No. 20-

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In The Supreme Court of the United States

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CHARLES MEYERS, JOHN BAKER, JUSTIN STREKAL, MILES WALSH, Petitioners,

v.

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, Respondents.

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. How individualized must government permission be to raise fair notice protection under the due process component of the Fourteenth Amendment?

B. Is notice that government permission has been revoked, prior to dispersal of First Amendment assembly, necessary to satisfy the Fourteenth Amendment fair notice protection?

C. This Court has ruled that reaching a Fourteenth Amendment constitutional question without first considering whether a municipal statute is dispositive of the matter, so far departs from the accepted and usual course of judicial proceedings as to call for this Court to exercise its supervisory power by: granting certiorari; vacating the summary decision of the Circuit Court; and remanding the case for consideration of the statutory grounds ("CVR").

Does reaching and deciding questions of First and Fourth Amendment constitutionality, without first considering whether statutory provisions are dispositive of the matter, call for such a grant of CVR?

LIST OF PARTIES TO PROCEEDING

The caption contains the name of all the parties in the court of appeals.

OTHER COURT PROCEEDINGS

1. *Meyers v. City of New York*, No. 14-cv-09142, U.S. District Court for the Southern District of New York. Opinion and order denying motion for summary judgment dismissal without prejudice. Order entered October 27, 2015. Not reported.
2. *Meyers v. City of New York*, No. 15-3841, U.S. Court of Appeals for the Second Circuit. Order vacating and remanding judgment of the district court entered October 27, 2015. Order entered February 2, 2017. *Meyers v. City of New York* 675 F. App'x 93 (2d Cir. 2017).
3. *Meyers v. City of New York*, No. 14-cv-09142, U.S. District Court for the Southern District of New York. Order dismissing all defendants. Judgment entered October 26, 2017. Not reported.
4. *Meyers v. City of New York*, No. 14-cv-09142, U.S. District Court for the Southern District of New York, order amending prior judgment to dismiss only individual defendants entered October 26, 2017. Judgment entered December 5, 2017. Not reported.
5. *Meyers v. City of New York*, No. 14-cv-9142, U.S. District Court for the Southern District of New York. Order granting dismissal of remaining claims. Judgment entered March 28, 2019. Not reported.

6. *Meyers v. City of New York*, No. 19-892, U.S. Court of Appeals for the Second Circuit. Order affirming judgment of the district court entered March 28, 2019. Summary Order and Judgment entered April 30, 2020. Not reported.
7. *Meyers v. City of New York*, No. 19-892, U.S. Court of Appeals for the Second Circuit. Rehearing denied June 9, 2020. Not reported.

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CITATIONS OF REPORTED OPINIONS AND ORDERS

The order of the U.S. Court of Appeals for the Second Circuit, entered February 2, 2017, vacating and remanding the judgment of the district court entered October 27, 2015 in *Meyers v. City of New York*, No. 15-3841, is reported at *Meyers v. City of New York*, 675 F. App'x 93 (2d Cir. 2017).

STATEMENT OF THE BASIS FOR THE JURISDICTION

The judgment of the court of appeals was entered on March 28, 2019. A petition for rehearing was denied on June 9, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fourth Amendment to the United States Constitution provides that

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or

> affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution, Section One provides that

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S. C. § 1983 provides that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section,

> any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The Zoning Resolution of the City of New York, Article III: Commercial District Regulations, Chapter 7 – Special Regulations, Section 37-77 Maintenance provides that

> The building owner shall be responsible for the maintenance of the public plaza including, but not limited to, the location of permitted obstructions pursuant to Section 37-726, litter control, management of pigeons and rodents, maintenance of required lighting levels, and the care and replacement of furnishings and vegetation within the zoning lot.

The Zoning Resolution of the City of New York, Article III: Commercial District Regulations, Chapter 7 – Special Regulations, Section 37-623 provides that "The City Planning Commission may, upon application, authorize the closing during certain nighttime hours of an existing plaza, residential plaza or urban plaza for which a floor area bonus has been received, pursuant to Section 37-727 (Hours of access)."

The Zoning Resolution of the City of New York, Article III: Commercial District Regulations, Chapter 7 – Special Regulations, Section 37-727 provides that "All public plazas shall be accessible to the public at all times, except where the City Planning Commission has authorized a nighttime closing, pursuant to the provisions of this Section."

STATEMENT OF THE CASE

Petitioners allege claims for damages arising from violations of the First, Fourth, and Fourteenth Amendments to the U.S. Constitution and 42 U.S. C. § 1983. The basis for federal jurisdiction in the court of first instance, the United States District Court for the Southern District of New York, was thus 28 U.S. C. § 1331, which grants the district courts original jurisdiction of all civil actions arising under the Constitution or laws of the United States.

Following their arrests for trespass, disorderly conduct, and obstruction of governmental administration, petitioners Charles Meyers, Justin Strekal, Miles Walsh and John Blake sued the City of New York and three of its former administrators, Michael Bloomberg (mayor), Raymond Kelly (police commissioner) and Joseph Esposito (police chief), for damages under 42 U.S.C. §1983, alleging false arrest and imprisonment (Fourth Amendment), malicious prosecution (Fourth Amendment), retaliatory arrest (First Amendment), and violation of the right to due process (Fourteenth Amendment). Appendix ("App.") 4a, 6a, 7a. The district court denied a motion for dismissal without prejudice. App. 47a. On interlocutory appeal, the circuit vacated and remanded to the district court. App. 53a. The district court then granted dismissal on all claims. App. 47a. The district court amended that ruling to dismiss only the individual defendants. App. 43a. The district court subsequently granted judgment on the pleadings in favor of the remaining municipality defendant. App. 10a. On appeal, the circuit court affirmed dismissal as to all claims [App. 1a] and denied rehearing [App. 58a]. The court reasoned that there was Fourth

Amendment probable cause to arrest the petitioners, [App. 4a-6a] and no First Amendment discrimination [App. 6a-7a]; that there was no Fourteenth Amendment violation because the mayor's announcement of government permission to members of OWS, that they could remain in this park indefinitely, was insufficiently "individualized" to give rise to fair notice protection [App. 8a]; and, finally, automatic revocation of the permission obviously had taken place, therefore the fair notice protection, if any, had been *forfeited*: "[s]ince 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." [App. 7a-8a].

1. Since the 1960s, New York has had a policy, enacted as the provisions of Sections 37-60 and 37-70 of its Zoning Resolution, of negotiating agreements between its City Council Planning Commission ("CPC") and private developers to exchange exemptions to city limits on upper floor area construction, for the creation and maintenance, *by private owners*, of nearby plazas as parks with easements for their use by the public, designated as "permanent open parks" and "special permit plazas." App. 38a; The Zoning Resolution of the City of New York, Article III: Commercial District Regulations, Chapter 7 – Special Regulations, Sections 37-77, 37-623 and 37-727 *see above* at 2-3. Zuccotti Park, a small plaza in lower Manhattan's financial district, was such a special permit plaza. *Id.*

2. Protesters against financial inequality in American society and government, affiliated under

the name Occupy Wall Street ("OWS") began living together in Zuccotti Park, a small, privately-owned, public space in downtown Manhattan's financial district, as a form of First Amendment assembly and expressive conduct. App. 2a-3a. Their community featured various erected structures, including a kitchen, medical clinic tent, and library, and had a global audience via press media and the internet. *Id.*, *Meyers v. City of New* York, United States Court of Appeals for The Second Circuit, Case No. 19-892, Appendix at A-77 – A-78, ¶¶ 121-123.

3. Respondent mayor announced that OWS could lawfully remain in the park indefinitely, although respondent city would enforce any violation of the law. App. 8a.

4. After the respondent mayor's announcement that protesters could remain, police, at the mayor's direction, issued a midnight park closure and dispersal order, without explanation. App. 3a. The purpose of these orders, as subsequently disclosed in the course of litigation, was allegedly to enable municipal workers to clean the privately-owned park. App. 7a, 24a, 37a; *Meyers v. City of New York*, United States Court of Appeals for the Second Circuit, Case No. 19-892, Appendix at A-335. An hour later, petitioners Charles Meyers, Justin Strekal, Miles Walsh and John Blake, were among those remaining and were arrested. App. 3a.

5. Meyers, Strekal, Walsh and Blake sued, as representative class action plaintiffs, the former city administrators Bloomberg, Kelly and Esposito, asserting false arrest and imprisonment, malicious prosecution, retaliatory arrest, and violations of due process, in violation of the First, Fourth, and

Fourteenth amendments to the United States Constitution, under 42 U.S.C. §1983 [App. 4a-8a] and *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978) [App. 14a-18a]. The district court ultimately granted judgment in favor of respondents. App. 2a.

As to the individual defendant mayor, police commissioner, and police chief of department, the district court granted qualified immunity, reasoning that the administrative officials faced "ambiguities of fact and law" concerning the implications of the ownership status of the park, and because the dispersal order itself could be "reasonably construed" to revoke the mayor's permission to stay. App. 50a-51a.

As to the defendant City of New York, on the false arrest and imprisonment claims, the district court ruled there was probable cause to arrest petitioners for trespass, disorderly conduct, and obstruction of governmental administration. App. 22a-34a. The court ruled that the protesters were removed for refusing a dispersal order arising from unlawful activity, particularly the erection of tents, rather than for remaining in the park, thus rendering lawful the dispersal order, despite the protesters' right to fair notice following the mayor's permission announcement; and that they previously had arguable constructive notice that use of tents was unlawful from aborted NYPD efforts to remove their tents, thus "further dampening" their Fourteenth Amendment claim (App. 41a-42a). The court dismissed the malicious prosecution claim because there had been probable cause for the charges as there had been for the arrests. App. 34a-35a. Accordingly, the district

court entered judgment on the pleadings in respondents' favor on all claims and dismissed the case. App. 42a.

6. Petitioners appealed the district court's decision to the Court of Appeals for the Second Circuit. App. 2a. The appellate court affirmed the lower court ruling, finding that the arrests were supported by Fourth Amendment probable cause, given a lawful dispersal order based on the park congestion and the protesters' use of erected structures [App. 5a-6a]; did not discriminate under the First Amendment because the police action was content neutral, narrowly-tailored, and directed at everyone in the park, not only the protesters [App. 6a-7a]; and that the respondents' orders were lawful under the Fourteenth Amendment because neither the Zoning Resolution provisions, nor the mayor's permission, created an individualized due process right, and failure to disperse as ordered exceeded the limits of the permission by violating the law [App. 7a-8a]. The court thus affirmed the grant of judgment on the pleadings dismissal of all claims. App. 9a.

REASONS FOR ALLOWANCE OF THE WRIT

1. This case squarely presents two unsettled issues, in an important First Amendment area, that are likely to recur.

A. The level of permission individualization required to raise the Fourteenth Amendment fair notice protection is an unsettled question.

This case squarely presents two unsettled questions remaining from prior decisions of this

Court: first, to what extent must permission be *individualized* to give rise to a fair notice right under the 14th Amendment. The prior decisions of this Court in *Cox v. Louisiana*, 379 U.S. 559 (1965) (permission granted, to a group of protesters gathered near a courthouse, to remain there, who are then convicted for refusing an order to leave) ("*Cox*") and *Raley v. Ohio*, 360 U.S. 423, 438 (1959) (permission granted to witnesses subpoenaed to testify before a legislative committee, to invoke their 5th amendment protection against self-incrimination, later convicted of contempt for refusing to testify) ("*Raley*"), did not address the issue of an "individualization" requirement for fair notice permission, and left this aspect of the fair notice right unsettled.

Here, the lower court ruled that government permission to remain, issued to a group of protesters in a public plaza, then arrested, as in *Cox*, for refusing an order to leave, lacked sufficient individualization to support fair notice protection, although neither *Cox* nor *Raley* considered such a requirement. App. 8a.

B. The role that *announcement* of a decision to revoke government permission plays, if any, in the fair notice protection, is an unsettled question.

Second, neither *Cox* nor *Raley* established the role a revocation *without* an *announcement* of that revocation plays in limiting permission, even if the revocation was otherwise valid. In *Cox*, police *announced* permission *had been revoked*, ordered dispersal, and arrested the group when it refused to leave. *Cox* at 572. In *Raley*, as to one of the witnesses, the government *stated grounds for revoking* its grant of permission (*i.e.*, that the witness' home address

could not be self-incriminating), resulting in a contempt conviction for that witness. *Raley* at 442.

Here, the government *did not announce* that the government permission had been revoked, *nor state grounds for the revocation*. It internally decided protesters had themselves revoked permission, by having an overcrowded campsite and erecting more tents, and issued a dispersal order *without explanation*. App. 3a.

C. The grant of permission to assembled demonstrators, and the question of whether it gives rise to fair notice protection, are likely to recur.

Permission for First Amendment assembly is a common feature of protest activity in public spaces. *See, e.g.,* https://www.washingtonpost.com/nation/2020/06/04/george-floyd-protests-live-updates/. It is doubtful that further percolation of cases from lower courts will provide so clear and undisputed a set of facts as to either of these unsettled questions, as this case squarely presents.

2. This case calls for an exercise of the Court's supervisory power.

A. It is forbidden to reach constitutional issues without first considering whether a municipal statute will resolve the matter.

Perhaps no rule of judicial review is so fundamental to the proper disposition of constitutional disputes as the requirement that courts first consider statutory grounds, before reaching constitutional questions. Supreme Court Rule 10(a) lists departure from the "accepted and usual course of

judicial proceedings" as one of the few bases for a grant of *certiorari*. The sole reported instance of that provision's application to date has been *New York Transit Authority v. Beazer*, 440 U.S. 568, 582 (1979); a lower court decision arising from a circuit court's summary decision which overlooked consideration of a municipal statute, to reach a Fourteenth Amendment issue.

B. Application of the rule in this case.

Here, the lower courts considered *only* the Fourteenth Amendment issue raised by a municipal statute, and *overlooked* the statutory provisions when deciding *First and Fourth Amendment disputes*. If New York City's zoning code prohibited Zuccotti Park from being *closed* without city council approval, and/or *prohibited municipal employees* from cleaning the privately-owned park because the owners were required to maintain it at their own expense, then the police dispersal orders and arrests, *closing the park* without city council approval, to have *municipal* workers, *not private workers*, clean the park, then the dispersal order to enable these actions was unlawful and violated the First and Fourth Amendments. *Cox v. Louisiana*, 379 U.S. 559 (1965) (holding dispersal order could not support arrests *under the 1st Amendment* because alleged dispersal basis was not consistent with local statute); The Zoning Resolution of the City of New York, Article III: Commercial District Regulations, Chapter 7 – Special Regulations, Sections 37-277, 37-77 and 37-623, *see above* at 2-3.

Such a finding could also result in a conclusion that the First Amendment was violated on discrimination grounds, because the government's decision to proceed against *protesters* for

administrative code violations, which were the *private owner's* statutory responsibility, was not supported by a legitimate government interest in taking action against the protesters.

This Court should, at minimum, grant *certiorari* to vacate the Circuit ruling and remand for consideration of the pertinent statutory grounds as they related to the First and Fourth Amendment claims.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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