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Revisiting the Right to Fair Warning after *Garcia v. Does*

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REVISITING THE RIGHT TO FAIR WARNING AFTER *GARCIA V. DOES*

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I. INTRODUCTION

During the fall of 2014, *First Amendment Law Review* published *Demonstrators' Right to Fair Warning*, which identified a right that multiple circuits had attributed to demonstrators, discussed three possible constitutional foundations for that right, and ultimately argued that courts should regard it as a narrowed form of First Amendment review.[1] As the article went to press, the United States Court of Appeals for the Second Circuit issued an opinion, *Garcia v. Does*,[2] which was broadly consistent with the article's ultimate argument.[3] On February 23, 2015, however, the Second Circuit reversed course, withdrawing its prior opinion and issuing a new one that reached the opposite conclusion.[4]

The final opinion in *Garcia* creates a split among the circuits. Whereas the Seventh and Tenth Circuits agree that demonstrators' right to fair warning is "clearly established"—indeed, so evident that "a defense of immunity would fail even in the absence of a precedent

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1 Caleb Hayes-Deats, *Demonstrators' Right to Fair Warning*, 13 FIRST AMEND. L. REV. 140 (2014). For the sake of brevity, familiarity with *Demonstrators' Right to Fair Warning* is presumed.

2 764 F.3d 170 (2d Cir. 2014), *withdrawn* 779 F.3d 84 (2d Cir. 2015).

3 *Id.*; *see also* Hayes-Deats, *supra* note 1, at 163–64 n.128.

4 Garcia v. Does, 779 F.3d 84 (2d Cir. 2015).

that had established the illegality of the defendants' conduct"[5]—the Second Circuit has now reached the opposite conclusion. In the words of the Second Circuit, the decisions reached by the Seventh and Tenth Circuits "agree[d] on neither the constitutional right at stake nor its contours" and extended the primary precedent on which they relied "beyond its due process holding."[6] These circuits' profoundly different conclusions emerge from the general uncertainty over the proper constitutional basis for demonstrators' right to fair warning.[7] As described below, whereas the Second Circuit regarded the right to fair warning as a due process right that extended only to cases of explicit permission,[8] the Seventh Circuit's approach envisioned a greater role for the First Amendment in the analysis.[9]

The discrepancy between the Second, Seventh, and Tenth Circuits highlights the analytical ambiguities that motivated *Demonstrators' Right to Fair Warning*. Accordingly, this short follow-up piece examines the newfound circuit split that has developed and updates the earlier analysis. The Article proceeds in four parts. Part II discusses *Garcia*, its holding, and its disagreements with earlier decisions. Part III analyzes one respect in which *Garcia* corroborates the analysis in *Demonstrators' Right to Fair Warning*. Specifically, it outlines how *Garcia* supports two of the earlier article's conclusions: (1) that the different potential constitutional foundations for demonstrators' right to fair warning would each create a right of different scope; and (2) that a right to fair warning grounded in the Due Process Clause would not protect demonstrators who had received only implicit permission for their conduct.[10] Finally, Part IV examines the primary challenge *Garcia* poses to the analysis in *Demonstrators' Right to Fair Warning*, namely, its conclusion that demonstrators'

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[5] Vodak v. City of Chicago, 639 F.3d 738, 747 (7th Cir. 2011); *see also* Buck v. City of Albuquerque, 549 F.3d 1269, 1286–87 (10th Cir. 2008).

[6] *Garcia*, 779 F.3d at 95 n.12.

[7] *See generally* Hayes-Deats, *supra* note 1, at 175–202 (discussing why the Due Process Clause, the Fourth Amendment, and the First Amendment might and might not provide the constitutional foundation for demonstrators' right to fair warning).

[8] *Garcia*, 779 F.3d at 95.

[9] *Vodak*, 639 F.3d at 749–50; *see also* Hayes-Deats, *supra* note 1, at 188–91.

[10] Hayes-Deats, *supra* note 1, at 144–45, 209–12.

right to fair warning is grounded in the Due Process Clause, rather than the First Amendment.

II. *GARCIA V. DOES*

On October 1, 2011, thousands of Occupy Wall Street protestors gathered for a march from Zuccotti Park, in Manhattan, to Brooklyn Bridge Park, in Brooklyn—a route that would take them across the Brooklyn Bridge.[11] During the early portions of the march, police officers directed the demonstrators' movements, at times even instructing the demonstrators to "proceed in ways ordinarily prohibited under traffic regulations."[12] When the demonstrators reached the Manhattan entrance to the Brooklyn Bridge, a bottleneck formed because the portion of the bridge reserved for pedestrians was significantly narrower than the streets on which demonstrators had proceeded. Initially, police officers formed a line across the bridge's vehicular entrance, preventing demonstrators from marching onto the portion of the bridge reserved for cars.[13] As the demonstrators continued to arrive at the bottleneck, one police officer stepped forward and used a bullhorn to warn demonstrators that those on the vehicular roadway were "obstructing traffic" and "subject to arrest."[14] All but a few demonstrators could not hear this warning.[15] Subsequently, "the officers ... turned around and began walking unhurriedly onto the [Brooklyn] Bridge roadway with their backs to the protestors."[16] A class of demonstrators alleged that they understood this action by the officers to constitute an "actual and apparent grant of permission to follow," particularly given that officers had instructed demonstrators to proceed in ways that violated traffic regulations at earlier points during the march.[17] Thus, the plaintiffs con-

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[11] *Garcia*, 779 F.3d at 88.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 89.
[15] *Id.*; *see also* Vodak v. City of Chicago, 639 F.3d 738, 746 (7th Cir. 2011) (finding that a bullhorn was "no mechanism ... for conveying a command to thousands of people").
[16] *Garcia*, 779 F.3d at 89.
[17] *Id.*

tended that officers had not provided the requisite fair warning when, half-way across the bridge, the officers stopped, blocked the movements of over 700 demonstrators who had followed them, and arrested them for obstructing traffic.[18]

The Second Circuit disagreed. Rather than addressing the demonstrators' argument that officers had violated their right to fair warning, the Second Circuit concluded that any such right was not so clearly established as to overcome officers' defense of qualified immunity.[19] According to the Second Circuit, *Cox v. Louisiana*,[20] the primary Supreme Court case on point, established only that "demonstrators or others who have been *advised* by the police that their behavior is lawful may not be punished for that behavior."[21] *Cox* had involved an "explicit consultation between the leaders of the demonstration and the police about what conduct would be permitted," and thus did not address what constitutional protections would apply where demonstrators had inferred implicit permission from officers' actions.[22] Because the class of demonstrators did not allege that they had "heard any statement from any police officer authorizing the protestors to cross the Bridge via the vehicular roadway,"[23] the Second Circuit could conclude only that "the officers were confronted with ambiguities of fact and law."[24] Such ambiguity could not invalidate the arrests, for which the officers otherwise had probable cause, because an affirmative defense could defeat probable cause only where an officer "deliberately disregard[s] facts *known to him* which establish justification."[25]

The Second Circuit carefully limited the scope of its holding, explaining that it had no occasion to consider whether the demon-

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[18] *Id.*

[19] *Id.* at 93.

[20] 379 U.S. 536 (1965).

[21] *Garcia*, 779 F.3d at 96 (emphasis added).

[22] *Id.* at 95.

[23] *Id.*; *see also id.* at 94 ("The Complaint . . . [is] devoid of any evidence that any police officer made any gesture or spoke any word that unambiguously authorized the protesters to continue to block traffic, and indeed the Complaint does not allege that any of the plaintiffs observed any such gesture.").

[24] *Id.* at 96.

[25] *Id.* at 93 (emphasis added) (quoting Jocks v. Tavernier, 316 F.3d 128, 136 (2d Cir. 2003)).

strators had a right to fair warning that would have, as it had in *Cox*, provided a defense against conviction for obstructing traffic.[26] Thus, it ostensibly left open the question of whether demonstrators had a right to fair warning in cases of implicit permission. But in holding that demonstrators' right to fair warning was not clearly established in cases of implicit permission—and, more broadly, that the right factored into the analysis only as an affirmative defense against *conviction*, rather than a prohibition on *arrest*—the Second Circuit departed markedly from the approaches of the Seventh and Tenth Circuits, each of which concluded that the right to fair warning was clearly established in cases of implicit permission.[27] In fact, the Second Circuit acknowledged its disagreement with the Seventh and Tenth Circuits, stating that it believed those courts' opinions had "extend[ed] *Cox* beyond its due process holding" and "agree[d] on neither the constitutional right at stake nor its contours."[28]

While the disagreement between the Second and Seventh Circuits primarily concerns whether demonstrators' right to fair warning is clearly established, such that it overcomes officers' defense of qualified immunity, that disagreement appears to result from a more fundamental divergence over the nature of the right.[29] In contrast to the Second Circuit, the Seventh Circuit noted that the First Amendment had required officers to grant demonstrators exceptions from otherwise applicable traffic laws.[30] This requirement informed the Seventh Circuit's understanding of what the officers

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[26] *Id.* ("We are not concerned with whether plaintiffs' asserted belief that the officers' behavior had given them implied permission to violate traffic laws otherwise banning pedestrians from the roadway would constitute a defense to the charge of disorderly conduct; that issue would be presented to a court adjudicating the criminal charges against plaintiffs."); *see also id.* at 96 ("The extent of [*Cox*'s defense] is less than clear, and we need not decide here how far it might extend.").

[27] *Id.* at 95–96, 95 n.12; *see also* Vodak v. City of Chicago, 639 F.3d 738, 746–47 (7th Cir. 2011); Buck v. City of Albuquerque, 549 F.3d 1269, 1286–87 (10th Cir. 2008); Hayes-Deats, *supra* note 1, at 164–69.

[28] *Garcia*, 779 F.3d at 95 n.12.

[29] For the sake of simplicity, this Article will focus on the differences between the Second and Seventh Circuits. As noted above, the Tenth Circuit's decision is broadly consistent with the Seventh's.

[30] *See Vodak*, 639 F.3d at 749–50.

policing the march had permitted demonstrators to do.[31] Effectively, because officers had not insisted that demonstrators specify a route to which they would adhere, the Seventh Circuit placed the burden of ambiguity on officers, interpreting them to have permitted anything they had not clearly proscribed by, for example, "prepar[ing] in advance reasonable measures for preventing the demonstration from spilling over the boundaries of the authorized march."[32] This approach collapsed the distinction between explicit and implicit permission that the Second Circuit has since emphasized. Effectively, the Seventh Circuit found that, because officers had explicitly permitted the demonstrators to march, they had further permitted the demonstrators to be in any location that the officers had not clearly told them to avoid. Thus, the Seventh Circuit could find that demonstrators' right to fair warning would be "clearly established" even in the absence of controlling precedent because notice was required to limit the scope of permission:

> No precedent should be necessary . . . to establish that the Fourth Amendment does not permit the police to say to a person go ahead and march and then, five minutes later, having revoked the permission for the march without notice to anyone, arrest the person for having marched without police permission.[33]

In other words, the Seventh and Second Circuits' diverging conclusions on the issue of whether demonstrators' right to fair warning was clearly established resulted from earlier analytical choices, including the choice of which constitutional provisions to emphasize.

Additionally, the split over whether demonstrators' right to fair warning was clearly established was influenced by the courts' differing understanding of how that right functioned procedurally. Whereas the Second Circuit regarded the right to fair warning as an affirmative defense that demonstrators could invoke in a criminal trial, the Seventh Circuit characterized it as a limitation on officers' conduct, *i.e.*, an obligation officers had to analyze whether *they* had

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[31] *See* Hayes-Deats, *supra* note 1, at 189–91.

[32] *Vodak*, 639 F.3d at 750; *see also* Hayes-Deats, *supra* note 1, at 168–69.

[33] *Vodak*, 639 F.3d at 746–47. While the Seventh Circuit indicated that it would have reached the same conclusion in the absence of controlling precedent, it also emphasized that it believed that *Cox* compelled the result it reached.

employed an appropriate "mechanism ... for conveying a command to thousands of people."[34] The Second Circuit's approach led it to emphasize officers' limited abilities to predict how courts will later decide an open legal issue.[35] The Seventh Circuit, in contrast, focused on facts that would have been obvious to officers, such as their ability to perceive that not all demonstrators had heard the bullhorn and their ignorance of what other warnings demonstrators might have received.[36] Thus, the divergence between the Second and Seventh Circuits over whether demonstrators' right to fair warning is clearly established followed from their very different views about the nature of the right in question.

The circuit split described above both supports and challenges the analysis from *Demonstrators' Right to Fair Warning*. On the one hand, the disagreement concerning the nature and scope of the right to fair warning supports the claims (1) that multiple constitutional provisions could plausibly provide the right's foundation and (2) that the choice between those provisions affects the right's scope. On the other hand, the Second Circuit's conclusion that *Cox* establishes only a narrow "due process holding" challenges the argument that demonstrators' right to fair warning is actually a narrowed form of First Amendment review that courts apply to officers' conduct in order to avoid invalidating problematic statutory schemes. The remainder of this Article addresses these issues.

III. THE IMPORTANCE OF THE ORIGIN OF DEMONSTRATORS' RIGHT TO FAIR WARNING

Demonstrators' Right to Fair Warning argued that "[g]rounding the right to fair warning in the Due Process Clause would raise severe doubts about whether the right applies to demonstrators who have received only implicit permission."[37] As articulated in *Raley v. Ohio*,[38] a right to fair warning under the Due Process Clause originates from a prohibition on the "indefensible sort of

[34] *Id.* at 746.
[35] Garcia v. Does, 779 F.3d 84, 96 (2d Cir. 2015).
[36] *Vodak*, 639 F.3d at 746.
[37] Hayes-Deats, *supra* note 1, at 211.
[38] Raley v. Ohio, 360 U.S. 423 (1959).

entrapment" that occurs when a state convicts someone "for exercising a privilege which the State had clearly told him was available to him."[39] Because a right to fair warning grounded in the First Amendment would protect demonstrators who receive only implicit permission,[40] *Demonstrators' Right to Fair Warning* concluded that the constitutional provision that courts identify as the basis for demonstrators' right to fair warning has important implications for the right's scope.[41] The contrast between *Garcia* and *Vodak* strongly supports each of these arguments.

Several aspects of the Second Circuit's opinion in *Garcia* indicate that it regarded the Due Process Clause as the foundation of demonstrators' right to fair warning. First and foremost, the Second Circuit described *Cox* as establishing a "due process holding."[42] Other aspects of the Second Circuit's opinion further indicate that the court grounded demonstrators' right to fair warning in the Due Process Clause. As described above, *Garcia* regarded the right to fair warning as a defense against criminal conviction, rather than as a limitation on officers' conduct.[43] This characterization evokes *Cox*'s discussion of *Raley v. Ohio* and "indefensible ... entrapment."[44] Courts have interpreted the defense recognized in *Raley* extremely narrowly, requiring defendants to demonstrate that responsible officials "clearly told" them their conduct was permissible.[45] *Garcia* followed this approach, holding that the defense it perceived would defeat probable cause only if demonstrators could show that a "police officer made a[] gesture or spoke a[] word that *unambiguously authorized* protestors to continue to block traffic."[46] Thus, *Garcia* characterized the right to fair warning as a due process defense against entrapment, one that existed only where permission was unambiguous.

In *Vodak*, the Seventh Circuit took a markedly different view of demonstrators' right to fair warning. Rather than evaluating

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[39] *Id.* at 425–26; *see also* Hayes-Deats, *supra* note 1, at 211–12.
[40] Hayes-Deats, *supra* note 1, at 209–11.
[41] *Id.* at 145, 216–17.
[42] Garcia v. Does, 779 F.3d 84, 95 n.12 (2d Cir. 2015).
[43] *Id.* at 93.
[44] *Raley*, 360 U.S. at 425–26; *see also* MODEL PENAL CODE § 2.04(3)(b)(iv)(2001).
[45] *Raley*, 360 U.S. at 425–26; *see generally* Hayes-Deats, *supra* note 1, at 178–79.
[46] *Garcia*, 779 F.3d at 94 (emphasis added).

whether officers had explicitly permitted demonstrators' specific conduct, the Seventh Circuit noted that the First Amendment had required officers to permit demonstrators to protest spontaneously in response to the United States' invasion of Iraq.[47] Because officers had generally permitted the demonstration, as required by the First Amendment, the Seventh Circuit focused on whether they had effectively revoked permission prior to making arrests by clearly communicating the requirements they sought to impose and giving demonstrators an opportunity to comply.[48] The Seventh Circuit's anal-analysis recalls *Cox*'s discussion of what effect to give to a dispersal order that the Supreme Court determined had not complied with the First Amendment.[49] In *Cox*, as in *Vodak*, officers had initially granted permission that they later sought to revoke. Each court thus had to determine whether officers' attempts to revoke their earlier grant of permission had complied with the Constitution. The Seventh Circuit concluded that revocation was constitutional only where "police had . . . good reason to believe [demonstrators] knew they were violating a police order."[50] Thus, focusing on the First Amendment led the Seventh Circuit to ask not whether officers had explicitly permitted demonstrators to march in the place where arrests had occurred—something officers had not done "unambiguously"[51]—but instead whether officers could reasonably believe that demonstrators "knew" that their conduct was excluded from officers' earlier, more general grant of permission.[52]

The discussion above demonstrates that the Second and Seventh Circuits' answers to the question of whether demonstrators had a clearly established right to fair warning largely followed from how each court had framed that question, and in particular from the constitutional provision that influenced each court's understanding of *Cox*'s right to fair warning. Whereas *Garcia* considered whether officers could reasonably anticipate a permission-based affirmative de-

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[47] Vodak v. City of Chicago, 639 F.3d 738, 749 (7th Cir. 2011).
[48] *Id.* at 746–47.
[49] Cox v. Louisiana, 379 U.S. 559, 572 (1965).
[50] *Vodak*, 639 F.3d at 746.
[51] *See* Hayes-Deats, *supra* note 1, at 168–69, 189.
[52] *Id.*

fense that demonstrators might invoke,[53] *Vodak* asked whether officers could reasonably believe that they had revoked their earlier permission in a constitutionally acceptable manner.[54] The courts' emphases on different constitutional provisions created these differences. Because a due process defense exists only in cases of "unambiguous" permission, the Second Circuit asked whether officers had explicitly permitted the behavior for which they arrested demonstrators.[55] In contrast, according to the Seventh Circuit, the First Amendment required officers to permit demonstrators to protest, and the court thus held officers responsible for any ambiguity about the scope of that compelled permission.[56] Moreover, because cases recognizing a due process right to fair warning typically treated that right as a defense against conviction, the Second Circuit viewed the right as such in *Garcia*.[57] In contrast, by focusing on the First Amendment, the Seventh Circuit regarded the right to fair warning as a set of limitations on officers' ability to revoke or limit permission.[58] Thus, the constitutional provisions the Second and Seventh Circuits chose to emphasize led them to regard demonstrators' right to fair warning very differently, effectively determining their divergent answers to the question of whether the right to fair warning was clearly established in the analogous circumstances they faced. *Demonstrators' Right to Fair Warning* foresaw the possibility of such divergence,[59] and that possibility motivated the Article's efforts to resolve the ambiguity over the origins of the right to fair warning.

IV. LOCATING THE RIGHT TO FAIR WARNING

Having analyzed the support that the newfound circuit split provides for the arguments set forth in *Demonstrators' Right to Fair Warning*, consideration now turns to the principal challenge *Garcia* presents to those arguments. *Demonstrators' Right to Fair Warning*

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[53] Garcia v. Does, 779 F.3d 84, 96 (2d Cir. 2015).
[54] *Vodak*, 639 F.3d at 746.
[55] *Garcia*, 779 F.3d at 95.
[56] *Vodak*, 639 F.3d at 745.
[57] *See Garcia*, 779 F.3d at 94.
[58] *See Vodak*, 639 F.3d at 746.
[59] *See* Hayes-Deats, *supra* note 1, at 140–41.

contended that cases vindicating the right to fair warning, including *Cox v. Louisiana*, applied a narrowed form of First Amendment review, one designed to avoid striking down problematic statutes, as the First Amendment would normally require, while still affording demonstrators full First Amendment protection, including the ability to protest spontaneously in response to current events.[60] *Garcia v. Does*, in contrast, held that *Cox* established only a narrow "due process holding,"[61] namely, that "demonstrators or others who have been advised by the police that their behavior is lawful may not be punished for that behavior."[62] This reading of *Cox* calls the central argument of *Demonstrators' Right to Fair Warning* into question. Accordingly, Part IV considers *Garcia*'s interpretation of *Cox* and its implications for the right to fair warning.

The perceived conflict between *Garcia* and *Demonstrators' Right to Fair Warning* might strike some readers as imagined, rather than real. After all, *Demonstrators' Right to Fair Warning* argued that ambiguity surrounded both the constitutional origin of demonstrators' right to fair warning and, consequently, its scope.[63] Such an argument appears consistent with *Garcia*'s conclusion that the right to fair warning did not unambiguously prohibit arrests in the circumstances presented.[64] Nonetheless, that apparent consistency is misleading. To overcome a defense of qualified immunity, a plaintiff must show that existing precedent clearly establishes *that* an arrest is unconstitutional, not *why* an arrest is unconstitutional. The constitutional basis for a right, then, is irrelevant to a qualified immunity defense if existing precedent recognizes the right with sufficient specificity. As described below, and as the Seventh Circuit has held, *Cox* clearly established that, where officers had permitted a demonstration, they had an obligation to revoke permission in a manner that complied with the Constitution.[65]

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[60] *See* Hayes-Deats, *supra* note 1, at 202–14.

[61] *Garcia*, 779 F.3d at 95 n.12.

[62] *Id.* at 96.

[63] *See* Hayes-Deats, *supra* note 1, at 144–47.

[64] *Garcia*, 779 F.3d at 96.

[65] In fact, existing Second Circuit precedent had discussed the limitations the First Amendment placed on officers policing a demonstration. *See* Papineau v. Parmley, 465 F.3d 46, 60 (2d Cir. 2006). Specifically, *Papineau* held that the

The most striking aspect of *Garcia*'s interpretation of *Cox* is what it ignores. In *Cox*, while officers initially "advised" demonstrators that "their behavior [was] lawful," they subsequently changed course, ordering the demonstrators to disperse.[66] Far from relying on officers' permission, then, "appellant Cox defied the [dispersal] order by telling the crowd not to move."[67] Thus, as the dissent emphasized, a right based solely on explicit permission would not have protected demonstrators, who continued their demonstration even after the explicit *revocation* of permission.[68] The majority in *Cox* dealt with the dispersal order not on due process grounds, but instead by holding that, under the First Amendment, the officers had not provided a "valid reason" for revoking the permission they had extended.[69] By ignoring the dispersal order, and the *Cox* majority's treatment of it, *Garcia* overlooked the importance of the First Amendment to *Cox*'s holding and to the right to fair warning it established. *Cox* established not only a due process right not to be arrested for conduct that officers had permitted, but also a right to have permission revoked in a way that did not violate the First Amendment.[70]

Taking the dispersal order into account, *Cox* becomes much more difficult to distinguish from *Garcia*. In *Garcia*, the officers did not dispute that, by their conduct, they had permitted demonstrators to march without a parade permit and to violate traffic laws that

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First Amendment required even officers who had "a lawful basis to interfere with [a] demonstration" to first provide a warning that would "'enable the ordinary citizen to conform his or her conduct to the law.'" *Id.* (quoting Feiner v. New York, 340 U.S. 315, 321 (1950)). *Garcia* distinguished *Papineau* on the ground that demonstrators did not "need[] permission from the police to engage in that protest." *Garcia*, 779 F.3d at 94 n.11. If, however, the Second Circuit had asked whether officers in *Garcia* had satisfactorily revoked or limited their *prior* permission to demonstrate, that distinction would have become inapposite.

[66] Cox v. Louisiana, 379 U.S. 559, 572 (1965).

[67] *Id.* at 582 (Black, J., dissenting).

[68] *Id.* at 583; *see also id.* at 587 (Clark, J., dissenting) ("The only way the court can support its finding is to ignore the time limitation and hold—as it does *sub silentio*—that once Cox and the 2,000 demonstrators were permitted to occupy the sidewalk they could remain indefinitely.").

[69] *Id.* at 572–73 (majority opinion).

[70] *Id.* at 574.

would have otherwise applied.[71] By analyzing only whether officers had explicitly permitted demonstrators to take the further step of proceeding onto the Brooklyn Bridge's vehicular roadway, the Second Circuit avoided the question of whether officers had revoked or limited their existing permission in a manner that complied with the First Amendment, one of the principal points of disagreement between the majority and the dissent in *Cox*. Thus, *Garcia* unduly limited the scope of the right *Cox* had established. Because the demonstrators in *Garcia* had officers' undisputed permission to march, either implicitly or explicitly, *Cox* established not only a due-process right that demonstrators would have had if officers had explicitly permitted them to continue their march on the Brooklyn Bridge's vehicular roadway, but also a right to have officers revoke or limit the permission they had already granted in a manner that complied with the First Amendment.

Only two bases exist for distinguishing the Brooklyn Bridge's vehicular roadway from the other locations where officers had permitted demonstrators to march, and thus from the apparent scope of officers' existing permission: (1) the warning officers provided through a bull horn; and (2) the intrusion of demonstrators into a new, categorically different area. But these bases were the precise distinctions that the Seventh and Tenth Circuits had rejected. Specifically, the Seventh Circuit had concluded that a bullhorn was "no mechanism for conveying a command to thousands of people."[72] Similarly, the Tenth Circuit held that officers had "sanctioned [a] march" that spilled over into new areas "by closing off streets to traffic, [and] also by directing the progress and direction of the proces-

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[71] Garcia v. Does, 779 F.3d 84, 88, 90 n.7 (2d Cir. 2015). Specifically, while the officers argued before the district court that they had probable cause broadly to arrest demonstrators for parading without a permit in violation of New York City Administrative Code § 10-110(a), they abandoned that argument on appeal. *Id.* In doing so, the officers effectively acknowledged that, regardless of whether they had explicitly informed demonstrators that they would not require a permit, they did not have probable cause to arrest each and every demonstrator, whether or not that demonstrator had proceeded onto to the Brooklyn Bridge's vehicular roadway.

[72] *See* Vodak v. City of Chicago, 639 F.3d 738, 746 (7th Cir. 2011).

sion."[73] Thus, the two bases for distinguishing *Garcia* from *Cox* are bases that other courts had already rejected.

Other First Amendment doctrines, in addition to *Cox*, indicate that once officers have permitted a spontaneous demonstration, the First Amendment significantly constrains their ability to revoke or limit that permission. Nearly every circuit to have addressed the issue has held that the First Amendment requires statutory and regulatory schemes to permit spontaneous demonstrations in response to developing events.[74] But a right to demonstrate spontaneously would mean little if demonstrators could exercise it only where officers had "beckon[ed] to [them] or state[d] by word or gesture that they were welcome to proceed."[75] Prior cases, including *Garcia*, indicate that, rather than extending explicit permission, officers frequently permit spontaneous demonstrations simply by tolerating them.[76] If officers who have implicitly permitted a march have probable cause to arrest demonstrators for any violation of the traffic laws that they have not explicitly permitted, then many actions that commonly occur in protests will subject demonstrators to potential arrest.[77] Indeed, First Amendment jurisprudence has long recog-

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[73] Buck v. City of Albuquerque, 549 F.3d 1269, 1283 (10th Cir. 2008). *Compare Garcia*, 779 F.3d at 89 (noting that plaintiffs "allege that the combination of . . . officers in front 'leading' the protesters onto the roadway and the officers on the side escorting them along the roadway led them to believe that the NYPD was escorting and permitting the march to proceed onto the roadway, as it had escorted and permitted the march through lower Manhattan earlier in the day").

[74] *See* Hayes-Deats, *supra* note 1, at 192–93 (citing decisions from the First, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits).

[75] *Garcia*, 779 F.3d at 90.

[76] *Id.* at 88 ("Although no permit for the march had been sought, the [NYPD] was aware of the planned event in advance, and NYPD officers escorted the marchers . . . ."); *Vodak*, 639 F.3d at 741 ("This waiver of the permit requirement is informal; it seems to consist just in *not* telling the demonstrators that they need a permit."); *Buck*, 549 F.3d at 1283 ("[O]fficers' conduct essentially amounted to the grant of a *de facto* parade permit . . . .").

[77] For example, marching alongside a silent officer could subject a demonstrator to arrest if it later turned out that the officer did not intend to permit the demonstrator to enter that particular roadway. *Garcia*, 779 F.3d at 89. Further examples are easily generated. In New York, demonstrators could make "unreasonable noise" in violation of N.Y. PENAL LAW § 240.20(2), "obstruct[] vehicular or pedestrian traffic" in violation of N.Y. PENAL LAW § 240.20(5), be "masked or

nized a tension between the First Amendment and laws that protect the public order, noting that demonstrating "best serve[s] its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[78]

Permitting arrests for actions that routinely occur during a demonstration would create a legal paradox: demonstrators would have a right to spontaneously protest, but would face potential arrest for many of the actions that protesting entails.[79] This paradox would erode the right to spontaneously demonstrate. First, as suggested above, demonstrators would not, in many instances, have a right to engage in the specific actions necessary to effectuate their broader right to demonstrate. Second, the uncertainty over the extent of demonstrators' right to spontaneously demonstrate would chill the exercise of that right, since the demonstrators could foreclose the possibility of arrest only by not demonstrating.[80] As a practical matter, the existence of a potential "defense to the charge" on which officers arrested demonstrators would provide demonstrators little reassurance.[81] In many cases, prosecutors simply drop charges against arrested demonstrators, obviating the need to present any defense.[82] Moreover, even where charges are dropped, arrests can have significant collateral consequences, inhibiting the arrestees' ac-

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in any manner disguised by unusual or unnatural attire or facial alteration" in violation of N.Y. PENAL LAW § 240.35(4), or "remain[] in or about school grounds" in violation of N.Y. PENAL LAW § 240.35(5).

[78] Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

[79] *See, e.g.*, N.Y. PENAL LAW § 240.20(2)(Consol. 2015)(criminalizing "unreasonable noise").

[80] *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) (noting that the existence of a prohibition may cause individuals "to refrain from constitutionally protected speech or expression").

[81] *Garcia*, 779 F.3d at 93.

[82] *See, e.g.*, Colin Moynihan, *Charges Are Dropped for 14 Demonstrators*, N.Y. TIMES, Feb. 17, 2012, http://www.nytimes.com/2012/02/18/nyregion/charges-are-dropped-for-14-occupy-wall-street-protesters.html?_r=0. The possibility of dropping charges in order to avoid review of conduct's constitutionality might itself create First Amendment problems, as it generates opportunities for discriminatory enforcement and deters conduct that the First Amendment protects. *See* Hayes-Deats, *supra* note 1, at 217–18.

cess to employment, credit, and housing.[83] Thus, failing to protect demonstrators from arrests for conduct they understood to be part of demonstrating—or at least did not reasonably understand to have been prohibited—would undercut the well-recognized right to spontaneously demonstrate.

A right to fair warning grounded in the First Amendment avoids the paradox described above by applying the same First Amendment principles to statutory regimes and officers' abilities to revoke permissions and make arrests. As argued in *Demonstrators' Right to Fair Warning*, past cases have effectively deployed the right to fair warning as a narrowed form of First Amendment review that avoids invalidating troublesome statutory schemes by focusing on whether officers' conduct complies with applicable First Amendment principles.[84] This approach results from a simple logic, even if courts have not explained that logic clearly. If courts wish to forgo subjecting public order statutes to a searching First Amendment analysis—either because they do not believe the statutes can be more narrowly tailored or because, in a given instance, officers have waived the problematic prohibition—they cannot do so at the expense of demonstrators' First Amendment rights.[85] Simply put, courts have recognized that, because demonstrators have a First Amendment right to spontaneously protest, they must also have a First Amendment right not to be arrested in a manner that would erode their broader right or deter its exercise.[86]

IV. CONCLUSION

As described above, the Second Circuit's decision in *Garcia* has generated a circuit split that squarely presents the question of

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[83] *See* Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014) http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402 ("Many people who have never faced charges, or have had charges dropped, find that a lingering arrest record can ruin their chance to secure employment, loans and housing.").

[84] *See* Hayes-Deats, *supra* note 1, at 202–19.

[85] *Id.*

[86] *Id.*

what constitutional provision creates demonstrators' right to fair warning and how far that right extends. Only the Supreme Court can conclusively resolve this question. Although the emergence of a circuit split supports some of the analysis advanced in *Demonstrators' Right to Fair Warning*, it impugns that Article's central argument. This short response has contended that *Garcia*'s interpretation of demonstrators' right to fair warning is unpersuasive.

Perhaps surprisingly, the Second Circuit's divergence from the past cases that have considered demonstrators' right to fair warning appears influenced not by its reading of those past cases, discussions of which are largely confined to footnotes,[87] as much as by its interpretation of the Supreme Court's recent qualified immunity jurisprudence. In reaching its holding, the Second Circuit cited four qualified immunity decisions that the Supreme Court has issued since 2011.[88] To the extent that the Second Circuit understood those cases to indicate that courts should give the narrowest possible interpretation to the constitutional rights plaintiffs invoke, upholding qualified immunity defenses wherever defendants have a colorable argument that existing precedent has not clearly established the constitutional right at issue,[89] the Circuit's reasoning and outcome raise a troubling possibility. As described above, the Second Circuit's conclusion that the right was not "clearly established" followed from its characterization of the right itself. In the future, that characterization will influence not only cases that consider qualified immunity defenses, but also any other case involving demonstrators' right to fair warning, including cases where demonstrators raise the right to fair warning as a defense to a criminal charge. To the extent cases that do not involve qualified immunity adopt the Second Circuit's narrowed view of demonstrators' right to fair warning, the Supreme Court's qualified immunity jurisprudence will have altered the apparent trajectory of that right's development. This phenomenon could potentially occur more generally, raising the question of

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[87] *See Garcia*, 779 F.3d at 94–95 nn.11–12.

[88] *Id.* at 95–97 & n.12 (citing Wood v. Moss, 134 S. Ct. 2056 (2014); Reichle v. Howards, 132 S. Ct. 2088 (2012); Messerschmidt v. Millender, 132 S. Ct. 1235 (2012); Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011)).

[89] *Garcia*, 779 F.3d at 95 n.12 (requiring that "the question at issue" be "beyond debate" (quoting *al-Kidd*, 131 S. Ct. at 2083)).

whether the narrow interpretations courts give when considering whether constitutional rights are "clearly established" emanate beyond the qualified immunity jurisprudence, narrowing or even eroding constitutional rights in other contexts.[90]

[90] *Cf.* Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity*, 113 MICH. L. REV. 1219, 1248–49 (2015) (arguing that "qualified immunity" jurisprudence has become "a mechanism to stunt the development of constitutional rights").