opinion, it was not argued on appeal, and *Brown II* never addresses it. Instead, *Brown II* confines its analysis to the issue of objective reasonableness under the Fourth Amendment standard of *Graham*. Notably, *Graham*

did not involve the question of qualified immunity of police officers. 490 U.S. at 399 n.12 ("Since no claim of qualified immunity has been raised in this case, . . . we express no view on its proper application in excessive force cases that arise under the Fourth Amendment.").

What is more, the District Court's disposition of the excessive force claims that was before this Court in *Brown II* did not require this Court to decide whether qualified immunity applied. In granting summary judgment on the excessive force claims in *Brown I*, the District Court disposed of the § 1983 excessive force claims against the City of New York (a disposition that became final when it was not appealed), in addition to those against the two officers in their individual capacities, by concluding that the officers did not use excessive force. Having done so, the District Court had no need to consider whether the doctrine of qualified immunity protected the two individual defendants from liability. Under the District Court's holding in *Brown I*, the two officers could not be liable to Brown in their individual capacities for damages arising from a violation of the Fourth Amendment prohibition against excessive use of force that the District Court held not to have occurred.

Arguing that the District Court erred in failing to follow the mandate in *Brown II*, plaintiff-appellant relies on *Statek Corp. v. Dev. Specialists, Inc.* (*In Re Coudert Bros. LLP*), 809 F.3d 94 (2d Cir. 2015) (*"In Re Coudert Bros."*). She relies, further, on *Puricelli v. Argentina*, 797 F.3d 213 (2d Cir. 2015), for the principle that "where a mandate directs a

district court to conduct specific proceedings . . . , generally the district court must conduct those proceedings . . . ." Pl.-Appellant's Br. 19 (quoting *Puricelli*, 797 F.3d at 218).

In Re Coudert Bros. is not on point. In that case, a bankruptcy court expressly was instructed "'to apply Connecticut's choice of law rules in deciding Statek's motion to reconsider.'" 809 F.3d at 99 (citation omitted). Noting that the bankruptcy court did not do so, this Court concluded that "[f]ar from giving full effect to our mandate . . . , the bankruptcy court here essentially gave it no legal effect." *Id.* When we consider the context of the vacatur of the summary judgment and the ordering of further proceedings, we cannot conclude that *Brown II* expressly or unambiguously ordered the District Court to conduct a trial on the issue of whether the force used in arresting Brown was excessive under Fourth Amendment standards. In response to the vacatur of the summary judgment, the District Court conducted appropriate further proceedings. It would be incorrect, therefore, to conclude that the District Court gave "no legal effect" to the mandate in *Brown II*.

Because *Brown II* did not expressly direct the District Court to hold a trial on remand, *Puricelli* is also distinguishable from this appeal. In *Puricelli*, this Court specifically directed that "on remand, the district court shall conduct an evidentiary hearing to resolve" certain specified factual issues pertaining to awards of damages in class action suits to recover on defaulted government bonds. 797 F.3d at 217 (*quoting*

Hickory Sec. Ltd. v. Republic of Argentina, 493 Fed. Appx. 156, 160 (2d Cir. 2012)). Rather than follow that mandated procedure, the district court modified the class definitions and granted new class certifications. *Id.* This Court held in *Puricelli* that the mandate in question "gave the District Court specific instructions that did not permit expanding the plaintiff classes." *Id.* at 218.

In summary, *Brown II* did not rule, explicitly or implicitly, on the issue of qualified immunity and is not properly interpreted to have required the District Court to conduct a trial on whether excessive force was used in arresting Brown. We hold, therefore, that the District Court did not err in considering a motion for summary judgment on the qualified immunity issue.

Plaintiff-appellant's second argument is that Naimoli and Plevritis waived their qualified immunity defense, first by raising it in only a "half-sentence argument" in support of their summary judgment motion before the last appeal, and again by failing to raise it in the last appeal. Pl.-Appellant's Br. 23. Brown argues that in their original summary judgment motion, defendants argued, only summarily, that "the officers are entitled to qualified immunity as it was reasonable under the circumstances for the officers to use the force shown." *Id.* at 23-24 (citing Mem. of Law in Supp. of Defs.' Mot. for Summ. J. at 17, *Brown I*, 2014 WL 2767232 (No. 13-cv-1018)). She submits that "[t]his contention does not argue that the law was not clearly established, nor that reasonable officers could be unsure whether the force employed was unconstitutional." *Id.* at 24.

Further, Brown argues that defendant-appellees' failure to raise qualified immunity on appeal in *Brown II* is "a concession that they had not properly raised it in the court below" and that this failure, in any event, waived the qualified immunity defense. *Id.* at 25.

The discretion trial courts may exercise on matters of procedure extends to a decision on whether an argument has been waived. *Olin Corp. v. Am. Home Assur. Co.*, 704 F.3d 89, 98 (2d Cir. 2012) ("A district court's determination that a party has not waived an argument by raising it earlier is reviewed for abuse of discretion" (citing *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 407 F.3d 34, 45 (2d Cir. 2005))). The District Court reasoned that Naimoli and Plevitis did not waive the qualified immunity defense because they "pled the defense in the Answer, raised it specifically as to the excessive force claim in the first summary judgment motion, and raised it again on summary judgment now." *Brown III*, 2016 WL 1611502 at *5 n.6. It also reasoned that the "quality of the argument in defendant's briefing does not here serve as a proper basis for a waiver." *Id.* Applying an abuse of discretion standard, we do not find error in the District Court's deciding that the officers did not waive the qualified immunity defense.

In arguing that the defendant officers inadequately raised the issue in their summary judgment motion, Brown relies on *Blissett v. Coughlin*, 66 F.3d 531

(2d Cir. 1995), and *McCardle v. Haddad*, 131 F.3d 43 (2d Cir. 1997). This reliance is misplaced.

Plaintiff-appellant characterizes *Blissett* and this case as involving "similar circumstances." Pl.-Appellant's Br. 24. We disagree. In *Blissett*, this Court affirmed a district court's ruling that the defense of qualified immunity had been waived where the defendants, although having "raised a general immunity defense in their answer" to the complaint, "did not raise the issue of qualified immunity during the subsequent five years of pre-trial proceedings," 66 F.3d at 538, and even at trial "never articulated a qualified immunity defense distinct from the contention—the heart of their defense throughout these proceedings—that no constitutional violation occurred." *Id.* at 539. Here, the officers raised the defense of qualified immunity during pre-trial proceedings, in their first motion for summary judgment before the District Court.

McCardle, which also affirmed a district court's ruling that the qualified immunity defense was waived, is inapposite as well. In *McCardle*, the defendant included the qualified immunity defense in its answer but made no motion for summary judgment on that basis nor showed that he had raised it in any pretrial motion, discovery, or court conference. 131 F.3d at 52. The defendant in *McCardle* raised the qualified immunity defense at the close of his case at trial as to one claim against him, but not as to another, and he did so in an improper motion. *Id.*

We next consider Brown's argument that the officers waived their qualified immunity defense by failing to argue it before this Court in the prior appeal. Concluding that the District Court did not abuse its discretion in ruling otherwise, we reject this waiver argument as well.

The role of the appellee is to defend the decision of the lower court. This Court has not held that an appellee is required, upon pain of subsequent waiver, to raise every possible alternate ground upon which the lower court could have decided an issue. *See Universal Church v. Geltzer*, 463 F.3d 218, 229 (2d Cir. 2006) (stating, in the analogous context of an appeal to a district court from a bankruptcy court, that "[a]lthough it behooves appellees to raise all their defenses on appeal because the appellate court can affirm on any basis supported by the record, even one not relied on by the lower court, *Pollara v. Seymour*, 344 F.3d 265, 268 (2d Cir. 2003), we are not aware of any case requiring them to do so."). For its argument to the contrary, Brown relies in part on *United States v. Quintieri*, 306 F.3d 1217 (2d Cir. 2002), but that case is not on point. *Quintieri* involved successive appeals by appellant Carlo Donato of a criminal sentence and a remand for resentencing that this Court concluded was a limited, not a *de novo*, resentencing remand. This Court held that "[b]ecause the remand was limited, Donato may not now raise arguments that he had an incentive and an opportunity to raise previously but did not raise, absent a cogent and compelling reason for permitting him to do so." *Id*. at 1225. Donato, notably, was the appellant, not the appellee, and the

holding in *Quintieri* as to the limited scope of the resentencing remand establishes no rule or principle relevant to this appeal of a civil judgment. Brown also argues that allowing the defense of qualified immunity in *Brown III* was error because qualified immunity is to be resolved at the earliest possible stage in litigation and because permitting "this type of piecemeal litigation will waste tremendous resources." Pl.-Appellant's Br. 26. According to Brown, the wastefulness results from "two *de novo* appellate reviews of the same record" and "[a]ll of this can be avoided in the future if the Court strictly enforces its mandate and remands for trial." *Id.* at 27. Resolving the qualified immunity defense at an early stage furthers the rule that qualified immunity insulates a defendant officer from suit as well as shielding him from liability. *See Lynch v. Ackley*, 811 F.3d 569, 576 (2d Cir. 2016). This rule, which benefits defendant officers, does not translate to an obligation of an appellee in the situation of Naimoli and Plevritis to have raised the defense of qualified immunity when as appellees they were arguing for affirmance of the judgment below, which was based on a different ground. Nor do we find merit in Brown's argument concerning "piecemeal litigation." Avoiding the "piecemeal litigation" as posited by plaintiff-appellant is not a valid reason for disturbing the legitimate exercise of discretion by the District Court on the question of waiver.

We next consider Brown's argument that the District Court, on the merits, impermissibly awarded summary judgment to Naimoli and Plevritis on the ground of

qualified immunity. We review a summary judgment award *de novo,* with all evidence viewed in the light most favorable to the nonmoving party and all reasonable inferences drawn in that party's favor. *See Okin v. Vill. of Cornwall–on–Hudson Police Dep't,* 577 F.3d 415, 427 (2d Cir. 2009); *Russo v. City of Bridgeport,* 479 F.3d 196, 203 (2d Cir. 2007). Summary judgment is warranted only where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a).

This Court's opinion in *Brown II* summarized a number of undisputed facts material to Brown's excessive force claim. The two officers "were arresting Brown for disorderly conduct, a violation that[,] under New York law, is subject to a maximum punishment of 15 days in jail." *Brown II*, 798 F.3d at 101. "Officer Plevritis was 5′ 10″" and weighed 215 pounds; Officer Naimoli was 5′ 7″ and weighed 150-160 pounds; Brown was 5′ 6″ and weighed 120 pounds." *Id.* "Officer Plevritis asked Brown to place her hands behind her back so that they could apply handcuffs, and she refused to do so." *Id.* "One of the officers kicked Brown's legs out from under her, causing her to fall to the ground." *Id.* "One officer succeeded in placing handcuffs on Brown's right wrist." *Id.* "Both officers struggled with Brown, forcing her body to the ground." *Id.* "Officer Plevritis used his hand to push Brown's face onto the pavement." *Id.* "Brown's left arm, without a handcuff, was under her as she fell to the ground." *Id.* "The officers endeavored to take hold of Brown's left arm and bring it behind her to complete the

handcuffing." *Id.* "While on the ground, Brown did not offer her arms for handcuffing in part because she was trying to keep hold of her phone and wallet and reach for the scattered contents of her purse." *Id.* "Officer Plevritis twice administered a burst of pepper spray directly to Brown's face." *Id.* "The officers completed the handcuffing while Brown was still on the ground." *Id.* "Officer Naimoli was aware of techniques for applying handcuffs to a reluctant arrestee, other than taking a person to the ground." *Id.*

The District Court relied upon these same uncontested facts in granting the summary judgment motion in *Brown III*. *Brown III*, 2016 WL 1611502, at *3. The District Court identified as an additional uncontested fact that "[d]uring the time that plaintiff was refusing to comply with the officers' instructions, and prior to each administration of pepper spray, the officer informed plaintiff that she would be sprayed." *Id.* at *2 n.3 (citations omitted). The District Court added that it is "also undisputed that the New York City Police Department Patrol Guide requires that pepper spray be used in 'two (2) one second bursts, at a minimum distance of three (3) feet, and only in situations when the uniformed member of the service reasonably believes it is necessary to . . . [e]ffect an arrest, or establish physical control of a subject resisting arrest.'" *Id.* at *2 (quoting New York City Patrol Guide, Procedure No. 212-95 (Jan. 1, 2000)).

The District Court recited two contested facts from the *Brown II* opinion, each of which it construed in favor of Brown for purposes of ruling on the summary judgment

motion: "According to Brown, the pepper spray was administered one foot away from her face[] (Officer Plevritis claims the first dose was from two feet away and the second dose was from three feet away[])," and "[a]ccording to Brown, she was trying to use her free arm to pull down her skirt, which was exposing her behind." *Id.*

"Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Reichle v. Howards*, 566 U.S. 658 (2012) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). "To be clearly established, a right must be sufficiently clear that every reasonable official would [have understood] that what he is doing violates that right." *Id.* at 664 (citing *al-Kidd*, 563 U.S. at 741) (quotations omitted). Controlling authority serves to put officials on notice of what is unlawful; however, "existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741.

On the uncontested facts and the two facts that it presumed in Brown's favor, the District Court held that the officers were shielded from liability by their qualified immunity. We agree. As instructed by the Supreme Court, we are "not to define clearly established law at a high level of generality," *al-Kidd*, 563 U.S. at 742 (citations omitted), and we consider, as we must, the particular circumstances in which the force was used in effecting Brown's arrest. The force applied, which was the repeated use of pepper spray, the kicking of Brown's legs out from under her to bring her to the

ground, and Plevritis's using his hand to push Brown's face onto the pavement, occurred after Brown refused to comply with the instructions to place her hands behind her back for handcuffing. During her noncompliance with the instructions, she was warned prior to each application of the pepper spray. The issue presented, therefore, is whether, under clearly established law, every reasonable officer would have concluded that these actions violated Brown's Fourth Amendment rights in the particular circumstance presented by the uncontested facts and the facts presumed in Brown's favor. Here, those circumstances involved a person's repeatedly refusing to follow the instructions of police officers who were attempting to apply handcuffs to accomplish an arrest.

No precedential decision of the Supreme Court or this Court "clearly establishes" that the actions of Naimoli or Plevritis, viewed in the circumstances in which they were taken, were in violation of the Fourth Amendment. The excessive force cases on which Brown relies do not suffice for this purpose.

Brown first directs our attention to *Robison v. Via*, 821 F.2d 913 (2d Cir. 1987), a decision vacating a district court's summary judgment award in favor of a defendant state police officer on a § 1983 claim. Summary judgment in favor of the officer was not proper, this Court held, due to the plaintiff's testimony that the officer "'pushed' her against the inside of the door of her car, 'yanked' her out, 'threw [her] up against the fender,' and 'twisted [her] arm behind [her] back.'" *Id.* at 923-24. The plaintiff also

"testified that she suffered bruises lasting a 'couple weeks.'" *Id.* The case is inapposite in key respects. The alleged force was more severe than that presented here, and the opinion in *Robison* does not state that the police officer exerted physical force to overcome resistance to arrest. To the contrary, no arrest was attempted, and the force was applied while the officer sought to prevent the plaintiff's interfering with her children's removal from her custody. *See id.* at 916-17.

Brown next cites *Bellows v. Dainack*, 555 F.2d 1105 (2d Cir. 1977), in which the plaintiff contended that defendant police officers twisted his arm and pushed him into a police car; he further alleged that an officer in the front seat pulled him by the scruff of his neck and struck him in the ribs while the plaintiff was sitting in the back seat. *Id.* at 1106. These allegations are not analogous to the force used against Brown, if for no other reason than that the alleged force was used while the plaintiff in *Bellows* was seated in the back of the police car, i.e., *after* the plaintiff was secured in the officers' custody.

Amnesty America v. Town of West Hartford, 361 F.3d 113 (2d Cir. 2004), also cited by Brown, involved police actions taken in response to resistance to arrest but additionally involved allegations of serious physical abuse of the plaintiffs that are readily distinguished from the salient facts of this appeal, including, *inter alia*, "pressing their wrists back against their forearms in a way that caused lasting damage," dragging a plaintiff "by his legs, causing a second-degree burn on his chest," and "ramming" a

plaintiff's "head into a wall at high speed." *Id.* at 123. Vacating an award of summary judgment in favor of the municipal defendant, this Court opined that "[i]t is entirely possible that a reasonable jury would find, as the district court intimated, that the police officers' use of force was objectively reasonable given the circumstances and the plaintiffs' resistance techniques" but also that "a reasonable jury could also find that the officers gratuitously inflicted pain in a manner that was not a reasonable response to the circumstances . . . ." *Id.* at 124. Plaintiff-appellant argues, unconvincingly, that the force alleged in *Amnesty America* "compares to, and if anything, is less than, the force used here." Pl.-Appellant's Br. 28.

Brown argues, further, that "*Tracy v. Freshwater*, 623 F.3d 90 (2d Cir. 2010), clearly established that the officers' use of pepper spray in this case was unconstitutional." *Id.* Brown's reliance on this case ignores a critical factual distinction. In *Tracy*, this Court vacated an award of summary judgment in favor of a defendant police officer after noting that there was an issue of fact as to whether pepper spray was used against the arrestee before handcuffs were applied, or after. *Tracy*, 623 F.3d at 98. The opinion concludes that "a reasonable juror could find that the use of pepper spray deployed mere inches away from the face of a defendant already in handcuffs and offering no further active resistance constituted an unreasonable use of force." *Id*. It is uncontested that Brown received pepper spray prior to, and in furtherance of, the officers' attempts to accomplish the handcuffing.

Finally, Brown draws our attention to several cases from other circuits. There is some tension in this Court's case law concerning whether out-of-circuit precedent can ever clearly establish law in this Circuit. *Compare Pabon v. Wright*, 459 F.3d 241, 255 (2d Cir. 2006), *with Garcia v. Does*, 779 F.3d 84, 95 n.12 (2d Cir. 2015). Even assuming that such precedent may suffice in certain circumstances, however, we conclude that no such circumstances exist in this case. This is not a case, for example, "where the law was established in three other circuits and the decisions of our own court foreshadowed" the establishment of the rule of law on which Brown seeks to rely. *Matusick v. Erie Cty. Water Auth.*, 757 F.3d 31, 61 (2d Cir. 2014).

Similarly, we must reject Brown's argument that summary judgment on qualified immunity grounds was improper because the officers allegedly violated the New York City Police Department Patrol Guide directive not to use pepper spray from a distance of less than three feet. Our presuming in Brown's favor the disputed fact as to the distance the officers maintained, as the District Court did, does not change our conclusion. Brown is unable to demonstrate that *any* administering of pepper spray at a distance of as short as one foot upon an uncooperative arrestee violated "clearly established" Fourth Amendment law against excessive force.

Brown argues that the two officers "were not entitled to qualified immunity since they violated clearly established law by using substantial and unnecessary force to arrest Ms. Brown when she posed no threat to the officers or others, and there were less

aggressive techniques to arrest her for a noncriminal and slight offense." Pl.-Appellant's Br. 27. She adds that "[s]ince the officers knew other less aggressive techniques to arrest Ms. Brown, it was unreasonable and excessive to use more aggressive force than needed." *Id.* at 32. Her argument is grounded in the *Graham* factors, but this Court already has concluded that these factors "would seem to point toward a determination of excessive force," *Brown II*, 798 F.3d at 102, in concluding that a jury possibly could find the force used against Brown to have exceeded that permitted under the Fourth Amendment. Her positing that she posed no threat and that less forceful methods existed to accomplish her arrest is not directed to the inquiry we must make as to qualified immunity. Again, that inquiry is whether every reasonable police officer would view the force used by Naimoli and Plevritis, in the circumstances in which that force was applied, as excessive according to clearly established law.

CONCLUSION

The mandate of this Court in *Brown II* did not preclude the District Court's considering, and ruling on, defendants' motion for summary judgment on the ground of qualified immunity. Defendants did not waive their qualified immunity defense, and the District Court committed no error in granting that motion. Accordingly, the judgment of the District Court is AFFIRMED.

In the
United States Court of Appeals
For the Second Circuit

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AUGUST TERM, 2016

ARGUED: AUGUST 23, 2016
DECIDED: JULY 24, 2017

No. 15-2053-cv

STEPHEN L. KASS,
Plaintiff-Appellee,

v.

CITY OF NEW YORK, MICHAEL ALFIERI, NYPD OFFICER; SHIELD #800, K. ERNST, NEW YORK CITY POLICE ("NYPD") OFFICER,
Defendants-Appellants,

NYPD OFFICER JANE BEGGIN, NYPD OFFICER JOHN DOE, NYPD OFFICER MEREDITH BIGGIN,
Defendants.[*]

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Appeal from the United States District Court
for the Southern District of New York.
No. 14 Civ. 7505 – Andrew L. Carter, Jr., *Judge*.

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Before: WALKER, CHIN, AND LOHIER, *Circuit Judges*.

[*] The Clerk of Court is directed to amend the caption as set forth above.

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2 Defendants-appellants the City of New York ("the City") and
3 certain New York City Police Department ("NYPD") officers bring
4 this interlocutory appeal from an order of the United States District
5 Court for the Southern District of New York (Andrew L. Carter, Jr.,
6 *J.*) denying their motion for judgment on the pleadings. We
7 consider in this appeal (1) whether the NYPD officers are entitled to
8 qualified immunity from plaintiff-appellee Stephen L. Kass's federal
9 false arrest and imprisonment claim under 42 U.S.C. § 1983 and
10 (2) whether we should exercise pendent jurisdiction over Kass's
11 state law claims against these officers and the City.

12 We hold that, because the officers had arguable probable
13 cause to arrest Kass for obstructing governmental administration,
14 N.Y. Penal Law § 195.05, and refusing to comply with a lawful order
15 to disperse, N.Y. Penal Law § 240.20(6), they are entitled to qualified
16 immunity. We therefore REVERSE the district court's denial of the
17 defendants-appellants' motion with respect to Kass's federal and
18 state false arrest and imprisonment claims. We DISMISS the
19 remainder of the appeal for lack of appellate jurisdiction.

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21 MELANIE T. WEST (Deborah A. Brenner, *on the*
22 *brief*), on behalf of Zachary W. Carter,
23 Corporation Counsel of the City of New York,
24 New York, NY, *for Defendants-Appellants*.

ANDREW G. CELLI, JR. (Alison Frick, *on the brief*) Emery Celli Brinckerhoff & Abady LLP, New York, NY *for Plaintiff-Appellee.*

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JOHN M. WALKER, JR., *Circuit Judge*:

Defendants-appellants the City of New York ("the City") and certain New York City Police Department ("NYPD") officers bring this interlocutory appeal from an order of the United States District Court for the Southern District of New York (Andrew L. Carter, Jr., *J.*) denying their motion for judgment on the pleadings. We consider in this appeal (1) whether the NYPD officers are entitled to qualified immunity from plaintiff-appellee Stephen L. Kass's federal false arrest and imprisonment claim under 42 U.S.C. § 1983 and (2) whether we should exercise pendent jurisdiction over Kass's state law claims against these officers and the City.

We hold that, because the officers had arguable probable cause to arrest Kass for obstructing governmental administration, N.Y. Penal Law § 195.05, and refusing to comply with a lawful order to disperse, N.Y. Penal Law § 240.20(6), they are entitled to qualified immunity. We therefore REVERSE the district court's denial of the defendants-appellants' motion with respect to Kass's federal and state false arrest and imprisonment claims. We DISMISS the remainder of the appeal for lack of appellate jurisdiction.

BACKGROUND

On September 17, 2013, protestors gathered in Zuccotti Park in New York City to commemorate the second anniversary of the Occupy Wall Street movement. The NYPD placed barricades around the perimeter of the park to cordon off the area where the protestors were gathered and to separate the protestors, who were inside the park, from the pedestrians who were on the adjacent sidewalk along lower Broadway. NYPD Sergeant Michael Alfieri, Officer Karen Ernst, and Officer Meredith Biggin were stationed on the sidewalk near the barricades.

At around 4:40 p.m., Stephen L. Kass, then a 73-year-old attorney, was walking north on Broadway when he noticed the crowd of people in Zuccotti Park. Kass approached the barricades and, while standing on the sidewalk, engaged in a non-confrontational conversation with several protestors. Kass did not impede pedestrian or vehicular traffic during this conversation. After Kass had spoken with the protestors for a minute or two, Ernst approached Kass and instructed him to "keep walking." Joint App'x at 16. Kass replied that he wanted to hear the protestors' views, he was not blocking pedestrian traffic, and he had a right to remain on the sidewalk. Ernst repeated that Kass had to move away from the barricade. When Kass continued to refuse to comply, Ernst called over Alfieri.

At this point, one of the protestors began recording a video of the interaction, the authenticity and accuracy of which is not in dispute. As can be seen on the video, Ernst and Alfieri instructed Kass several times to continue walking. Kass repeated that he wanted to talk to the protestors, that he was not blocking pedestrian traffic, and that he would not move. Alfieri then directed Kass to follow him and placed his hand on Kass's elbow, attempting to guide him away from the barricades. Kass pulled away, telling Alfieri to take his hands off of him and that he was talking to the protestors. Ernst then suggested that Kass could go inside the park to continue his conversation with the protestors.

After Kass continued to refuse to comply, Alfieri grabbed Kass's right arm and pulled him toward the middle of the sidewalk, away from the barricade and protestors. Kass immediately objected, saying "get your hands off of me, how dare you, get your hands off me." A third unidentified officer then grabbed Kass's other arm, and the officers handcuffed Kass. Kass was brought to the precinct and issued a summons for disorderly conduct under New York Penal Law § 240.20(5). This charge was ultimately dismissed for failure to prosecute.

On September 16, 2014, Kass filed the instant action against the City and NYPD officers Ernst and Alfieri. Kass also named as a defendant an NYPD officer who was later identified as Meredith

Biggin and who was served with the complaint on May 13, 2015. Kass alleged that the officers did not have probable cause to arrest him and that the City was liable for the actions of its employees under the doctrine of *respondeat superior*. Kass asserted federal claims against the officers for false arrest and imprisonment as well as malicious prosecution, and New York state law claims against all of the defendants for false arrest and imprisonment, malicious prosecution, and assault and battery.

On March 16, 2015, before Biggin was served with the complaint, the City, Ernst, and Alfieri moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). Ernst and Alfieri argued that they were entitled to qualified immunity because there was probable cause or, at least, arguable probable cause to support Kass's arrest. The City, Ernst, and Alfieri also sought dismissal of the state law claims against them. While this motion was pending, Kass withdrew his federal malicious prosecution claim.

On June 8, 2015, the district court dismissed Kass's withdrawn claim, but otherwise denied the defendants-appellants' motion. The district court did not explain its basis for rejecting the officers' qualified immunity defense. On June 24, 2015, the City, Ernst, Alfieri, and Biggin timely filed an interlocutory appeal.

DISCUSSION

As an initial matter, we address whether defendant Biggin is properly included as an appellant in this action. Kass argues that because Biggin was not a party to the Rule 12(c) motion, she should not be permitted to appeal the district court's denial of that motion. Although Kass only cursorily raises this issue and the defendants do not present any arguments in response, we must address whether Biggin has standing to pursue this appeal before we turn to the merits of her arguments. *See Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 77 (2d Cir. 2006) (noting "[s]tanding to appeal is an essential component of our appellate jurisdiction"); *see also Tachiona v. United States*, 386 F.3d 205, 210-11 (2d Cir. 2004).

In order to have standing on appeal, "a party must be aggrieved by the judicial action from which it appeals." *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 92 (2d Cir. 2014) (citation omitted). A party that is "not bound by a [district court order] will, in the usual case, have difficulty showing that it meets the Article III standing requirement" that it has suffered such an injury. *Tachiona*, 386 F.3d at 211; *see, e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 (1997) (noting "grave doubts" as to whether parties who "were not bound by the judgment" of the district court had Article III standing to appeal).

Here, defendant Biggin was not a party to the relevant Rule 12(c) motion , she is not bound by the district court's order denying that motion, and the defendants have failed to argue on appeal that she has sustained any legal injury as a result of this order. We therefore agree with Kass that she is not properly an appellant before this Court. Thus, our decision concerns only Kass's claims against the City, Ernst, and Alfieri, the defendants-appellants.

I. Federal False Arrest and Imprisonment Claim

On appeal, the defendants-appellants argue first that Kass's federal false arrest and imprisonment claim should be dismissed against Officers Ernst and Alfieri because the district court incorrectly rejected their qualified immunity defense. Although generally an appeal must await a final dispositive judgment in the district court, we have jurisdiction over an interlocutory appeal from a denial of qualified immunity when, as is the case here, the matter can be decided as a matter of law. *See DiStiso v. Cook*, 691 F.3d 226, 239 (2d Cir. 2012). That is because an individual who is entitled to qualified immunity is immune not only from liability, but also from further legal proceedings, and should receive such immunity at "the earliest possible stage of the litigation." *Wood v. Moss*, 134 S. Ct. 2056, 2065 n.4 (2014) (citation and brackets omitted).

We review *de novo* a district court's denial of a motion for judgment on the pleadings based on qualified immunity. *See*

Anderson v. Recore, 317 F.3d 194, 197 (2d Cir. 2003); *Garcia v. Does*, 779 F.3d 84, 91 (2d Cir. 2015). We apply the same standard as that applicable to a motion under Rule 12(b)(6), accepting the allegations contained in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Anderson*, 317 F.3d at 197. However, when the record includes a video that the parties concede is authentic and accurate**,** as is the case here, we view the allegations of the complaint as true only "to the extent that they are not contradicted by video evidence." *See Garcia*, 779 F.3d at 88.

The burden is on the defendants to demonstrate that qualified immunity applies and that their motion for judgment on the pleadings should be granted. *McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004). The defendants therefore must show that, construing all reasonable inferences in the plaintiff's favor, "the facts supporting the [immunity] defense appear on the face of the complaint" and that "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Id.* (citation omitted).

An officer is entitled to qualified immunity from a federal false arrest and imprisonment claim if he had arguable probable cause to arrest the plaintiff for any offense, regardless of the offense with which the plaintiff was actually charged. *Betts v. Shearman*, 751 F.3d 78, 82-83 (2d Cir. 2014); *Myers v. Patterson*, 819 F.3d 625, 632-33

(2d Cir. 2016); *Zalaski v. City of Hartford*, 723 F.3d 382, 390 n.4 (2d Cir. 2013). Probable cause exists when "the facts and circumstances within . . . the officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested." *Marcavage v. City of N.Y.*, 689 F.3d 98, 109 (2d Cir. 2012) (citation omitted). Arguable probable cause exists when "it was objectively reasonable for the officer to believe that probable cause existed, or . . . officers of reasonable competence could disagree on whether the probable cause test was met." *Myers*, 819 F.3d at 633 (citation omitted). In other words, an officer is entitled to qualified immunity unless "no officer of reasonable competence could have made the same choice in similar circumstances." *Id*. (citation omitted). The qualified immunity defense, thus, is a broad shield that protects "all but the plainly incompetent or those who knowingly violate the law." *Zalaski*, 723 F.3d at 389 (citation omitted).

Here, the officers assert that they are entitled to qualified immunity because they had probable cause or, at least, arguable probable cause to arrest Kass for two separate offenses: obstructing governmental administration, N.Y. Penal Law § 195.05, and refusing to comply with a lawful order to disperse, N.Y. Penal Law § 240.20(6). We agree that the officers are shielded by qualified

immunity, and we reverse the district court's denial of the officers' motion for judgment on the pleadings with respect to Kass's federal false arrest and imprisonment claim.

i. Obstruction of Governmental Administration

We first address whether the officers had arguable probable cause to arrest Kass for obstructing governmental administration. New York Penal Law § 195.05 provides that,

> A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act.

An individual, therefore, may be convicted under this statute when (1) a public servant is performing an official function; (2) the individual prevents or attempts to prevent the performance of that function by interfering with it; and (3) the individual does so intentionally. *See* N.Y. Penal Law § 195.05. For the following reasons, we think that it was at least debatable and reasonable officers could disagree as to whether all three of these elements were met in the instant case.

a. *Official Function*

The first element is that the public servant must be performing an official function that is "authorized by law." *In re Verna C.*, 531 N.Y.S.2d 344, 345 (2d Dep't 1988). The defendants argue that, in ordering Kass to move, the officers were lawfully regulating pedestrian traffic and addressing any congestion or security issues relating to the protest. Kass responds that it was not objectively reasonable for the officers to believe that he had committed a crime and thus that they had the authority to arrest him for standing on a public sidewalk and refusing to move.

Kass's argument misses the point. An officer does not need to believe that an individual has committed a crime before he or she may lawfully direct the individual to move from where he is standing. *See, e.g.*, *Marcavage*, 689 F.3d at 110 (concluding that officers lawfully directed protestors to move because protestors were standing in a designated no-demonstration zone). And, contrary to Kass's assertion, the officers did not direct Kass to move simply because he was standing on a sidewalk or, as we will discuss below, arrest him because he refused to obey an arbitrary order to move. Kass's argument ignores the context in which the officers' orders occurred: on a sidewalk in the heart of downtown Manhattan, shortly before 5 p.m., and near a public protest that the officers were attempting to maintain within a confined area to

ensure crowd control and security. We think that, under such circumstances, it was objectively reasonable for the officers to believe that they had the authority to order Kass, who was engaging with protestors while standing on a sidewalk adjacent to the protest, either to "keep walking" or enter the park to continue speaking with the protestors.

Kass also argues that these orders were unconstitutional under the First Amendment because they "arbitrarily and forcibly remove[d] a passer-by from a public sidewalk" and prevented him from hearing the protestors' message. Appellee Br. at 17. The First Amendment, which applies to the states through the Fourteenth Amendment, guarantees freedom of speech. U.S. CONST. amend. I; *see Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). This guarantee extends not only to the right to speak, but also to the right to listen and receive information. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) ("[W]here a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both."(footnote omitted)); *Conant v. Walters*, 309 F.3d 629, 643 (9th Cir. 2002) ("[T]he right to hear and the right to speak are flip sides of the same coin.").

The First Amendment, however, "does not guarantee the right to communicate . . . at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*,

452 U.S. 640, 647 (1981). The extent to which the government may permissibly restrict such communications depends in part upon the circumstances under which those communications and the receipt of those communications occur. *Zalaski v. City of Bridgeport Police Dep't*, 613 F.3d 336, 341 (2d Cir. 2010) (per curiam). Traditional public fora, such as sidewalks and parks, are afforded the broadest protections for free expression. *Id.*; *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2536 (2014) ("[N]ormal conversation . . . on a public sidewalk . . . [is a form of expression that has] historically been more closely associated with the transmission of ideas than others."). In such public fora, the government may apply content-neutral time, place, and manner restrictions only if they are "narrowly tailored to serve a significant government interest" and if "ample alternative channels of communication" are available. *Zalaski*, 613 F.3d at 341 (citation omitted).[1]

At issue here is the balance between an individual's First Amendment right to engage in a conversation on a public sidewalk with protestors and the government's interest in maintaining public safety and order. Although sidewalks are generally open to the public, including for "expressive activities," we have recognized that the government "certainly has a significant interest in keeping its

[1] There is no claim here that the officers were responding based on the content of the protestors' or Kass's speech.

public spaces safe and free of congestion." *Marcavage*, 689 F.3d at 104 (citations omitted); *see also Mastrovincenzo v. City of New York*, 435 F.3d 78, 100 (2d Cir. 2006) ("[R]educing sidewalk and street congestion in a city with eight million inhabitants[] constitute[s] [a] 'significant governmental interest[]'."). Here, as we have noted, Kass was standing on a sidewalk in downtown Manhattan that was adjacent to the protest and that was being used by pedestrians. We agree with the officers that the government had a significant interest in ensuring that the protest remained within the park and that pedestrian traffic on this sidewalk was not impeded.

The officers' orders also were narrowly tailored to achieve this significant government interest. *See Zalaski*, 613 F.3d at 341. A restriction on free speech is narrowly tailored if it does not "burden substantially more speech than is necessary to further the government's legitimate interests." *McCullen*, 134 S. Ct. at 2535 (citation omitted); *see also Frisby v. Schultz*, 487 U.S. 474, 485 (1988) ("A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." (citation omitted)). The restriction, however, need not be "the least restrictive or least intrusive means of [achieving those interests]." *Mastrovincenzo*, 435 F.3d at 98 (citation omitted). In *Marcavage v. City of New York*, for example, we held that police officers, who were regulating pedestrian traffic during the 2004 Republican National

Convention and who instructed protestors to leave an area that had been designated as a no-demonstration zone, were performing a lawful governmental function that did not violate the protestors' First Amendment rights. 689 F.3d at 109. We determined that, because there were crowds of protestors and pedestrians associated with the convention and the non-protest areas were limited to a two-block stretch during the convention, these restrictions were sufficiently tailored to achieve the government's significant interest in keeping such public spaces safe and free of congestion. *Id.* at 106-07.

Here, the officers ordered Kass, after he had conversed with the protestors for a minute or two while standing outside of the designated protest area, to either keep walking or enter the park to continue his conversation. The officers' orders targeted and sought to eliminate the risk that the protest might expand beyond the barricades and that individuals who were not within the park, such as Kass, might cause congestion or a security issue by interacting with protestors on the sidewalk outside of the protest area. We acknowledge that, when the officers ordered Kass to move, he was the only individual speaking with the two protestors and he was not then impeding pedestrian or vehicular traffic. Whether the officers' orders were justified under these circumstances, however, "should not be measured by the disorder that would result from granting an

exemption solely to [one individual] because if [he] were allowed a dispensation, so too must other groups, which would then create a much larger threat to the [City's] interest in crowd control and security." *See id*. at 107 (citation omitted). Further, we do not think that to avoid liability the officers needed to refrain from intervening until Kass actually impeded pedestrian traffic or caused a security issue. *See id.* (rejecting plaintiffs' argument that, because they were two protestors who were "standing out of the way," the congestion and security risks justifying a no-demonstration zone did not apply to them). We also note that once Alfieri tried to move Kass away from the barricades, Kass became agitated and hostile, thereby further increasing the risk that he would impede traffic or pose a security threat. Under such circumstances, the officers' repeated orders that Kass either "keep walking" or enter the protest area to continue his conversation were narrowly tailored to maintain crowd control and security.

Finally, the officers' orders did not foreclose ample, alternative channels of communication. Such channels need not "be perfect substitutes for those . . . denied to [the plaintiff] by the regulation at hand." *Mastrovincenzo*, 435 F.3d at 101; *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 293 (6th Cir. 1998) ("[T]he requirement that ample alternative channels be left available does not mean that there must be a channel where [plaintiffs] can

express themselves in precisely the same manner."). Here, the officers suggested a reasonable alternative: Kass could continue his conversation with the protestors if he simply entered the park. Kass does not advance any argument on appeal as to why this would not have been an adequate, alternative forum for his conversation.

Thus, because the officers' orders were content neutral, narrowly tailored, and allowed an adequate, alternative channel of communication, they were a permissible time, place, and manner restriction on speech and did not violate the First Amendment.

b. *Interference with the Official Function*

The second element is that an individual must prevent or attempt to prevent a public official from performing a lawful official function by interfering with that function. *See* N.Y. Penal Law § 195.05. Although the interference must at least in part be "physical" and cannot consist solely of verbal statements, *People v. Case*, 42 N.Y.2d 98, 101-02 (1977), an officer may consider both words and deeds in determining whether the individual's conduct is sufficiently obstructive to justify an arrest, *In re Davan L.*, 91 N.Y.2d 88, 91-92 (1997). Such interference can consist of "inappropriate and disruptive conduct at the scene of the performance of an official function even if there is no physical force involved." *People v. Romeo*, 779 N.Y.S.2d 860, 861-62 (3d Dep't 2004) (internal citations omitted). This element of the statute is satisfied when an individual

"intrude[s] himself into, or get[s] in the way of, an ongoing police activity." *In re Kendell R.*, 897 N.Y.S.2d 83, 84 (1st Dep't 2010); *see also Davan L.*, 91 N.Y.2d at 91 ("[C]riminal responsibility should attach to minimal interference set in motion to frustrate police activity.").

Here, Kass physically interfered with the officers' efforts to confine the protest to the park and keep the sidewalk clear for pedestrians. Kass refused to obey the officers' repeated orders to move along and, after Alfieri placed his hand on Kass's elbow to guide Kass away from the barricades, Kass instructed Alfieri to "get [his] hands off" of him and pulled away. A reasonable officer could conclude under these circumstances that Kass had physically "[gotten] in the way of" and had frustrated the officers' efforts to contain the protest and prevent sidewalk congestion. *See Kendell R.*, 897 NY.S.2d at 84; *see also Marcavage,* 689 F.3d at 110 (probable cause to arrest protestors for refusing to leave the no-demonstration zone despite officers' repeated requests); *Romeo*, 779 N.Y.S.2d at 861 (probable cause to arrest individual who was "belligerent, uncooperative and refused several direct requests that he keep away from the officers as they attempted to subdue his girlfriend").

c. *Intent to Prevent Performance of Official Function*

Finally, the third element is that an individual who interferes with an official function must intend to prevent the officers from performing that function. *See* N.Y. Penal Law § 195.05. However,

because "the practical restraints on police in the field are greater with respect to ascertaining intent . . ., the latitude accorded to officers considering the probable cause issue in the context of mens rea crimes must be correspondingly great." *Zalaski*, 723 F.3d at 393 (citation omitted); *see also Conner v. Heiman*, 672 F.3d 1126, 1132 (9th Cir. 2012) (whether inference of innocent intent "was also reasonable . . . does not matter so long as the [officer's] conclusion [that there was culpable intent] was itself reasonable").

Here, as we have described, the officers were stationed on the public sidewalk and in close proximity to the protest in order to maintain crowd control and security. The officers informed Kass that he needed to move in order to keep the sidewalk clear for pedestrian traffic. Kass, however, verbally and physically refused to obey the officers' orders either to "keep walking" or join the protestors inside of the park. We think that it was reasonable for the officers to infer that, based on Kass's repeated refusals to move, he intended to interfere with their efforts to confine the protest in the designated area and prevent sidewalk congestion. *See Marcavage*, 689 F.3d at 110 (probable cause to arrest protestors who were "hostile and noncompliant" when officers ordered them to move); *Davan L.*, 91 N.Y.2d at 91-92 (probable cause to arrest individual who rode bicycle into "confined and defined" police activity area, despite being "put on specific direct notice" not to do so).

In sum, because reasonable officers could at least debate whether there was probable cause to arrest Kass for obstructing governmental administration in violation of New York Penal Law § 195.05, we hold that the officers are entitled to qualified immunity for Kass's federal false arrest and imprisonment claim.

ii. Refusal to Comply with a Lawful Order to Disperse

Although we must reverse the district court's ruling if the officers had arguable probable cause to arrest Kass for any offense, we think the officers also had arguable probable cause to arrest Kass for disorderly conduct. Pursuant to New York Penal Law § 240.20(6), "a person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof . . . [h]e congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse." This offense consists of the following elements: the individual (1) congregated with other persons in a public place; (2) was given a lawful order of the police to disperse; (3) refused to comply with that order; and (4) acted with intent to cause or recklessly created a risk of public inconvenience, annoyance or alarm. *Id.*

a. *Congregating with Others in a Public Place*

First, it was objectively reasonable for the officers to determine that Kass was "congregat[ing] with other persons in a public place."

See N.Y. Penal Law § 240.20(6). New York courts have defined this term as a gathering of "at the very least three persons . . . at a given time and place," including the individual who was arrested. *People v. Carcel*, 3 N.Y.2d 327, 333 (1957); *see also United States v. Nelson*, 500 F. App'x 90, 92 (2d Cir. 2012) (summary order). Kass argues on appeal that he approached only one protestor. He alleged in his complaint, however, that he was "arrested while speaking with *protestors*" and that he "engaged in a brief discussion with a protestor who was holding [a] sign and with another protestor standing nearby." Joint App'x at 13, 16 (emphasis added). Based on Kass's own allegations, therefore, he was speaking with at least two protestors.

Kass also argues that he did not "congregate" with these protestors because he refused to cross the barricades to join the protest. In support of this argument, he cites two cases in which New York state courts determined that the individual at issue was not physically close enough to other demonstrators to satisfy this element of the statute. In *People v. Millhollen*, the court found that a woman who was protesting while perched in a tree was not "congregating with others" because, although she had supporters who were standing on the ground, there was no one else in the tree who was protesting with her. 786 N.Y.S. 2d 703, 708 (Ithaca City Ct. 2004). Similarly, in *People v. Carcel*, the court determined that two

individuals—one who was walking outside of the United Nations' headquarters and the other who was standing "quite some distance apart" handing out leaflets—were not congregating with one another because they were "not even standing together" and were "only two in number." 3 N.Y.2d at 331, 333.

In the instant case, it was objectively reasonable for the officers to conclude that Kass had gathered with the two protestors, even though there was a barricade between them. Kass does not dispute that he was standing in close proximity to the protestors while he was conversing with them. Further, although this conversation lasted only for a short period before the officers ordered that Kass move along, the officers did not have any basis to believe that Kass was pausing only momentarily on the sidewalk. Indeed, when they instructed Kass to leave, he refused to do so and stated that he wanted to continue talking with the protestors.

b. *Lawful Order to Disperse*

Second, the officers lawfully ordered Kass to disperse. As an initial matter, Kass disputes that the officers directed him to leave the area where he was standing and argues that they made a "series of confusing and contradictory statements." Appellee Br. at 34. The video clearly contradicts this assertion. The officers ordered Kass to "keep walking" and to "move on" several times. Joint App'x at 16-17, 120. Although Ernst suggested that Kass could join the

protestors in the park, the unavoidable implication was that he could no longer stand on the sidewalk near the barricades while speaking with the protestors. Moreover, Kass responded that he would not move from where he was standing, thereby indicating that he heard and understood the officers' orders.

Further, New York courts have held that "a refusal to obey such an order [to move] can be justified only where the circumstances show conclusively that the police officer's direction was purely arbitrary and was not calculated in any way to promote the public order." *People v. Todaro*, 26 N.Y.2d 325, 328–29 (1970) (quoting *People v. Galpern*, 259 N.Y. 279, 284-85 (1932)); *Crenshaw v. City of Mount Vernon*, 372 F. App'x 202, 206 (2d Cir. 2010) (summary order) (same). As we have described earlier, the officers lawfully ordered Kass to move in furtherance of a legitimate public purpose—to maintain crowd control and security—and thus their orders were not "purely arbitrary." *See Todaro*, 26 N.Y.2d at 328-29.

c. *Refusal to Obey the Order to Disperse*

Third, Kass explicitly refused to obey the officers' orders. In response to Ernst's repeated requests that he "keep walking," he stated that he "was not part of the protest," that "he was a citizen who wanted to hear what the protestor was saying," and that "he had a right to do so." Joint App'x at 16-17. Alfieri then approached Kass and instructed him to leave the area, to which Kass responded

that he would not move because he was "talking to these people." Alfieri took hold of Kass's elbow to guide Kass away from the barricades, and Kass instructed Alfieri to "get [his] hands off" of him and pulled away from Alfieri.

Based on this conduct, a reasonable officer could infer that Kass was refusing to obey the officers' orders to disperse. *See Shamir v. City of N.Y.*, 804 F.3d 553, 557 (2d Cir. 2015) (noting where plaintiff initially obeyed officer's order to move and then went back to the officer and called him a thug, plaintiff's "approach to the officer [after he was told to move] is the antithesis of complying with an order to disperse"); *see also Rivera v. City of N.Y.*, 836 N.Y.S.2d 108, 112 (1st Dep't 2007) (failure of protestors to disperse after lawful order to do so, even when protestors asserted right to remain, supported probable cause for arrest).

d. *Recklessly Creating Risk of Causing Public Inconvenience, Annoyance or Alarm*

Finally, fourth, reasonable officers could disagree about whether Kass's continued refusal to leave the area where he was standing "recklessly creat[ed] a risk" of "caus[ing] public inconvenience, annoyance or alarm." *See* N.Y. Penal Law § 240.20(6). Although "the risk of public disorder does not have to be realized[,] the circumstances must be such that defendant's intent to create such a threat (or reckless disregard thereof) can be readily

inferred." *People v. Baker*, 20 N.Y.3d 354, 360 (2013) (citation omitted). In determining whether this element is satisfied, New York courts consider "the time and place of the episode under scrutiny; the nature and character of the conduct; the number of other people in the vicinity; whether they are drawn to the disturbance and, if so, the nature and number of those attracted; and any other relevant circumstances." *Id.* (citation omitted).

Here, as we have noted, Kass was standing on a sidewalk in the heart of downtown Manhattan shortly before 5 p.m. and in close proximity to a public protest. It is not clear based on the video whether protestors or pedestrians were drawn to Kass's interaction with the police. After Kass initially refused the officers' orders to "keep walking," however, at least one unidentified individual interjected by responding to the officers that Kass was not blocking the sidewalk. Further, as can be seen on the video, once Alfieri placed his hand on Kass to guide him away from the barricades, Kass became increasingly agitated. A third officer eventually needed to intervene in order to help Alfieri physically move Kass, who was resisting Alfieri's attempts to pull him away from the barricades.

Given the context in which Kass repeatedly refused to comply with the officers' orders—on a public sidewalk where pedestrians were passing, at a time of day when the sidewalks might shortly

become more congested, and in close proximity to a public protest—and because Kass became increasingly hostile and resistant toward the officers, it was objectively reasonable for the officers to infer that Kass's continued defiance of their orders recklessly created a risk that he would "cause public inconvenience, annoyance or alarm," including a public disturbance. *See* N.Y. Penal Law § 240.20(6). At the very least, competent police officers could reasonably disagree as to whether, by remaining on the sidewalk despite numerous requests to move on, Kass recklessly created such a risk.

In sum, we conclude that Ernst and Alfieri had arguable probable cause to arrest Kass for violating both New York Penal Law § 195.05 and § 240.20(6) and are entitled to qualified immunity for Kass's federal false arrest and imprisonment claim. Any other conclusion, in our view, would not appropriately confine the denial of qualified immunity to officers who are "plainly incompetent" or "knowingly violate the law." *See Zalaski*, 723 F.3d at 389.

II. State Law Claims

The defendants also request that this Court dismiss Kass's state law claims against the officers and the City. In exercising jurisdiction over an immediate appeal from the denial of qualified immunity, we may consider issues that are "inextricably intertwined" with the qualified immunity question, such that "no additional inquiry or analysis is necessary" once the question of

qualified immunity has been resolved. *Skehan v. Vill. of Mamaroneck*, 465 F.3d 96, 105 (2d Cir. 2006) (citations omitted), *overruled on other grounds by Appel v. Spiridon*, 531 F.3d 138, 139-40 (2d Cir. 2008).

Because the officers are immune from suit with respect to Kass's federal false arrest claim, we dismiss Kass's state law false arrest claim against the officers. *See Jenkins v. City of N.Y.*, 478 F.3d 76, 86-87 (2d Cir. 2007) ("If the . . . defendants [are] entitled to qualified immunity under federal law, . . . judgment [is] similarly appropriate on [plaintiff's] state law false arrest claim."). We also dismiss Kass's state law false arrest claim against the City, which is based solely on his allegation that the City is responsible for any false arrest that was committed by the officers. *See Demoret v. Zegarelli*, 451 F.3d 140, 152-53 (2d Cir. 2006). Kass's remaining state law claims for malicious prosecution and assault and battery, however, require additional analysis and we therefore lack appellate jurisdiction over those claims. *See Skehan*, 465 F.3d at 105; *Toussie v. Powell*, 323 F.3d 178, 184-85 (2d Cir. 2003).

CONCLUSION

For the foregoing reasons, we **REVERSE** the district court's denial of the defendants-appellants' motion for judgment on the pleadings with respect to Kass's federal and state false arrest and imprisonment claims and **DISMISS** the remainder of the appeal.