

15-2053-cv

Kass v. City of New York, et al.

1
2 In the
3 United States Court of Appeals
4 For the Second Circuit
5
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7 AUGUST TERM, 2016

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9 ARGUED: AUGUST 23, 2016

10 DECIDED: JULY 24, 2017

11
12 No. 15-2053-cv

13
14 STEPHEN L. KASS,
15 *Plaintiff-Appellee,*

16
17 *v.*

18
19 CITY OF NEW YORK, MICHAEL ALFIERI, NYPD OFFICER; SHIELD #800,
20 K. ERNST, NEW YORK CITY POLICE ("NYPD") OFFICER,
21 *Defendants-Appellants,*

22
23 NYPD OFFICER JANE BEGGIN, NYPD OFFICER JOHN DOE, NYPD
24 OFFICER MEREDITH BIGGIN,
25 *Defendants.**

26
27 Appeal from the United States District Court
28 for the Southern District of New York.
29 No. 14 Civ. 7505 – Andrew L. Carter, Jr., *Judge.*

30
31
32 Before: WALKER, CHIN, AND LOHIER, *Circuit Judges.*

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

1 _____

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.

20 _____

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*.

1
2 ANDREW G. CELLI, JR. (Alison Frick, *on the brief*)
3 Emery Celli Brinckerhoff & Abady LLP, New
4 York, NY *for Plaintiff-Appellee*.

5
6 JOHN M. WALKER, JR., *Circuit Judge*:

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8 certain New York City Police Department (“NYPD”) officers bring
9 this interlocutory appeal from an order of the United States District
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13 qualified immunity from plaintiff-appellee Stephen L. Kass’s federal
14 false arrest and imprisonment claim under 42 U.S.C. § 1983 and
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16 state law claims against these officers and the City.

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20 to disperse, N.Y. Penal Law § 240.20(6), they are entitled to qualified
21 immunity. We therefore REVERSE the district court’s denial of the
22 defendants-appellants’ motion with respect to Kass’s federal and
23 state false arrest and imprisonment claims. We DISMISS the
24 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.

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

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

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

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

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

18 On June 8, 2015, the district court dismissed Kass's withdrawn
19 claim, but otherwise denied the defendants-appellants' motion. The
20 district court did not explain its basis for rejecting the officers'
21 qualified immunity defense. On June 24, 2015, the City, Ernst,
22 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).

1 Here, defendant Biggin was not a party to the relevant Rule
2 12(c) motion , she is not bound by the district court's order denying
3 that motion, and the defendants have failed to argue on appeal that
4 she has sustained any legal injury as a result of this order. We
5 therefore agree with Kass that she is not properly an appellant
6 before this Court. Thus, our decision concerns only Kass's claims
7 against the City, Ernst, and Alfieri, the defendants-appellants.

8 **I. Federal False Arrest and Imprisonment Claim**

9 On appeal, the defendants-appellants argue first that Kass's
10 federal false arrest and imprisonment claim should be dismissed
11 against Officers Ernst and Alfieri because the district court
12 incorrectly rejected their qualified immunity defense. Although
13 generally an appeal must await a final dispositive judgment in the
14 district court, we have jurisdiction over an interlocutory appeal from
15 a denial of qualified immunity when, as is the case here, the matter
16 can be decided as a matter of law. *See DiStiso v. Cook*, 691 F.3d 226,
17 239 (2d Cir. 2012). That is because an individual who is entitled to
18 qualified immunity is immune not only from liability, but also from
19 further legal proceedings, and should receive such immunity at "the
20 earliest possible stage of the litigation." *Wood v. Moss*, 134 S. Ct.
21 2056, 2065 n.4 (2014) (citation and brackets omitted).

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

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

10 The burden is on the defendants to demonstrate that qualified
11 immunity applies and that their motion for judgment on the
12 pleadings should be granted. *McKenna v. Wright*, 386 F.3d 432, 436
13 (2d Cir. 2004). The defendants therefore must show that, construing
14 all reasonable inferences in the plaintiff’s favor, “the facts
15 supporting the [immunity] defense appear on the face of the
16 complaint” and that “it appears beyond doubt that the plaintiff can
17 prove no set of facts in support of his claim that would entitle him to
18 relief.” *Id.* (citation omitted).

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

1 (2d Cir. 2016); *Zalaski v. City of Hartford*, 723 F.3d 382, 390 n.4 (2d Cir.
2 2013). Probable cause exists when “the facts and circumstances
3 within . . . the officers’ knowledge and of which they had reasonably
4 trustworthy information are sufficient in themselves to warrant a
5 man of reasonable caution in the belief that an offense has been or is
6 being committed by the person to be arrested.” *Marcavage v. City of*
7 *N.Y.*, 689 F.3d 98, 109 (2d Cir. 2012) (citation omitted). Arguable
8 probable cause exists when “it was objectively reasonable for the
9 officer to believe that probable cause existed, or . . . officers of
10 reasonable competence could disagree on whether the probable
11 cause test was met.” *Myers*, 819 F.3d at 633 (citation omitted). In
12 other words, an officer is entitled to qualified immunity unless “no
13 officer of reasonable competence could have made the same choice
14 in similar circumstances.” *Id.* (citation omitted). The qualified
15 immunity defense, thus, is a broad shield that protects “all but the
16 plainly incompetent or those who knowingly violate the law.”
17 *Zalaski*, 723 F.3d at 389 (citation omitted).

18 Here, the officers assert that they are entitled to qualified
19 immunity because they had probable cause or, at least, arguable
20 probable cause to arrest Kass for two separate offenses: obstructing
21 governmental administration, N.Y. Penal Law § 195.05, and refusing
22 to comply with a lawful order to disperse, N.Y. Penal Law
23 § 240.20(6). We agree that the officers are shielded by qualified

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

4 i. Obstruction of Governmental Administration

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

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

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

1 a. *Official Function*

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

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

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

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

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

1 452 U.S. 640, 647 (1981). The extent to which the government may
2 permissibly restrict such communications depends in part upon the
3 circumstances under which those communications and the receipt of
4 those communications occur. *Zalaski v. City of Bridgeport Police Dep't*,
5 613 F.3d 336, 341 (2d Cir. 2010) (per curiam). Traditional public fora,
6 such as sidewalks and parks, are afforded the broadest protections
7 for free expression. *Id.*; see also *McCullen v. Coakley*, 134 S. Ct. 2518,
8 2536 (2014) (“[N]ormal conversation . . . on a public sidewalk . . . [is]
9 a form of expression that has] historically been more closely
10 associated with the transmission of ideas than others.”). In such
11 public fora, the government may apply content-neutral time, place,
12 and manner restrictions only if they are “narrowly tailored to serve a
13 significant government interest” and if “ample alternative channels
14 of communication” are available. *Zalaski*, 613 F.3d at 341 (citation
15 omitted).¹

16 At issue here is the balance between an individual’s First
17 Amendment right to engage in a conversation on a public sidewalk
18 with protestors and the government’s interest in maintaining public
19 safety and order. Although sidewalks are generally open to the
20 public, including for “expressive activities,” we have recognized that
21 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.

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

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

1 Convention and who instructed protestors to leave an area that had
2 been designated as a no-demonstration zone, were performing a
3 lawful governmental function that did not violate the protestors'
4 First Amendment rights. 689 F.3d at 109. We determined that,
5 because there were crowds of protestors and pedestrians associated
6 with the convention and the non-protest areas were limited to a two-
7 block stretch during the convention, these restrictions were
8 sufficiently tailored to achieve the government's significant interest
9 in keeping such public spaces safe and free of congestion. *Id.* at 106-
10 07.

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

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

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

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

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

10 *b. Interference with the Official Function*

11 The second element is that an individual must prevent or
12 attempt to prevent a public official from performing a lawful official
13 function by interfering with that function. See N.Y. Penal Law
14 § 195.05. Although the interference must at least in part be
15 “physical” and cannot consist solely of verbal statements, *People v.*
16 *Case*, 42 N.Y.2d 98, 101-02 (1977), an officer may consider both words
17 and deeds in determining whether the individual’s conduct is
18 sufficiently obstructive to justify an arrest, *In re Davan L.*, 91 N.Y.2d
19 88, 91-92 (1997). Such interference can consist of “inappropriate and
20 disruptive conduct at the scene of the performance of an official
21 function even if there is no physical force involved.” *People v. Romeo*,
22 779 N.Y.S.2d 860, 861-62 (3d Dep’t 2004) (internal citations omitted).
23 This element of the statute is satisfied when an individual

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

5 Here, Kass physically interfered with the officers’ efforts to
6 confine the protest to the park and keep the sidewalk clear for
7 pedestrians. Kass refused to obey the officers’ repeated orders to
8 move along and, after Alfieri placed his hand on Kass’s elbow to
9 guide Kass away from the barricades, Kass instructed Alfieri to “get
10 [his] hands off” of him and pulled away. A reasonable officer could
11 conclude under these circumstances that Kass had physically
12 “[gotten] in the way of” and had frustrated the officers’ efforts to
13 contain the protest and prevent sidewalk congestion. *See Kendell R.*,
14 897 N.Y.S.2d at 84; *see also Marcavage*, 689 F.3d at 110 (probable cause
15 to arrest protestors for refusing to leave the no-demonstration zone
16 despite officers’ repeated requests); *Romeo*, 779 N.Y.S.2d at 861
17 (probable cause to arrest individual who was “belligerent,
18 uncooperative and refused several direct requests that he keep away
19 from the officers as they attempted to subdue his girlfriend”).

20 c. *Intent to Prevent Performance of Official Function*

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

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

9 Here, as we have described, the officers were stationed on the
10 public sidewalk and in close proximity to the protest in order to
11 maintain crowd control and security. The officers informed Kass
12 that he needed to move in order to keep the sidewalk clear for
13 pedestrian traffic. Kass, however, verbally and physically refused to
14 obey the officers’ orders either to “keep walking” or join the
15 protestors inside of the park. We think that it was reasonable for the
16 officers to infer that, based on Kass’s repeated refusals to move, he
17 intended to interfere with their efforts to confine the protest in the
18 designated area and prevent sidewalk congestion. *See Marcavage*,
19 689 F.3d at 110 (probable cause to arrest protestors who were
20 “hostile and noncompliant” when officers ordered them to move);
21 *Davan L.*, 91 N.Y.2d at 91-92 (probable cause to arrest individual
22 who rode bicycle into “confined and defined” police activity area,
23 despite being “put on specific direct notice” not to do so).

1 In sum, because reasonable officers could at least debate
2 whether there was probable cause to arrest Kass for obstructing
3 governmental administration in violation of New York Penal Law
4 § 195.05, we hold that the officers are entitled to qualified immunity
5 for Kass's federal false arrest and imprisonment claim.

6 ii. Refusal to Comply with a Lawful Order to Disperse

7 Although we must reverse the district court's ruling if the
8 officers had arguable probable cause to arrest Kass for any offense,
9 we think the officers also had arguable probable cause to arrest Kass
10 for disorderly conduct. Pursuant to New York Penal Law
11 § 240.20(6), "a person is guilty of disorderly conduct when, with
12 intent to cause public inconvenience, annoyance or alarm, or
13 recklessly creating a risk thereof . . . [h]e congregates with other
14 persons in a public place and refuses to comply with a lawful order
15 of the police to disperse." This offense consists of the following
16 elements: the individual (1) congregated with other persons in a
17 public place; (2) was given a lawful order of the police to disperse;
18 (3) refused to comply with that order; and (4) acted with intent to
19 cause or recklessly created a risk of public inconvenience, annoyance
20 or alarm. *Id.*

21 a. *Congregating with Others in a Public Place*

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

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

13 Kass also argues that he did not “congregate” with these
14 protestors because he refused to cross the barricades to join the
15 protest. In support of this argument, he cites two cases in which
16 New York state courts determined that the individual at issue was
17 not physically close enough to other demonstrators to satisfy this
18 element of the statute. In *People v. Millhollen*, the court found that a
19 woman who was protesting while perched in a tree was not
20 “congregating with others” because, although she had supporters
21 who were standing on the ground, there was no one else in the tree
22 who was protesting with her. 786 N.Y.S. 2d 703, 708 (Ithaca City Ct.
23 2004). Similarly, in *People v. Carcel*, the court determined that two

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

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

16 b. *Lawful Order to Disperse*

17 Second, the officers lawfully ordered Kass to disperse. As an
18 initial matter, Kass disputes that the officers directed him to leave
19 the area where he was standing and argues that they made a “series
20 of confusing and contradictory statements.” Appellee Br. at 34. The
21 video clearly contradicts this assertion. The officers ordered Kass to
22 “keep walking” and to “move on” several times. Joint App’x at 16-
23 17, 120. Although Ernst suggested that Kass could join the

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

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

17 c. *Refusal to Obey the Order to Disperse*

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

1 that he would not move because he was “talking to these people.”
2 Alfieri took hold of Kass’s elbow to guide Kass away from the
3 barricades, and Kass instructed Alfieri to “get [his] hands off” of him
4 and pulled away from Alfieri.

5 Based on this conduct, a reasonable officer could infer that
6 Kass was refusing to obey the officers’ orders to disperse. *See Shamir*
7 *v. City of N.Y.*, 804 F.3d 553, 557 (2d Cir. 2015) (noting where plaintiff
8 initially obeyed officer’s order to move and then went back to the
9 officer and called him a thug, plaintiff’s “approach to the officer
10 [after he was told to move] is the antithesis of complying with an
11 order to disperse”); *see also Rivera v. City of N.Y.*, 836 N.Y.S.2d 108,
12 112 (1st Dep’t 2007) (failure of protestors to disperse after lawful
13 order to do so, even when protestors asserted right to remain,
14 supported probable cause for arrest).

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

17 Finally, fourth, reasonable officers could disagree about
18 whether Kass’s continued refusal to leave the area where he was
19 standing “recklessly creat[ed] a risk” of “caus[ing] public
20 inconvenience, annoyance or alarm.” *See* N.Y. Penal Law
21 § 240.20(6). Although “the risk of public disorder does not have to
22 be realized[,] the circumstances must be such that defendant’s intent
23 to create such a threat (or reckless disregard thereof) can be readily

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

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

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

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

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

17 II. State Law Claims

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

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

4 Because the officers are immune from suit with respect to
5 Kass's federal false arrest claim, we dismiss Kass's state law false
6 arrest claim against the officers. *See Jenkins v. City of N.Y.*, 478 F.3d
7 76, 86-87 (2d Cir. 2007) ("If the . . . defendants [are] entitled to
8 qualified immunity under federal law, . . . judgment [is] similarly
9 appropriate on [plaintiff's] state law false arrest claim."). We also
10 dismiss Kass's state law false arrest claim against the City, which is
11 based solely on his allegation that the City is responsible for any
12 false arrest that was committed by the officers. *See Demoret v.*
13 *Zegarelli*, 451 F.3d 140, 152-53 (2d Cir. 2006). Kass's remaining state
14 law claims for malicious prosecution and assault and battery,
15 however, require additional analysis and we therefore lack appellate
16 jurisdiction over those claims. *See Skehan*, 465 F.3d at 105; *Toussie v.*
17 *Powell*, 323 F.3d 178, 184-85 (2d Cir. 2003).

18 CONCLUSION

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