No. 18-

IN THE

Supreme Court of the United States

LIEUTENANT JOHN MAGUIRE
AND OFFICER MIKE POLETTO,

Petitioners,

v.

ANIKA EDREI, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

NYPD officers were escorting a large protest in the middle of Manhattan when the situation grew chaotic: a hostile crowd of protestors surrounded a much smaller group of officers, yelling and blocking a major intersection, with some throwing glass bottles and other objects toward the outnumbered officers. To gain control of the scene and direct protestors out of the roadway, Lieutenant John Maguire and Officer Mike Poletto used the alert tone and oral announcement functions of an LRAD 100X—a groundbreaking, portable acoustic device—at intervals over the next three minutes. None of the plaintiffs in this lawsuit were arrested or detained. The question presented is:

> Did the Second Circuit err in finding a potential constitutional violation for excessive force and denying the officers qualified immunity, particularly given that no case had addressed whether and when sound constitutes force, much less held that the use of an acoustic device crosses the line into constitutionally excessive force under circumstances resembling those here or, indeed, under any circumstances at all?

PARTIES TO THE PROCEEDING

Petitioners—Lieutenant John Maguire and Officer Mike Poletto—were defendants-appellants in the court of appeals. Respondents—Anika Edrei, Shay Horse, James Craven, Keegan Stephan, Michael Nusbaum, and Alexander Appel—were plaintiffs-appellees in the court of appeals.

The City of New York and William J. Bratton were defendants in the district court and were not appellants or appellees in the court of appeals.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Page

STATUTES AND OTHER AUTHORITIES

INTRODUCTION

Betraying little regard for this Court's qualified immunity precedent, the decision below contravenes or dilutes every core principle of the doctrine. The court of appeals distorted this Court's cautionary note that not every novel case leads to qualified immunity into a rule that renders novelty irrelevant, treated inapt cases as providing clear legal guidance, exported the asserted legal standards of today to judge conduct in the past, and stripped from the picture any consideration of a reasonable official's perspective in the evolving and tense circumstances confronted. The decision deviates so sharply from this Court's precedent that summary reversal is warranted.

The excessive force claims raised by plaintiffs present novel legal questions at every turn: Can use of a device that operates purely by sound constitute force under the Constitution? If so, when does it constitute force, as contrasted with the use of sirens, bullhorns, and similar tools? If its use does constitute force in some circumstances, how should officers approach determining where on the continuum of force it falls? How should they approach determining when its use crosses the often hazy border into excessive force?

When the events underlying this case unfolded, none of these questions had been answered by this Court, the court of appeals, or any other appellate court—not in general, and certainly not with anything approaching the particularity required to clearly establish the law. Even a cursory glance at this case confirms that it reflects precisely the kind of uncertain legal landscape that

compels qualified immunity. The court of appeals' contrary decision can only be explained as the result of a deeply flawed understanding of, or studied disagreement with, this Court's qualified immunity precedent.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 892 F.3d 525. The opinion of the district court (Pet. App. 39a-71a) is reported at 254 F. Supp. 3d 565.

JURISDICTION

The court of appeals entered its opinion and order on June 13, 2018, and denied rehearing or rehearing en banc on August 30, 2018 (*see* Pet. App. 72a-73a). On November 21, 2018, Justice Ginsburg extended petitioners' time to file this petition to December 19, 2018.

Jurisdiction lies under 28 U.S.C. § 1254(1) and the collateral order doctrine, which authorizes review before final judgment when qualified immunity has been denied on an issue of law. *See Behrens v. Pelletier*, 516 U.S. 299, 306-11 (1996).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions are reproduced in the appendix (*see* Pet. App. 74a-75a): U.S. Const. amend. XIV, § 1, and 42 U.S.C. § 1983.

STATEMENT[1]

This petition centers on whether two line-level NYPD officers are entitled to qualified immunity on plaintiffs' 14th Amendment excessive force claims. From its inception, this lawsuit was designed as a test case about the constitutional boundaries governing the use of acoustic devices. To describe the case is to confirm its novelty.

A. Acoustic devices and their value

Acoustic devices, a fairly new technology, assist law enforcement in a variety of ways, enabling, for example, the dissemination of information to large crowds in connection with demonstrations, terrorist attacks, and emergencies. Marketed as a safer alternative to the use of force when crowd control becomes necessary, acoustic devices are invaluable to police departments like the NYPD, which has been sued for failing to communicate directives loudly enough to demonstrators. Indeed, in one lawsuit, the NYPD was seemingly criticized for *not* using an acoustic device. *See* Joint App., Vol. I, at 166-67, *Garcia v. Bloomberg*, No. 12-2634 (2d Cir. 2014), ECF No. 36.

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1. The record consists of the amended complaint and two videos depicting the events incorporated there. Plaintiffs have never objected to the consideration of the videos or suggested that they are inaccurate. *See Scott v. Harris*, 550 U.S. 372, 378 (2007). To the contrary, two of the plaintiffs admit that they shot (and publicized) the footage (Joint App., Vol. I, 2d Cir. ECF No. 31 ("JA") at 211; *see also* JA54, 62), and plaintiffs themselves submitted a third video shot by a non-plaintiff (*see* JA211). A disc with all three videos is included in the appendix here.

The device at issue here—the LRAD 100X—produces the lowest sound level among the devices sold by the LRAD Corporation, with a maximum continuous output of 137 decibels at a distance of around three feet (Joint App., Vol. I, 2d Cir. ECF No. 31 ("JA") at 187). The plaintiffs here allege that, at times, they were roughly three times further away from the device (10 feet) (JA42). But even at the closer three-foot radius, the device's maximum sound level is below that which can rupture eardrums (150 dB), and is comparable to a rock concert (110-40 dB) and some police and ambulance sirens (up to 129 dB). To be sure, a sound level above 85 dB can cause hearing damage, but all manner of common technologies, including bullhorns, lawn mowers, and the subway, operate at or above that level.[2]

B. The officers' use of an acoustic device after a large protest became unruly

The six plaintiffs attended a protest in Midtown Manhattan in December 2014 after a grand jury declined to indict Officer Daniel Pantaleo in connection with the death of Eric Garner (JA40). The grand jury's decision sparked a wave of protests across New York City (*id.*), and came just over a week after violent protests in Ferguson, Missouri, where a grand jury declined to indict an officer in the death of Michael Brown (JA30).[3]

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2. *See* Nat'l Inst. on Deafness and Other Communication Disorders, "Listen Up! Protect Your Hearing," https://perma.cc/AE5G-ARC5; EarQ, "How Loud Is Too Loud?," https://perma.cc/9S6K-JTWN.

3. *See also* Goodman & Baker, "Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case," *N.Y. Times* (Dec. 3, 2014), https://perma.cc/XM2X-24AF; John

For hours, the unpermitted protest proceeded peacefully through Midtown's high-traffic streets, escorted by NYPD officers (JA40). But shortly after 1 a.m., the peace unraveled and the scene turned chaotic. On the heels of several arrests, many dozens of protestors surrounded the officers in the intersection of Madison Avenue and East 57th Street, shouting in protest and recording the arrests (JA40, 44, 50, 54; JA182 ("Video 1") at 0:00-2:00). Officers struggled to keep the crowd at a safe distance. They directed the crowd to "get back" (Video 1 at 1:41) and "get out of the street" (*id.* at 1:14; *see also* JA50 ("Plaintiff … heard the police yell … for everyone to get on the sidewalk.")). Notwithstanding these directives, multiple protestors—including one of the plaintiffs—repeatedly came within mere feet of the arrests (JA44, 50; Video 1 at 1:30-2:10).

Simultaneously, some protestors began throwing objects—including glass bottles—toward the arresting officers, and hurling bags of garbage into the air and into the street (JA40, 50, 54, 61; Video 1 at 1:30-2:00). Unidentified officers then deployed pepper spray, at which point some protestors retreated from the intersection (JA40-41, 50, 58). But many others remained in the intersection or at its edges—despite police orders—blocking the streets in each direction and yelling at the officers (JA50; Video 1 at 1:40-2:30).

With an increasingly volatile crowd, the situation risked spiraling out of control. We will never know how

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M. Glionna, et al., "Violence Erupts After Grand Jury Declines to Indict Ferguson Officer," *L.A. Times* (Nov. 25, 2014), https://perma.cc/8GEZ-X469.

far it would have deteriorated had officers stood by and done nothing, because it was at this crucial moment that Lieutenant Maguire and Officer Poletto began using the LRAD 100X to gain control of the scene and aid in ensuring that protestors moved out of the street and onto the sidewalks.

Over the next three minutes, the officers walked the length of one block in the roadway, using the LRAD 100X to verbally warn the protestors to get and stay on the sidewalks or risk arrest, and engaging the device's alert tone at varying, multi-second intervals (JA41-42; *see generally* JA184 ("Video 2")). The tactic helped avoid additional arrests and bring the fraught encounter to a swift conclusion. None of the plaintiffs were arrested; most just left the scene, although several chose to remain in close proximity to the LRAD 100X (and even pursue it) to film its use (JA45-46, 50-51, 54, 58-59, 61, 64).

Plaintiffs allege that they sustained injuries—variously including migraines, sinus pain, dizziness, confusion, sensitivity to sounds, ringing in the ears, and hearing loss (JA46-47, 52, 55, 59, 62, 64-65)—because the officers used the LRAD 100X within distances as close as 10 feet and "pointed" and "angled" it toward them (JA22, 42, 51). But the videos show there was no reason for the officers to believe the device was causing pain, let alone lasting injury. Almost no one depicted in the videos even covers his or her ears (*see generally* Video 2), and a group of protestors remained directly in front of the officers and continued to shout and hurl garbage into the air (*id.* at 0:00-0:20; *see also* Video 1 at 2:48, 3:00-3:28). Indeed, Maguire and Poletto continued to use the LRAD 100X while *their fellow officers* walked right in front of the

device, at times within a few feet (Video 1 at 2:50-3:05, 3:35, 3:44-3:48; Video 2 at 0:40, 2:28).

C. This § 1983 lawsuit

In the amended complaint, plaintiffs claimed that Maguire and Poletto retaliated against them for exercising their First Amendment rights (JA67-69). They further alleged that the two officers "seized" them by using the LRAD 100X, asserting that the use of the device constituted "objectively unreasonable" force under the Fourth Amendment (JA65-67).

Plaintiffs also vaguely claimed that the officers violated their substantive due process rights under the 14th amendment (JA69-70). Though plaintiffs alleged that the officers "knew or should have known that the use of the [device] could cause permanent hearing damage and other injury" (JA42), they did not make any specific allegations that the officers used it maliciously or with an intent to harm them, and nowhere did they allege that the use of the device "shocked the conscience."

Maguire and Poletto moved to dismiss, arguing that plaintiffs failed to state a Fourth Amendment claim because they had not been "seized," and their allegations failed to meet the 14th Amendment's more stringent "shocks the conscience" standard (SDNY ECF No. 36 at 6-8). The officers argued that, at the very least, they were entitled to qualified immunity (*id.* at 8-14).

In opposition, plaintiffs conceded that, if they had not been seized, the 14th Amendment's "shocks the conscience" standard applied (SDNY ECF No. 48 at 12-13). But instead

of explaining how their allegations met that standard, they merely asserted, in a single sentence, that they had done enough to entitle them "to develop evidence … to flesh out" their claims (*id.*).

D. The district court's denial of qualified immunity

The district court dismissed the bulk of the federal claims against Maguire and Poletto. On the First Amendment retaliation claims, the court found that, far from adequately alleging that the officers were motivated to deter their speech, plaintiffs' allegations and the videos revealed the officers' "reasonable motivation" to direct protestors to get or stay on the sidewalks "in the midst of an increasingly confrontational, though not yet uncontrollable, period" (Pet. App. 56a-57a). Indeed, the court described the officers' interest in ensuring public safety and order, and promoting the free flow of traffic, as "strong" (*id.*).

On the Fourth Amendment claims, the court rejected plaintiffs' assertion that they were "seized," given their admission that they "moved around the Protest area or left the vicinity … as each desired" (*id.* 48a-49a). But on the 14th Amendment excessive force claims, the court found that plaintiffs adequately alleged that the use of the LRAD 100X was "not appropriate" (*id.* 52a). Although the court found it "understandable" that the officers increased the volume to reach a large crowd, it characterized the protest as "broadly in control" (*id.*). On that basis, the court opined that there could have been a "disconnect" between the need for the device and its use (*id.*).

The court also denied the officers qualified immunity (Pet. App. 53a-54a). Though the court recognized that "there is little case law discussing the precise issues," it nonetheless found that cases addressing the use of stun grenades "could" have put Maguire and Poletto on notice that their use of the LRAD 100X was "unreasonable" (*id.* 54a).

E. The court of appeals' affirmance

The court of appeals affirmed the denial of qualified immunity. Starting with the question of whether plaintiffs had alleged a 14th Amendment violation, the court acknowledged that the governing standard at the time of the events was whether a defendant used "conscience-shocking" force (Pet. App. 13a). But the court held that under *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015)—decided after the events here—any "objectively unreasonable" force suffices if it is intentionally rather than accidentally applied (Pet. App. 14a-21a).

Purporting to apply the factors identified in *Kingsley* to plaintiffs' allegations and the videos, the court concluded that plaintiffs plausibly pleaded that the officers used unreasonable force (Pet. App. 22a-24a). The court described the general threat as "minimal" and the specific threat to the officers as "negligible" (*id.* 22a). Although the court recognized that a glass bottle had been thrown at officers and that the presence of protestors in the intersection was a safety hazard, it characterized the bottle-throwing as an isolated, "victimless" incident and said it was "common" for cars and pedestrians to mix at protests (*id.*). On that foundation, the court opined that a fact-finder could conclude that using the device here was "disproportionate" (*id.* 24a).

Next, the court of appeals held that officers were not entitled to qualified immunity because the constitutional right was "clearly established" (Pet. App. 24a-36a). The court initially recognized that, at this stage of the inquiry, it had to apply the law as it existed at the time of the conduct—before *Kingsley* (*id.* 27a-28a). But the court did not adjust its analysis, concluding that the result was "the same" before and after *Kingsley* (*id.*) because the Court's decision had resulted in only a "modest refinement" of the prior standard (*id.* 20a). To the extent a culpable state of mind was required before *Kingsley*, in the court of appeals' estimation, the use of the LRAD 100X was so disproportionate that it could be inferred that the officers acted "maliciously and sadistically" in using it (*id.* 28a)—a contention that even plaintiffs had not made before the district court or on appeal.

In concluding that the unlawfulness of the conduct was clear, the court of appeals pointed to a footnote, in a decision about stun grenades, that parenthetically referred to an article in a Dutch journal discussing unspecified "acoustical weaponry" (Pet. App. 34a (citing *Terebesi v. Torreso*, 764 F.3d 217, 237 n.20 (2d Cir. 2014)). The court identified no case that had addressed whether the use of acoustic devices was excessive under any circumstances, or even whether sound can constitute force. Viewing the novelty of acoustic devices as irrelevant (*id.* 33a-35a), the court painted the use of the LRAD 100X as "significant" force, relying on a report produced about the LRAD 3300—a device much louder and larger than the 100X (*id.* 35a).

The court then rejected an argument that the officers had never made—that it was not clearly established that

using force in a crowd control context can violate the 14th Amendment (Pet. App. 28a-32a). The court also pointed to two cases applying a different constitutional provision—the Fourth Amendment—to wholly different conduct—arresting peaceful protestors on private property with brutality (*id.* 31a-32a). The court ultimately remanded for discovery on the claims against Maguire and Poletto.

REASONS TO GRANT THE PETITION

This petition raises questions of importance to government officials nationwide, and to "society as a whole." *White v. Pauly*, 137 S. Ct. 548, 551-52 (2017) (per curiam). The qualified immunity doctrine balances two crucial interests: (1) ensuring that government officials can perform their duties without fear of personal monetary liability, and (2) ensuring that they are held accountable when all reasonable officials would have known that their conduct violated the law. *Anderson v. Creighton*, 483 U.S. 635, 638-40 (1987). The touchstone of the doctrine, then, is notice: whether the officials have "fair warning" about when their conduct "crosse[s] the line" between what is lawful and unlawful so that they can conform their conduct accordingly. *Hope v. Pelzer*, 536 U.S. 730, 743 (2002).

The court of appeals could deny McGuire and Poletto qualified immunity only by disregarding many of this Court's express directives on this front. The court gave no weight to the novelty of the situation the officers faced. It relied on cases addressing different conduct under different circumstances. It conflated the legal standard that existed at the time of the events with the standard that purportedly existed at the time of its decision, though significant legal developments had occurred in between.

And it stripped from its analysis any fair consideration of the perspective of a reasonable officer, charged to make split-second decisions in tense and rapidly evolving circumstances.

Certiorari is warranted to restore the balance between fairness, flexibility, and accountability that has been struck by this Court. Indeed, the decision below is so steeped in error that this Court should reverse summarily. The result below—denying two line-level police officers qualified immunity for navigating fraught circumstances that no court had ever come close to confronting—is particularly astonishing in light of the strict standard for liability in existence at the time of the conduct: whether the officers used *conscience-shocking* force.

This case presents an ideal vehicle to consider these questions. Because it comes to the court on a motion to dismiss, there are no disputed issues of fact. At the same time, because the record includes extensive video footage taken by the plaintiffs, it offers a detailed and objective view of the events at issue. The lack of any case law addressing the use of an acoustic device at all—let alone under the circumstances presented here—throws into sharp relief questions about the role novel circumstances play in the qualified immunity analysis. And because immunity is at stake, these questions should be resolved now, before the burdens of discovery begin. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

A. The decision below twists this Court's warning that novelty is not dispositive into an invitation to disregard it.

Time and again, this Court has stressed that government officials should be spared the burdens of litigation unless the law is so clearly established that "every reasonable official would have understood that what he or she is doing violated that right." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (cleaned up). This standard affords "ample room for mistaken judgments," and protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986).

These principles apply with special force when an official faces novel facts and circumstances. This Court has never expected non-lawyers to perfectly predict how broad constitutional standards apply to all the situations they may confront. *See Anderson*, 483 U.S. at 644-46. As a result, the constitutional right cannot be defined "at a high level of generality," *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011), but rather must be viewed in light of the "*particular* conduct" and "the specific context of the case." *Mullenix*, 136 S. Ct. at 308.

In fact, this Court has advised lower courts to treat unique facts "alone" as "an important indication … that [the] conduct did not violate a 'clearly established' right." *White*, 137 S. Ct. at 551-52. When lower courts fail to heed that advice, and give short shrift to novel circumstances, the Court has not hesitated to reverse. *See City & Cnty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015). Indeed, in the past decade, the Court has asked whether a particular

constitutional right was clearly established on at least 18 occasions, and has answered the question in the negative every time.

Meanwhile, this Court has provided extensive guidance on what is required to place a question "beyond debate." *al-Kidd*, 563 U.S. at 741. The answer must be "settled"—dictated by "controlling authority or a robust consensus of cases of persuasive authority." *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018) (cleaned up). As a practical matter, that usually means pointing to a case holding that an official violated the law under similar circumstances. *Id.* at 590. Otherwise, the unlawfulness of the conduct must be obvious, but that will be the "rare" case. *Id.*

The court of appeals did not cite many of these principles, and it certainly did not honor them. As the district court recognized (Pet. App. 54a)—and the court of appeals' silence confirms—there is no case law addressing the use of acoustic devices at all, let alone a body of case law addressing similar conduct under similar circumstances. And this is far from the rare "obvious" case where no precedent is required. On the contrary, this should have been an obvious case *for* qualified immunity.

The LRAD 100X is not merely novel, but fundamentally different from other devices used by police that are widely recognized to effectuate force, like tasers or pepper spray, which incapacitate specific targets. The LRAD 100X functions solely by sound, which no court has ever held to constitute force. And instead of incapacitating specific targets, the device is intended to give instructions to—and potentially disperse—large crowds, *avoiding* the need

for measures historically regarded as force. The device shares characteristics with sirens and bullhorns, which have never been regarded as instruments of force. And indeed, plaintiffs alleged that the officers used the device "as if it were a megaphone" (JA21).

Whether acoustic devices fall on the continuum of force—and if so, precisely where—are questions that courts have only just started to ask. For the purpose of qualified immunity, what matters is that these questions were not resolved with clarity at the time the officers acted.

The court of appeals nonetheless held that the novelty of the device was not relevant because it is only the effect of the device—its capability to cause pain or injury—that is legally significant (Pet. App. 34a-35a). But the court cited no precedent clearly articulating that principle, and it is flawed when cast as an absolute blanket rule. Even if the principle were correct, and were not newly announced in this case, it still falls at far too high a level of abstraction to resolve the question of qualified immunity. Its application here is not self-evident, where the videos confirm that reasonable officers would have had no reason to conclude that they were causing either pain or injury and where, even if the officers' use of the device were considered force, there would remain the question whether it was constitutionally excessive under the circumstances.

The court of appeals' refusal to consider the device's novelty cannot be reconciled with this Court's direction that novelty is highly relevant. The Court has made clear that what matters is what a *reasonable officer* could view as significant, and reasonable officers may struggle to accurately predict how the law will apply to novel facts.

Here, the court ignored all of the practical reasons why reasonable officers could have believed that using the LRAD 100X did not constitute significant force, or force at all, and relied instead on its own conclusions about how the law should be applied.

In giving the novelty of the acoustic device no weight, the court of appeals also departed from the practice of other circuits, which typically take into account the specific technology an officer is alleged to have used—like a taser, pepper spray, or a flash-bang—when defining the right at issue. The practice implements this Court's direction that the right must be defined with an eye to the "particular conduct." It is also common sense: different technologies serve different purposes, are used under different facts and circumstances, and have different potential for injury, even if force or injury is not an intended or anticipated consequence of utilizing that technology.

For example, in *Mattos v. Agarano*, the Ninth Circuit sitting en banc defined the right at issue as whether using a *taser* under the circumstances was excessive, and afforded officers qualified immunity because no controlling case had found that it was. 661 F.3d 433, 448, 452 (9th Cir. 2012) (en banc). And in *Estate of Bing v. City of Whitehall*, the Sixth Circuit similarly found that officers were immune because no controlling case would have advised them that using a *flash-bang* would be excessive. 456 F.3d 555, 570-71 (6th Cir. 2006).

To be sure, novelty may not be dispositive. *See Hope*, 536 U.S. at 741 ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances."). But where, as here, the novelty of a

technology could have led reasonable officers to disagree about the legality of using it under the circumstances, an award of qualified immunity is not only warranted, but required. The court of appeals' refusal to give the novelty of the LRAD 100X any role in the analysis inverts this Court's holding that novelty is not dispositive—just highly relevant—into a principle that novelty is beside the point. And by eliminating the margin of error that qualified immunity is meant to safeguard, the decision below shifts the risks of using new and important technologies designed to limit arrests and defuse tense situations to individual officials, discouraging their use and pushing officials toward more serious forms of force.

B. Ignoring this Court's repeated directives, the decision below denies qualified immunity based on inapt cases.

Compounding the problem, the court of appeals pretended as if the officers argued that substantive due process principles simply do not apply to crowd control or protestors (Pet. App. 28a-32a). Not so. Instead, the officers offered precisely the kind of particularized analysis that this Court's precedent contemplates, arguing that it was not clearly established that their particular conduct in this specific context constituted conscience-shocking force, or even objectively unreasonable force (Br. for Appellants, 2d Cir. ECF No. 33 at 25-45).

Sidestepping the officers' actual argument, the court of appeals tried to bridge the gap between this case and existing precedent by ignoring all the facts that make this case so different. But in doing so, the court of appeals ran headlong into a violation of this Court's repeated direction

not to deny qualified immunity based on cases addressing fundamentally different facts and circumstances. *See, e.g.*, *Sheehan*, 135 S. Ct. at 1776-77.

The court of appeals relied largely on two cases. Both held that officers violated the Fourth Amendment by using "brutality" to arrest peaceful protestors on private property. In *Amnesty America v. Town of West Hartford*, officers, while arresting peaceful demonstrators chained to an abortion clinic, allegedly dragged, choked, kicked, stood on, and rammed them into walls, causing them to scream in pain. 361 F.3d 113, 118-19, 122-24 (2d Cir. 2004). Likewise, in *Papineau v. Parmley*, officers allegedly choked, dragged, and used batons to beat protestors gathered peacefully on private property while making arrests. 465 F.3d 46, 53, 61-63 (2d Cir. 2006).

Even setting aside whether Fourth Amendment excessive force cases can clearly establish the law for 14th Amendment purposes,[4] *Amnesty America* and *Papineau* are too far afield to have given the officers "fair warning" about the lawfulness of their conduct. Both addressed force calculated to effectuate arrests, not steps taken to restore order to a mass gathering with relative expediency and without resort to escalating force or arrests. Both addressed brutal and gratuitous violence, not the use of a novel acoustic device that officers would have had no reason to conclude caused the crowd (or the other officers in the vicinity) pain. And both addressed peaceful and largely static gatherings on private property, not hostile,

4. *See Reed v. Clough*, 694 F. App'x 716, 725-26 (11th Cir. 2017) (summary order); *Norris v. Engles*, 494 F.3d 634, 639 n.5 (8th Cir. 2007).

obstructive conduct in Manhattan's traffic-filled streets under tense and evolving circumstances.

The court's reliance on cases addressing radically different conduct under radically different circumstances exposes an unspoken assumption underlying its analysis: that the proper resolution of this case is so obvious that on-point precedent is not required. But this Court has cautioned that the obvious cases are "rare." *Wesby*, 138 S. Ct. at 590. In fact, the Court appears to have decided only one such case, holding that it should have been obvious to correction officers that they could not lawfully tie a shirtless inmate to a hitching post for seven hours in the sun, deny him bathroom breaks, and taunt him with water that they then spilled on the ground. *See Hope*, 536 U.S. at 734-35, 738.

It defies reason that this case would present a similarly obvious constitutional violation. Even the district court found the use of the LRAD 100X "understandable" and "reasonable" at its core, and recognized that the officers were acting in furtherance of significant governmental interests. In light of these interests, as well as the multiple layers of novelty presented, the only thing that is obvious here is that qualified immunity should have been granted.

C. The decision below contravenes this Court's precedent by applying significant legal developments retroactively.

The court of appeals' error in denying qualified immunity is thrown into yet sharper relief by the fact that the relevant constitutional standard here is the 14th Amendment's bar on conscience-shocking force, not the

Fourth Amendment's bar on objectively unreasonable force. To be clear, there was no binding precedent that would have put every reasonable officer on notice that the conduct was so disproportionate such that it would be objectively unreasonable. But there most certainly was no binding precedent that would have put every reasonable officer on notice that the conduct would be so "truly brutal and offensive to human dignity" that it would shock the conscience.

In reaching the opposite conclusion, the court of appeals contravened this Court's express injunction to apply the law as it existed at the time of the conduct. This Court has been clear that decisions post-dating the conduct at issue cannot clearly establish the law in the past. *Brosseau v. Hogan*, 543 U.S. 194, 200 n.4 (2004) (per curiam); *Mitchell*, 472 U.S. at 534-35. And the Court has rejected precisely what the court below did: skirting this bar by treating later decisions as "illustrative" of the rule the officers were alleged to have violated at the time. *Kisela v. Hughes*, 138 S. Ct. 1148, 1154 (2018). The court of appeals elided the difference between the law at the time of the decision with the law at the time of the conduct four years earlier, in effect "reading back" in time the legal principles it had just announced at the first step of its qualified immunity analysis.

After all, the decision below was the first time the court of appeals applied in a published opinion this Court's decision in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), outside the pre-trial detention context in which that case arose (Pet. App. 14a-21a). The court of appeals held that *Kingsley* provides that any objectively unreasonable force violates the 14th Amendment if it is

intentional, not accidental (*id.*). Though the court paid lip service to the notion that it had to apply the law as it stood pre-*Kingsley* to evaluate qualified immunity because the conduct occurred a year before *Kingsley* was decided, it did not do so. Instead, the court held the result would have been "the same" (*id.* 27a-28a), insisting that *Kingsley* announced only a "modest refinement" to the 14th Amendment standard, because, in its estimation, unreasonable force always satisfied that standard (*id.* 20a).

But that was not the law. Most circuits, including the Second Circuit, had interpreted the last decision from this Court to address the use of force in the non-seizure, non-detention context—*County of Sacramento v. Lewis*, 523 U.S. 833 (1998)—as establishing a far stricter standard than objective reasonableness. Indeed, *Kingsley* itself resolved a circuit split on the requirements of a 14th Amendment excessive force claim that had arisen in *Lewis*' wake. Several circuits—including the Second Circuit—had held that plaintiffs must show that a government official had acted with a culpable mental state in order to succeed on such a claim. *Kingsley*, 135 S. Ct. at 2472.

In *Lewis*, this Court reaffirmed that official conduct must "shock the conscience" in order to satisfy the 14th Amendment, and that this test is distinct from, and more stringent than, objective reasonableness. 523 U.S. at 846-50. To satisfy it, an official's act must be more than incorrect or ill-advised, but arbitrary in a constitutional sense—a standard "only the most egregious official conduct" will satisfy. *Id.* at 846. The Court noted that it had previously found that conduct must be "brutal" and "offensive to human dignity" to shock the conscience,

id. at 846-47, and held that the test includes a subjective element asking whether the conduct was taken with a culpable mental state, *id.* at 849-50. "[C]onduct intended to injure in some way unjustifiable by any government interest," the Court advised, would be the conduct most likely to satisfy this strict standard. *Id.* at 849.

For the conduct before it in *Lewis*—deadly police action during a high-speed chase—this Court concluded that the standard for fault should be particularly strict because it was taken "on an occasion calling for fast action." *Lewis*, 523 U.S. at 853. Under such circumstances, the Court reasoned, officers were subject to the "tug" of competing obligations: they "are supposed to act decisively and to show restraint at the same moment" and are required to make decisions "in haste, under pressure, and frequently without the luxury of a second chance." *Id.*

Following *Lewis*, many courts of appeals held that the use of force by police in the non-seizure, non-detention context violated this strict standard only if it was brutal or egregious, or was taken with the specific intent to cause harm, unsupported by any legitimate governmental objective.

For example, in *Darrah v. City of Oak Park*, the Sixth Circuit held that an officer's act of striking a protestor in the face, after the protestor grabbed his ankle while he was arresting another protestor, did not state a 14th Amendment claim. 255 F.3d 301, 306-07 (6th Cir. 2001). The court interpreted *Lewis* as requiring plaintiffs to clear "a substantially higher hurdle" under the 14th Amendment than under the Fourth, holding that malicious and sadistic conduct was required. *Id.* at 306-07.

Similarly, in *Cummings v. McIntire*, the First Circuit held that an officer's shove of the plaintiff while directing traffic did not shock the conscience, even though the shove was unjustified and caused severe injuries, because it was not truly brutal and there was no evidence that it was malicious or sadistic. 271 F.3d 341, 346-47 (1st Cir. 2001). And in *Smith v. Hollow Hills Central School District*, the Second Circuit itself held that it was "undeniably wrong" to slap a student across the face at full force without justification, causing pain and psychological injury, but it was not so brutal and offensive to human dignity as to shock the conscience. 298 F.3d 168, 173 (2d Cir 2002).

Reading *Kingsley* to equate all objectively unreasonable force with conscience-shocking force is more than a "modest refinement" of the law. To be sure, the Second Circuit had twice held that a plaintiff could proceed on 14th Amendment claims without specifically addressing whether the plaintiffs had shown malicious and sadistic conduct (Pet. App. 21a). But those cases were decided before *Lewis* provided clear guidance on the proper application of the "shocks the conscience" test to police action in tense circumstances, and this Court has cautioned against "cherry pick[ing]" aspects of decisions supporting a denial of qualified immunity. *al-Kidd*, 563 U.S. at 743.

In any event, a holding that a plaintiff *can* sometimes state a claim for conscience-shocking force without showing that the conduct was taken with a culpable mental state is a far cry from a holding that a plaintiff always *does* state a claim for conscience-shocking force without making such a showing. Make no mistake about it, the court of appeals did not just move the line between

objectively unreasonable and conscience-shocking force; it obliterated the distinction—a result that *Kingsley* does not require. But even putting aside the questionable merits of such a rule, it certainly was not "beyond debate" before *Kingsley* had even been decided.

To the extent the court of appeals suggested that it may be inferred that the officers acted "maliciously and sadistically for the very purpose of causing harm" (Pet. App. 27a-28a)—that conclusion has no basis in the record. Plaintiffs evidently recognized as much, pressing no such argument in their briefs at both levels below. The videos rebut any such inference, demonstrating that the officers would have had no reason to conclude that they were causing pain, let alone lasting injury. This Court has made clear that even when an unlawful motive is a *conceivable* explanation for the facts alleged in a complaint, a motion to dismiss should be granted if a *more likely* lawful explanation exists. *See Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009). And here, both the district court and the court of appeals recognized that the officers were acting in aid of legitimate government interests—not for the very purpose of causing harm (Pet. App. 26a, 56a-57a).

The conflation of pre- and post-*Kingsley* law matters here. Because "guideposts for responsible decisionmaking" are "scarce and open-ended" in this area, the 14th Amendment provides even less guidance than the Fourth Amendment's "objectively unreasonable" test on the point at which the use of force crosses the hazy line between lawfulness and unlawfulness. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). Indeed, even the court of appeals recognized that the "shocks the conscience" standard is "indefinite[]" and has "no

calibrated yard stick" (Pet. App. 19a-20a). But the lack of standards clearly establishing how the law applies to a particular situation is yet another ground supporting a grant of qualified immunity—not a ground to deny it.

D. The decision below guts the doctrine by transforming this Court's objective test into a series of jury questions.

What is more, the court of appeals stripped all consideration of the perspective of a reasonable officer at the scene from the qualified immunity analysis and mistook elements of the "clearly established" prong as questions of fact for the jury. That result contravened this Court's decades-old injunction that whether conduct violates clearly established law is an objective legal inquiry for the court. *Mitchell*, 472 U.S. at 526. And indeed, if it were not, excessive force claims could rarely, if ever, be resolved on qualified immunity before trial—at which point the defense is essentially lost. *Id.*

Here, the court of appeals obscured all of the uncertainty and complications that the officers were required to navigate. The court held that the officers acted in aid of only one clear and legitimate interest: moving the protestors onto the sidewalk (Pet. App. 26a). Otherwise, the court concluded, a jury could find the threat to the officers' safety to be "negligible," and the bottles that were thrown at them to be merely an "isolated and victimless" incident (*id.* 22a). Although the court suggested that a jury could also find that the circumstances were threatening and potentially violent (*id.* 26a), it disregarded that this Court has repeatedly framed the pertinent question as what a reasonable officer "could have believed" based on

the facts and circumstances he or she confronted—a legal issue for the court. *Saucier v. Katz*, 533 U.S. 194, 208-09 (2001); *see also Wesby*, 138 S. Ct. at 591-93.

Even outside the qualified immunity context, this Court has repeatedly cautioned against the type of hindsight analysis invited by the court of appeals, emphasizing that an officer's actions—even those that clearly constitute force—"must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). "The calculus … must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 397. Qualified immunity amplifies that insight, asking whether every reasonable officer would have known that the use of force violated "clearly established law." *Mitchell*, 472 U.S. at 526.

For example, in *Mullenix v. Luna*, this Court rejected the Fifth Circuit's formulation of the rule the defendant had allegedly violated—that officers may not "use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officers or others"—because it did not capture what a reasonable officer at the scene could have perceived. 136 S. Ct. at 308-09. The Court reformulated the relevant question as whether officers may use deadly force against "a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer." *Id.* at 309.

Here, the court of appeals relied on a formulation of the relevant rule precisely like that rejected by this Court in *Mullenix*—that officers may not "subject[] non-violent protestors to pain and serious injury simply to move them onto the sidewalks" (Pet. App. 28a). But that formulation omits any mention of the circumstances the officers faced, and the other important objectives served by their quick action. Most notably, the court wholly failed to explain why every officer was required to conclude that the risk to his or her safety—and to the safety of others at the scene or using the area's busy streets—was "negligible." And in fact, the opposite is true. The officers here faced a difficult decision: although the protest had not yet developed into a riot, it was becoming unruly, hostile, and obstructive.

Like the officers in *Lewis*, the officers here were required to balance numerous interests, including their own safety, the safety of other officers, the safety of the protestors, and the need to keep the streets of Midtown Manhattan clear of obstruction. And like the officers in *Lewis*, the officers were required to act in tense and volatile circumstances, without knowing whether the circumstances would become increasingly confrontational and dangerous for all involved. On these facts, the officers' choice of the LRAD 100X as a method to help restore order, with expediency, and without resorting to physical force or further arrests is nowhere near a clear case of conscience-shocking force—or conscience shocking at all.

Even the court of appeals recognized that a jury could reach different conclusions about whether the protest was potentially violent (Pet. App. 26a). But the very fact that different judgments could be made about the risks the officers faced refutes the conclusion that every

reasonable officer would have reached the conclusion that safety threats were minimal. It simply does not shock the conscience that, instead of waiting to see whether the protest did become uncontrollable and thus require a significant show of force or further arrests, the officers attempted to use an acoustic device to help restore order. Holding the officers liable for that decision cannot be reconciled with the stringent standards of substantive due process at the time, nor can it be reconciled with this Court's injunction that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 343.

Taken together, the court of appeals' errors in this case are so egregious that summary reversal is warranted. At a minimum, certiorari should be granted and full briefing and argument ordered. Considering the multiple levels of novelty and complexity in this case, it lies within the heartland of qualified immunity. To reach the opposite result and deny the officers qualified immunity, the court turned the doctrine's central principles on their head. But "qualified immunity is important to society as a whole," and its protections are lost if a case is erroneously permitted to proceed. *White*, 137 S. Ct. at 551. This Court should grant review to restore the proper scope of the doctrine.

CONCLUSION

The writ of certiorari should be granted.

December 19, 2018

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JUNE 13, 2018

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 17-2065

ANIKA EDREI, SHAY HORSE, JAMES CRAVEN, KEEGAN STEPHAN, MICHAEL NUSBAUM, AND ALEXANDER APPEL,

Plaintiffs-Appellees,

versus

LIEUTENANT JOHN MAGUIRE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, OFFICER MIKE POLETTO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, SHIELD NO. 3762,

Defendants-Appellants,

WILLIAM JOSEPH BRATTON, NEW YORK POLICE DEPARTMENT (NYPD) COMMISSIONER, CITY OF NEW YORK,

Defendants.[*]

March 27, 2018, Argued,
June 13, 2018, Decided

[*] The Clerk of Court is directed to amend the official caption to conform to the above.

Appendix A

Before: KATZMANN, *Chief Judge*, WALKER, and POOLER, *Circuit Judges*.

Plaintiffs, six individuals who participated in and observed protests in Manhattan on the night of December 4-5, 2014, sued Lieutenant John Maguire and Officer Mike Poletto ("defendants") of the New York Police Department under 42 U.S.C. § 1983. The complaint alleges, among other things, that defendants violated plaintiffs› Fourteenth Amendment right against excessive force when they used a long-range acoustic device ("LRAD"), also known as a "sound gun," to disperse non-violent protesters, resulting in significant injuries, including hearing loss. Defendants moved to dismiss, arguing, in part, that they were entitled to qualified immunity because the complaint neither stated a Fourteenth Amendment claim nor alleged a violation of clearly established law. The district court rejected both arguments, reasoning that LRADs, which can cause injuries comparable to those caused by other tools that are capable of excessive force, fit within the scope of existing precedents. We AFFIRM.

KATZMANN, *Chief Judge*:

This appeal arises out of the New York Police Department's ("NYPD" or "Department") response to a December 2014 protest in Manhattan. The six individual plaintiffs allege that Lieutenant John Maguire and Officer Mike Poletto ("defendants") violated their Fourteenth Amendment rights by using a long-range acoustic device ("LRAD"), also known as a "sound gun," to compel them and other non-violent protesters to exit the street. The

district court held that the plaintiffs adequately alleged an excessive force violation and, accepting the allegations as true, that the defendants were not entitled to qualified immunity. This case comes to us on an interlocutory appeal from that order.

We, like the district court, consider only the factual allegations in the complaint and the videos it incorporates. With this limitation, we are compelled to affirm the denial of qualified immunity. In a narrow ruling, we hold that purposefully using a LRAD in a manner capable of causing serious injury to move non-violent protesters to the sidewalks violates the Fourteenth Amendment under clearly established law. At the same time, recognizing that the complaint before us provides only the vantage point of the plaintiffs, we caution that once both sides present evidence—especially about what the officers observed and knew—the defendants may yet be entitled to qualified immunity.

BACKGROUND

I. Factual History

On an interlocutory appeal from the denial of qualified immunity, our jurisdiction is limited to deciding whether, based on facts alleged by the plaintiffs or stipulated to by the parties, "the immunity defense is established as a matter of law." *Salim v. Proulx*, 93 F.3d 86, 90 (2d Cir. 1996). For purposes of this appeal, the defendants accept as true the allegations set forth in this factual history.

Appendix A

A. LRAD Technology and the NYPD

LRADs are acoustic weapons developed for the U.S. military in the wake of the deadly terrorist attack on the USS *Cole* in 2000. "If mounted aboard a Navy ship, the device's loudspeaker could be used to 'warn off' boats that came too close. If those warnings are ignored, the device could be used to send out sound at a dangerously high level . . . to cause pain/hearing damage to try to repel the attack." First Amended Complaint ("FAC") ¶ 11. This technique, known as "area denial," has been used in both military and crowd control settings. *Id.*

An LRAD can produce louder sound than a traditional amplification device, such as a megaphone, and can project over much greater distances. To achieve this effect, LRADs concentrate sound into a 30- to 45-degree cone-shaped beam. They also reshape acoustic energy to produce flatter sound waves that (1) reduce dampening as the wave travels and (2) interact with the air to create additional frequencies within the wave. Alex Pasternack, *The New Sound of Crowd Control*, "Motherboard" (Dec. 17, 2014), https://motherboard.vice.com/en_us/article/qkve7q/the-new-sound-of-crowd-control (last accessed Mar. 11, 2018). This can produce volumes of up to 146 decibels. For context, the threshold for human discomfort begins between 120 and 140 decibels and the National Institute of Health cautions that hearing loss can result from short exposure to sounds at or above 110 to 120 decibels.

The New York Police Department purchased two Model 3300 LRADs before the 2004 Republican National

Convention in New York City. Like other LRADs, the Model 3300 has two functions. One, it can serve as a "loudspeaker" to broadcast police commands over vast distances. And, two, the "area denial" function can "propel piercing sound at higher levels . . . than are considered safe to human ears." App. at 85. According to a Department representative speaking at the time of the Convention, the LRADs were purchased to direct crowds to safety in the event of a calamity.

Following the convention, the NYPD used its LRADs sporadically and, then, mainly as loudspeakers. In 2010, the NYPD's Disorder Control Unit tested the Model 3300 at an empty parking lot in the Bronx. Measured from 320 feet away, the spoken voice commands registered at 102 decibels and the area denial mode at 110 decibels. The Department did not take readings within the 320-foot range, which it described as a "potential danger area." A report analyzing the test results observed that, in the "dangerous range (above 120 decibels), this device can cause damage to someone's hearing and may be painful." FAC ¶ 11.

Shortly thereafter, the NYPD purchased the more portable Model 100X, which also has loudspeaker and area denial functions. The 100X's product sheet boasts that it has a maximum volume of 136 decibels at one meter and the manufacturer guidelines caution not to use it within 10 to 20 meters of people. A diagram on the 100X's control panel shows a red beam emanating from the front of the device and instructs: "DO NOT ENTER WITHIN 10 METERS DURING CONTINUOUS OPERATION." *Id.* ¶ 25.

B. The Protest

On December 3, 2014, a Staten Island grand jury declined to indict the NYPD officer who placed Eric Garner, an unarmed black man, in a fatal chokehold. The next day, protests arose across the nation. In Manhattan, hundreds took to the streets to denounce police brutality. The plaintiffs, many of whom are activists and journalists, participated in and documented the protest. Over the course of the evening and into the pre-dawn hours, the demonstrators marched across the city, escorted by NYPD officers.

Sometime after 1:00 a.m., as the protest crossed through the intersection of 57th Street and Madison Avenue, officers made several arrests. Videos of the scene (which are incorporated into the complaint) show a crowd—cordoned off from the arrests by a chain of officers—gathered in a semicircle to observe. Unable to proceed through the intersection, cars idled in the street as protesters streamed past. Meanwhile, many onlookers inched closer to take photographs only to be waved off by officers or told to "get back." Although some demonstrators demanded that the officers "let [the arrestees] go," none interfered with the arrests. Several plaintiffs reported hearing what sounded like a glass bottle breaking, but it did not appear to strike or injure anyone.

Then, with no warning, NYPD officers discharged pepper spray. Several plaintiffs who had been watching the arrests began to flee. Seconds later the wail of a high-pitched alarm began pulsing though the streets. The

defendants had activated the LRAD's area denial function. According to plaintiffs, they had not been ordered to disperse and no such order is audible on the video.

After several bursts from the alarm tone, Lieutenant Maguire and Officer Poletto, both members of the Disorder Control Unit, began broadcasting commands. One officer held the briefcase-sized device in front of him while the other trailed behind and spoke into a corded microphone. "[T]his is the New York City Police Department. You must not interfere with vehicular traffic. You must remain on the sidewalk. If you do interfere with vehicular traffic, you will be placed into custody." Video 1 at 3:23-3:41. Variants of this refrain, punctuated by alarm tones, were repeated for about three minutes as the officers walked the length of 57th Street between Madison and Park Avenues. Although many people in the LRAD's path "were already fleeing on the sidewalks," the officers followed close on their heels, sometimes from fewer than ten feet. FAC ¶ 124. Plaintiffs maintain that the defendants "knew or should have known that the use of the LRAD could cause permanent hearing damage and other injury." *Id.* ¶ 130.

In the days and weeks following the protest, each plaintiff reported physical injuries. Many claimed that they experienced significant ear pain, prolonged migraines, vertigo, and ringing in the ears. Most sought medical treatment. One plaintiff "had extreme difficulty with his hearing." *Id.* ¶ 370. His doctor explained that "the pressure of the extreme level of the noise from the LRAD had pushed a bone in his ear inwards, impacting and damaging a nerve in his ear." *Id.* ¶ 372. His hearing

improved after a course of steroidal medication. Several plaintiffs allege that they are now afraid to attend protests, which, for some, has harmed their professional opportunities as journalists.

II. Procedural History

In March 2016, the six plaintiffs sued Lieutenant Maguire and Officer Poletto, as well as then-NYPD Commissioner William Bratton and the City of New York. They asserted claims under 42 U.S.C. § 1983 premised on violations of the First, Fourth, and Fourteenth Amendments, as well as related municipal liability and New York state law claims. Defendants moved to dismiss the amended complaint, arguing that plaintiffs had failed to state a claim and that the officers were entitled to qualified immunity.

The motion was granted in part and denied in part. The district court found that plaintiffs had adequately pleaded excessive force in violation of the Fourteenth Amendment (as well as the related municipal liability claim) and denied defendants qualified immunity. It also permitted the state-law assault and battery claims to proceed, including the claims against the City under a theory of *respondeat superior*. The district court dismissed the other claims, including all claims against Commissioner Bratton.

On the Fourteenth Amendment claim, the district court reasoned that "[t]he use of the [Model 100X] as a projector of powerfully amplified sound is no different

than other tools in law enforcement's arsenal that have the potential to be used either safely or harmfully," such as stun grenades. Special App. at 16. As to qualified immunity, the district court rejected defendants' argument that amplified noise did not constitute unconstitutional force under existing precedent. "[T]here is much case law discussing the need for careful, vicinity-specific considerations when using tools like distraction devices," the court explained, and, if the circumstances were as plaintiffs allege, these analogous cases would have informed the officers of the illegality of their actions. *Id.* at 21.

Lieutenant Maguire and Officer Poletto timely filed this interlocutory appeal.

DISCUSSION

I. Appellate Jurisdiction and Standard of Review

The sole issue on appeal is whether defendants are entitled to qualified immunity on the Fourteenth Amendment claim. Ordinarily a district court order denying a motion to dismiss is not appealable. *See* 28 U.S.C. § 1291. Yet the Supreme Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam). This is because qualified immunity represents not simply a bar on liability but also an "entitlement not to stand trial or face the burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). Accordingly, denying

qualified immunity "conclusively determines that the defendant[s] must bear the burdens of discovery; is conceptually distinct from the merits of the plaintiff[s'] claim; and would prove effectively unreviewable on an appeal from a final judgment." *Ashcroft v. Iqbal*, 556 U.S. 662, 672, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (internal quotation marks and brackets omitted). It follows that, "[p]rovided it turns on an issue of law," the district court's denial of qualified immunity is a final reviewable order. *Id.* (internal quotation marks omitted).

"Of course, [by] presenting [their] immunity defense on a Rule 12(b)(6) motion instead of a motion for summary judgment[, the defendants] must accept the more stringent standard applicable to this procedural route." *McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004). Briefly summarized, we accept the complaint's factual allegations as true and draw all reasonable inferences in the plaintiffs' favor, including both those that support the claim and "those that defeat the immunity defense." *Id.* This standard represents a "formidable hurdle." *Id.* at 434. Because the facts are undisputed, our review is *de novo. Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 250 (2d Cir. 2001).

II. Qualified Immunity

Assured of our jurisdiction, we turn to the merits. Section 1983 establishes a private right of action for money damages against state officials, acting "under color" of law, who violate a constitutional or statutory right. 42 U.S.C. § 1983. This "deter[s] governmental abuse and remed[ies] unlawful governmental transgressions." *Newburgh*, 239

F.3d at 250. At the same time, "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). To balance the need for accountability and the potential chilling effect, "the Supreme Court established qualified immunity as an affirmative defense to § 1983 claims." *Newburgh*, 239 F.3d at 250. This defense is designed to "reduce[] the general costs of subjecting officials to the risks of trial" by immunizing them from monetary liability "based on unsettled rights." *Connell v. Signoracci*, 153 F.3d 74, 79 (2d Cir. 1998) (internal quotation marks omitted).

Officers are entitled to qualified immunity "unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). Failure to establish either prong would resolve this case and we may "exercise [our] sound discretion in deciding which . . . should be addressed first." *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). Like the district court, we begin with the first prong.

A. Fourteenth Amendment Violation

The right not to be subject to excessive force, perhaps most commonly associated with the Fourth and Eighth

Amendments, can also arise under the Fourteenth. *See Graham v. Connor*, 490 U.S. 386, 394, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989); *Hemphill v. Schott*, 141 F.3d 412, 418 (2d Cir. 1998). This is because "[t]he touchstone of due process," which "is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), bars "the exercise of power without any reasonable justification in the service of a legitimate governmental objective," *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). When the government action is executive, rather than legislative, the Supreme Court has cautioned that "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Lewis*, 523 U.S. at 846 (internal quotation marks omitted). This standard is most readily satisfied when conduct is "intended to injure in some way unjustifiable by any government interest." *Id.* at 849.

While the parties agree that the Fourteenth Amendment establishes a right against excessive force, they disagree about the relevant test. Defendants maintain that the proper inquiry is whether the conduct shocks the conscience. Appellants' Reply Br. at 11. They argue that this standard includes a subjective element—whether the officers behaved "maliciously and sadistically for the very purpose of causing harm." Appellants' Br. at 33 (quoting *Tierney v. Davidson*, 133 F.3d 189, 196 (2d Cir. 1998)). According to defendants, this standard is "distinct from, and more stringent than, objective reasonableness." Appellants' Reply Br. at 11. Plaintiffs counter that conduct shocks the conscience when the use of force was both

"objectively unreasonable" and "intentional, as opposed to negligent." Appellees' Br. at 33. In addressing this disagreement, we apply the law as it exists at the time of decision. *See Whitney v. Empire Blue Cross & Blue Shield*, 106 F.3d 475, 477 (2d Cir. 1997) (per curiam).

Defendants are correct that many cases describe the test for excessive force under the Fourteenth Amendment with the shorthand "shocks the conscience." *See, e.g., Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952). For many years, courts have understood this standard to be distinct from the Fourth Amendment's prohibition against "unreasonable" government action. *See Lewis*, 523 U.S. at 842-43. As recognized in *Graham*, this distinction reflects the varied sources of excessive force claims. 490 U.S. at 393-94. Arrestees may invoke the Fourth Amendment's prohibition against "unreasonable" seizures. U.S. Const. amend. IV. Those incarcerated for a criminal conviction draw on the Eighth Amendment's ban on "cruel and unusual punishments." U.S. Const. amend. VIII. Meanwhile, pretrial detainees and non-incarcerated persons rely on the constitutional guarantee of "due process." U.S. Const. amends. V, XIV.

In *Johnson v. Glick*, this Court identified four illustrative factors for assessing whether conduct, in the words of *Rochin*, "shocks the conscience." 481 F.2d 1028, 1033 (2d Cir. 1973) (Friendly, *J.*) (quoting *Rochin*, 342 U.S. at 172). The factors are: "the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether the force was . . . [inflicted] maliciously or

sadistically." *Id.* In the decades since *Glick* was decided, these factors have continued to guide our Fourteenth Amendment excessive force analysis. *See, e.g., Tierney*, 133 F.3d at 199. But they have never been exhaustive, nor is each factor necessary. *See Glick*, 481 F.2d at 1033 (stating only that "a court must look to such factors as . . ."). In particular, we have never treated malice or sadism as a requirement for stating (or proving) an excessive force claim under a due process theory. Where officials lacked "any legitimate government objective and [caused] substantial injury," we have treated malicious or sadistic conduct as presumptively unconstitutional. *Newburgh*, 239 F.3d at 252. But we have also found excessive force under the Fourteenth Amendment without ever examining an officer's subjective intent. *See, e.g., Robison v. Via*, 821 F.2d 913, 924 (2d Cir. 1987); *Bellows v. Dainack*, 555 F.2d 1105, 1106 & n.1 (2d Cir. 1977).

In 2015 (after the events at issue in this case) the Supreme Court revisited the Fourteenth Amendment standard in *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 192 L. Ed. 2d 416 (2015). The question there was whether a pretrial detainee alleging a Fourteenth Amendment violation must prove that the officers were subjectively aware that the force was excessive, as in the Eighth Amendment context, or merely that the force was objectively excessive. 135 S. Ct. at 2470. In resolving this question, the Court began by clarifying that excessive force claims involve "two separate state-of-mind questions." *Id.* at 2472. The first concerns the official's "state of mind with respect to his physical acts." *Id.* Drawing on its decision in *Lewis*, the Court explained that accidental or

negligent acts are not subject to Fourteenth Amendment liability while those committed purposefully, knowingly, or (perhaps) recklessly are. *Id.*

The second mental state, and the one at issue in *Kingsley*, "concerns the defendant's state of mind with respect to whether his use of force was 'excessive.'" *Id.* On this score, the Supreme Court held that, unlike in the Eighth Amendment context, the standard for a pretrial detainee suing under the Fourteenth Amendment is "objective" and merely requires showing that "the force purposely or knowingly used against him was objectively unreasonable." *Id.* at 2472-73. This objective showing can be established through contextual factors and the Court identified six non-exhaustive "considerations." *Id.* at 2473. These factors included proportionality or, as the Court described it, "the relationship between the need for the use of force and the amount of force used." *Id.* They also included related indicia such as "the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting." *Id.*

Viewed against the backdrop of this circuit's Fourteenth Amendment jurisprudence, *Kingsley* offers two important insights. First, the objective standard it announced confirms that the subjective mental state referenced in *Glick* and some of this Court's other precedents is not a necessary showing. Second, and more significantly, *Kingsley* used modified terminology to

describe the Fourteenth Amendment standard. Although prior excessive force cases spoke of whether the official's conduct "shocks the conscience," *Lewis*, 523 U.S. at 846-47 (collecting cases), *Kingsley* asked whether the force was "objectively unreasonable," 135 S. Ct. at 2473. More on this later.

Returning to the case at hand, defendants protest that, contrary to plaintiffs' assertion, *Kingsley* is not the appropriate touchstone for assessing the alleged Fourteenth Amendment violation. On defendants' reading, *Kingsley*'s holding is doubly inapposite because it is limited to pretrial detainees and did not abdicate the traditional "shocks the conscience" standard. Both arguments are unpersuasive.

Defendants' first—and principal—argument is based on a misinterpretation of this Court's earlier statement that *Kingsley* "addressed only the legally requisite state of mind required for a pretrial detainee's excessive force claims." *Dancy v. McGinley*, 843 F.3d 93, 117 (2d Cir. 2016). Defendants understand this language as limiting *Kingsley* to pretrial detainees only. But this ignores the context. *Dancy* involved a Fourth Amendment excessive force claim and this Court was distinguishing between principles that applied under the Fourteenth Amendment and those that governed under the Fourth. *See id.* It follows that *Dancy* had no reason to address *Kingsley*'s applicability to nondetainees bringing claims under the Fourteenth Amendment.

Moreover, we have not treated the precise factual context at issue in *Kingsley*—a pretrial detainee claiming

excessive force—as a limitation on the Fourteenth Amendment standard announced therein. In our one case to engage closely with *Kingsley*, we held that its standard applied not just to excessive force claims, but also to those alleging deliberate indifference toward pretrial detainees. *Darnell v. Pineiro*, 849 F.3d 17, 33-34 (2d Cir. 2017). In reaching this conclusion, the *Darnell* Court did not apply *Kingsley*'s language mechanically. Instead it looked to the sweep and substance of the Supreme Court's reasoning. We do the same.

To begin where *Kingsley* did, "a pretrial detainee can prevail" by alleging "that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose." 135 S. Ct. at 2473-74. As discussed above, this standard is the essence of all Fourteenth Amendment claims, not merely those brought by pretrial detainees. In *Lewis*, a case that involved a non-detainee, the Supreme Court grounded its analysis in the same principle: "the touchstone of due process" is protection from "the exercise of power without any reasonable justification in the service of a legitimate governmental objective." 523 U.S. at 845-46 (brackets omitted). What's more, *Kingsley*'s reliance on *Lewis* as the source of the Fourteenth Amendment standard belies defendants' suggestion that claims by non-detainees are subject to a distinct test. *See Kingsley*, 135 S. Ct. at 2472-73.[1]

1. Additionally, when the *Kingsley* defendants argued that *Lewis* supported a subjective intent standard, the Court had an opportunity to distinguish its earlier decision as a case limited to non-detainees. But the Court did no such thing. Instead, it explained why that argument misread *Lewis*'s holding. 135 S. Ct. at 2475.

The distinction *Kingsley* drew was not between pretrial detainees and non-detainees. Instead, it was between claims brought under the Eighth Amendment's Cruel and Unusual Punishment Clause and those brought under the Fourteenth Amendment's Due Process Clause. 135 S. Ct. at 2475. As the Court observed, not only do the two clauses use distinct language, but, "most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished *at all*." *Id.* (emphasis added). The same is true of non-detainees, except more so. After all, with a non-detainee the government has not even shown probable cause of criminal activity, much less a public safety (or flight) risk warranting detention. For this reason, it would be extraordinary to conclude that "pretrial detainees . . . cannot be punished at all, much less 'maliciously and sadistically,'" *id.*, while requiring non-detainees to prove malice and sadism.

Defendants offer no principled justifications to buttress such an implausible standard, nor could they. Their argument is contrary to this Court's entire body of non-detainee cases, which have long applied the standard announced in *Glick*, a pretrial detainee case. *See, e.g.*, *Newburgh*, 239 F.3d at 251-52; *Tierney*, 133 F.3d at 199. And yet, although defendants acknowledge that *Kingsley* represents a new gloss on the pretrial detainee standard, they would hold the non-detained plaintiffs to this Court's prior articulation of the pretrial detainee standard. To state the argument is to reveal its untenability.[2]

2. Defendants, moreover, point to no case in our Circuit dealing with nondetainees—before or after *Kingsley*—that treated proof of subjective intent as a necessary precondition for a successful

Shifting gears, defendants contend that *Kingsley* did not formally overrule the "shocks the conscience" standard. That may be true, but we think it is beside the point. This is because defendants' focus on phrasing reflects an overly formalistic view of Fourteenth Amendment law. To repeat, the central inquiry has always been whether the government action was rationally related to a legitimate government objective. *Lewis*, 523 U.S. at 846. Although the Supreme Court has "spoken of the cognizable level of executive abuse of power as that which shocks the conscience," this merely showed that the "due process guarantee does not . . . impos[e] liability whenever someone cloaked with state authority causes harm." *Id.* at 846, 848. Instead, "the Due Process Clause is violated by executive action only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." *Id.* at 847 (internal quotation marks omitted).

As the Supreme Court has observed, "the measure of what is conscience shocking is no calibrated yard stick"; it merely "point[s] the way." *Id.* (internal quotation marks omitted). Mindful of this indefiniteness, *Kingsley* is best read as elaborating on this standard, not abandoning it. *Kingsley* held that excessiveness is measured objectively

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Fourteenth Amendment excessive force claim. Thus, even if they could convince us that *Kingsley* should be cabined to pretrial detainees (which they cannot), this would not require us to dismiss an excessive force claim absent an allegation of malice or sadism. *Kingsley* made explicit what we have long taken for granted: a government actor's use of force violates due process when it is objectively excessive.

and then identified various considerations that inform the ultimate Fourteenth Amendment inquiry: whether the governmental action was rationally related to a legitimate governmental objective. 135 S. Ct. at 2473 (considering such things as the "relationship between the need for the use of force and the amount of force used").[3] To put a finer point on it, *Kingsley* teaches that purposeful, knowing or (perhaps) reckless action that uses an objectively unreasonable degree of force *is* conscience shocking.[4]

Although we now hold that *Kingsley* provides the appropriate standard for all excessive force claims brought under the Fourteenth Amendment, it bears emphasizing that this new formulation is but a modest refinement of *Glick*'s four-factor test, on which this Court has long relied. The first three factors identified in *Glick*—the need for force, the relationship between the need and the degree of force used, and the extent of the injury, 481 F.2d at 1033—parallel the six non-exhaustive factors identified in *Kingsley*. Consider *Glick*'s first factor, the

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3. Framed in these terms, defendants cannot seriously dispute *Kingsley*'s logic. After all, their own brief acknowledges that, "[i]t is where officials take injurious action with *no apparent government interest* that this Court has found their conduct conscience-shocking." Appellant's Br. at 39 (emphasis added).

4. One might argue that this conclusion is in tension with *Dancy*'s observation that "Fourth Amendment claims are tied to reasonableness, which is considerably less demanding" than the Due Process Clause. 843 F.3d at 117. But, once again, because *Dancy* focused on the intent standard under the Fourth Amendment, it did not purport to address how *Kingsley* affected cases brought under the Due Process Clause.

need to use force. *Kingsley* effectively disaggregates this into three considerations that all bear on whether force was necessary. 135 S. Ct. at 2473 (encouraging courts to consider "the severity of the security problem," the threat perceived, and "whether the plaintiff was actively resisting"). As for *Glick*'s next two factors—"the relationship between the need and the amount of force that was used" and "the extent of injury inflicted," 481 F.2d at 1033—these are explicitly incorporated into *Kingsley*. *See* 135 S. Ct. at 2473 (highlighting "the relationship between the need for the use of force and the amount of force used" and "the extent of the plaintiff's injury").

Turning to the fourth *Glick* factor, whether the force was applied "maliciously and sadistically for the very purpose of causing harm," 481 F.2d at 1033, *Kingsley* explained that this is not a "necessary condition for liability," 135 S. Ct. at 2476 (emphasis omitted). Instead it is simply one consideration "that *might* help show that the use of force was excessive." *Id.* (emphasis added). This interpretation is consistent with our own precedents, which have repeatedly assessed excessive force claims without looking to subjective intent. *See, e.g., Robison*, 821 F.2d at 924 (holding that the assertion that officers "yanked [a woman] out [of her car], threw her up against the fender, and twisted her arm behind her back" was enough to prevent summary dismissal of an excessive force claim (internal quotation marks omitted)); *Bellows*, 555 F.2d at 1106 & n.1 (concluding that plaintiff stated an excessive force claim based solely on the injuries and absence of a legitimate government interest).

Applying *Kingsley*'s analysis to the allegations at hand, we conclude that the plaintiffs' complaint states a Fourteenth Amendment violation. First, consider the need for force. Under plaintiffs' account, which we must accept as true, the security threat posed by the protest was low. The video footage confirms that the demonstrators were non-violent and there was a robust police presence monitoring the crowd. Although someone may have thrown a glass bottle, this appears to have been an isolated and victimless incident. None of the onlookers filming and photographing the arrests interfered and additional officers were on scene to keep protesters at bay. The most significant problem confronting law enforcement appears to have been traffic disruption caused by protesters walking in the street. However, while mixing cars and pedestrians might have presented a hazard, this is the sort of public safety risk common to large public demonstrations, not necessarily an imminent threat warranting a significant use of force. In short, on the facts alleged, the "severity of the security problem" was minimal and the "threat reasonably perceived by the officers" was negligible. *Kingsley*, 135 S. Ct. at 2473.

In addition, there is no indication that plaintiffs were "actively resisting." *Id.* Quite the opposite: the complaint alleges that once the police began ordering people to move to the sidewalks the plaintiffs promptly complied. (One plaintiff admits that he briefly stepped off the curb while yelling a critical comment at the police. But this was, as most, *de minimis* resistance.)

Turning to proportionality, the disparity between the threat posed by the protest and the degree of force is stark.

The Department's 2010 report describes the purpose of an earlier LRAD model's area denial function as "send[ing] out sound at a *dangerously high* level [to cause] attackers to turn away, or at least, to *cause pain/hearing damage* to try to repel [an] attack." App. at 85 (emphases added). The control panel on the Model 100X that was used here warned operators in capital letters that entering within 10 meters of the device during operation was dangerous. *See* FAC ¶ 25. The device's product sheet likewise listed the LRAD's maximum volume as 136 decibels at one meter, well above the 120 decibels threshold where pain begins and just short of the 140 decibels at which the report advised that "[s]hort term exposure can cause permanent damage." App. at 86. Exposure to this dangerous volume (which we must assume from the pleadings) is a severe consequence for blocking traffic.

The injuries alleged by the plaintiffs (another *Kingsley* consideration, *see* 135 S. Ct. at 2473) are consistent with the report's projections. They endured auditory pain, migraines, tinnitus, and hearing loss, of varying degrees and duration. Several plaintiffs claimed that they still had periodic tinnitus as of the complaint's filing (a year and a half after the protest) and at least one plaintiff said that he experienced constant ringing. Another suffered nerve damage and hearing loss that required medical treatment. These impairments fit comfortably on the spectrum of injuries that this Court has found sufficient to state a Fourteenth Amendment violation. *See, e.g., Newburgh*, 239 F.3d at 252 (holding that "head trauma, lacerations, and bruising" constitute a "substantial physical injury"); *Robison*, 821 F.2d at 924 (denying qualified immunity for

a Fourteenth Amendment violation when officers caused bruises that lasted "a couple weeks").

Kingsley also asks whether the officers tried to "temper or to limit the amount of force." 135 S. Ct. at 2473. Nothing in the complaint suggests that they did. There was no audible dispersal warning before the defendants activated the area denial function, nor any other visible attempt to move protesters out of the street. Looking at the force itself, the plaintiffs allege that the officers used the LRAD at close range while "pointing it" at the demonstrators. FAC ¶ 229. In addition, the alleged injuries support an inference that the LRAD was set to an extremely high decibel-level.

Pulling these threads together, plaintiffs' allegations indicate that the officers' use of the LRAD's area denial function was disproportionate to the limited security risk posed by the non-violent protest and caused substantial physical injuries. Or, stated somewhat differently, the defendants' use of a device capable of causing pain and hearing loss was an "exercise of power without any reasonable justification in the service of a legitimate government objective." *Lewis*, 523 U.S. at 846. Because defendants have chosen to appeal the denial of a motion to dismiss, we are compelled to accept the allegations as true and must therefore conclude that the complaint adequately states a Fourteenth Amendment claim.

B. Clearly Established Law

The remaining question is whether the constitutional right at issue was "clearly established at the time of the

challenged conduct." *al-Kidd*, 563 U.S. at 735 (internal quotation marks omitted). This inquiry "ensure[s] that the official being sued had fair warning that his or her actions were unlawful." *Terebesi v. Torreso*, 764 F.3d 217, 230 (2d Cir. 2014) (internal quotation marks omitted). And, because officers cannot have fair warning of rights that are not yet established, we look to precedent in existence at the time of the events. *See Anderson*, 483 U.S. at 639. Here, this means that, for purposes of "clearly established law," we apply the Fourteenth Amendment analysis from *Glick*, not the Supreme Court's 2015 decision in *Kingsley*.

We begin with the delicate task of defining the right at issue. In doing so, we must be mindful that, on the one hand, "[c]haracterizing the right too narrowly to the facts of the case might permit government actors to escape personal liability." *Newburgh*, 239 F.3d at 251. On the other hand, defining clearly established law at too high a level of generality "avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff v. Rickard*, 572 U.S. 765, 134 S. Ct. 2012, 2023, 188 L. Ed. 2d 1056 (2014).

Here, defendants' frame the question as "whether the officers violated the Fourteenth Amendment by using the LRAD 100X to aid in moving protesters to the sidewalks after the protest became obstructive and potentially violent." Appellants' Br. at 28. This framing puts not one but two thumbs on the scale in favor of defendants. First, it focuses on the officers' professed objective—moving protesters onto the sidewalk—while ignoring the degree of force that the officers allegedly used. Second, it recasts

the protest as "violent," a characterization that, based on plaintiffs' allegations and the scene captured in the videos, is at best arguable. *See, e.g., id.* at 34 (describing a "large crowd of hostile demonstrators—who greatly outnumbered and had surrounded the officers, were becoming violent, and were obstructing traffic"). Perhaps this is an inference that a factfinder might ultimately make, but at this stage we must draw all inferences in favor of the plaintiffs, not the defendants.

Defining the Fourteenth Amendment right according to the "particular circumstances" requires attention to the precipitating events, the government interest at issue, the degree of force used, and the reasonably anticipated consequences of the government action. To illustrate, consider the Supreme Court's analysis in *Plumhoff*. The Court began with the context, a "lengthy, highspeed pursuit" that "posed a danger both to the officers involved and to any civilians who happened to be nearby." 134 S. Ct. at 2023. The officers' objective was to "protect those whom [the suspect's] flight might endanger." *Id.* After the suspect crashed and then tried to speed away, several officers fired a collective 15 shots. *Id.* at 2024. It was undisputed that this was "deadly force." *Id.* at 2021, 2022, 2024. Weaving all these circumstances together, the Court addressed whether it was clearly established in 2004 that a suspect who leads a long and dangerous car chase has a right not to be subjected to deadly force used to protect public safety. *Id.* at 2023-24. The Court held that he did not. *Id.* Following this template, and accepting the facts alleged by the plaintiffs, the question here is whether, in 2014, non-violent protesters and onlookers, who officers

had not ordered to disperse, had a right not to be subjected to pain and serious injury that was inflicted to move them onto the sidewalks.

Preliminarily, we address whether this conduct alleges a Fourteenth Amendment violation under the legal standard applicable in 2014. Although our earlier discussion drew on *Kingsley*, the result is the same under *Glick*'s parallel factors. To repeat, this Court's longstanding test for excessive force claims teaches that force must be necessary and proportionate to the circumstances. *See Glick*, 481 F.2d at 1033; *see also Newburgh*, 239 F.3d at 253 ("[W]hether force is excessive depends as much upon the need for force as the amount of force used."). Here, on the allegations that we must accept as true, the problem posed by protesters in the street did not justify the use of force, much less force capable of causing serious injury, such as hearing loss.

The most significant difference between the *Kingsley* factors applied above and *Glick* is, of course, the latter's inquiry into "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Glick*, 481 F.2d at 1033. But, as our prior cases show, this evidence has never been necessary for a Fourteenth Amendment excessive force claim. *See, e.g., Robison*, 821 F.2d at 924; *Bellows*, 555 F.2d at 1106 & n.1. And, when parties choose to present evidence on this point, they can establish subjective intent through circumstantial evidence. *See Blue v. Koren*, 72 F.3d 1075, 1084 (2d Cir. 1995). Although the plaintiffs need not allege facts showing

that defendants subjectively intended to use excessive force, we conclude that, given the gross disparity between the need for force and the level of pain and injury inflicted, the plaintiffs have sufficiently alleged that the officers behaved "maliciously and sadistically." *See Newburgh*, 239 F.3d at 252 (concluding that the fourth *Glick* factor was satisfied where the force used "far surpassed anything that could reasonably be characterized as serving legitimate government ends").

The remaining question is whether the right was clearly established. Would reasonable officers have known that subjecting non-violent protesters to pain and serious injury simply to move them onto the sidewalks violated the Fourteenth Amendment? Defendants insist that the circumstances before them were too dissimilar from then-existing precedents to provide this notice. They raise two principal arguments. Neither withstands scrutiny.

First, the defendants deny that it was clearly established in December 2014 that using force in a crowd control context violates due process. In their view, because this Court has not applied "substantive due process principles to crowd control," the officers lacked notice that the right against excessive force applies to non-violent protesters. Appellants' Br. at 37. But that is like saying police officers who run over people crossing the street illegally can claim immunity simply because we have never addressed a Fourteenth Amendment claim involving jaywalkers. This would convert the fair notice requirement into a presumption against the existence of basic constitutional rights. Qualified immunity doctrine

is not so stingy. In fact, we rebuffed a nearly identical argument in *Newburgh*. There, a teacher who brutally assaulted a student insisted that he was entitled to qualified immunity because the right to be free from excessive force had not been "applied to the educational setting." 239 F.3d at 253. Unpersuaded, we declined to adopt such a piecemeal view of Fourteenth Amendment protections. *Id.* We see no reason to take a different tack here.

Were this not enough, a wealth of cases inform government officials that protesters enjoy robust constitutional protections. "[O]ur constitutional command of free speech and assembly is basic and fundamental and encompasses peaceful social protest, so important to the preservation of the freedoms treasured in a democratic society." *Cox v. Louisiana*, 379 U.S. 559, 574, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965); *see also Papineau v. Parmley*, 465 F.3d 46, 56 (2d Cir. 2006) ("[T]he First Amendment protects political demonstrations and protests . . . ."); *Belknap v. Leary*, 427 F.2d 496, 499 (2d Cir. 1970) (Friendly, *J.*) (recognizing a "First Amendment right[] to protest peaceably against the war—or anything else"). Against this backdrop, it would be passing strange to presume that protesters exercising a foundational constitutional right have weaker substantive due process rights than citizens in other contexts.

To be sure, government officials may stop or disperse a protest when faced with an "immediate threat to public safety, peace, or order," including "interference with traffic upon the public streets." *Parmley*, 465 F.3d at 57 (quoting

Cantwell v. Connecticut, 310 U.S. 296, 308, 60 S. Ct. 900, 84 L. Ed. 1213 (1940)). But this authority is not without limits. Among other things, officials have an obligation, "absent imminent harm," to inform demonstrators that they must disperse, *id.* at 60, and may not use unreasonable force, *id.* at 63. In short, our cases amply establish that protesters enjoy robust constitutional protection, protection of which reasonable law enforcement officers are well aware.

In spite of this precedent, defendants, drawing on distinguishable out-of-circuit authority, would have us believe that courts generally conclude that "use of force in a crowd control context [does] not violate substantive due process." Appellants' Br. at 37 n.12. Hardly. Our sister circuits and district courts in this Circuit have routinely applied excessive force principles to crowd control situations. *See, e.g., Nelson v. City of Davis*, 685 F.3d 867, 882-83 (9th Cir. 2012); *Buck v. City of Albuquerque*, 549 F.3d 1269, 1289-90 (10th Cir. 2008); *Asociacion de Periodistas de Puerto Rico v. Mueller*, 529 F.3d 52, 59-62 (1st Cir. 2008); *Darrah v. City of Oak Park*, 255 F.3d 301, 306-08 (6th Cir. 2001); *Duran v. Sirgedas*, 240 F. App'x 104, 112-13 (7th Cir. 2007) (summary order); *Piper v. City of Elmira*, 12 F. Supp. 3d 577, 589-96 (W.D.N.Y. 2014). Training our focus on controlling authority, we see that this Court has repeatedly emphasized that officers engaging with protesters must comply with the same principles of proportionality attendant to any other use of force. *See Parmley*, 465 F.3d at 53, 63; *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 119, 123-24 (2d Cir. 2004). A brief summary of these cases is instructive.

In *Parmley* we refused to condone officers' assault on protesters who distributed flyers on a public highway. *See* 465 F.3d at 52. The record showed that several dozen protesters had gathered on private property for a lawful demonstration. *Id.* At some point, a contingent walked to a nearby highway to distribute fliers to passing cars. *Id.* After the protesters left the highway, a large group of officers stormed onto the private property without "order[ing] the protesters to disperse or provid[ing] them with any warning or justification for their actions." *Id.* at 53. They went on to assault non-violent, compliant protesters, "beating them with . . . riot batons, dragging them by their hair and kicking them." *Id.* Failing to discern a legitimate justification for this violent response, we readily concluded that that the officers' motion for summary judgment based on qualified immunity was properly denied. *Id.* at 63.

We have also warned officers against gratuitously employing "pain compliance techniques," such as bending protesters' wrists, thumbs, and fingers backwards. *Amnesty Am.*, 361 F.3d at 119, 123-24. Reasoning that the pain associated with these techniques was "comparable [to] amounts of force" that we considered unreasonable when "used during the arrest of a nonviolent suspect," we concluded that a reasonable factfinder could decide that the force was excessive. *Id.* at 124. We elaborated that liability would turn on whether a jury found either that such techniques were a proportionate response to protesters purposefully making themselves difficult to arrest or that "the officers gratuitously inflicted pain in a manner that was not a reasonable response to the circumstances." *Id.*

Gratuitous infliction of a pain compliance technique—the strategy behind the LRAD's area denial function—is exactly what the current plaintiffs allege.

Both *Parmley* and *Amnesty America* gave the defendants fair warning that the prohibition on excessive force applies to protesters. This is true even though both those cases arose under the Fourth Amendment. *See Poe v. Leonard*, 282 F.3d 123, 137 (2d Cir. 2002) ("Although the Fourth Amendment cases are not on all fours with [plaintiff's] claim under the Fourteenth Amendment, they are instructive . . . .").[5] After all, there is no intuitive reason to think a recalcitrant protester who is being arrested has more robust rights than a compliant protester who is not. Thus, we see no merit in defendants' argument that they lacked notice of the substantive due process rights of protesters.

Shifting attention from the protesters to the technology at issue, defendants' second argument is that, at the time of the events, the Fourteenth Amendment

5. Defendants' reply brief argues that Fourth Amendment cases "cannot establish the law for Fourteenth Amendment purposes." Appellants' Reply Br. at 22. This argument is inconsistent with the practice of the Supreme Court and this Circuit, both of which cross-pollinate between Fourth, Eighth, and Fourteenth Amendment contexts. *See, e.g.*, *Graham*, 490 U.S. at 396 (relying on language from *Glick*, a Fourteenth Amendment case, to explain Fourth Amendment constraints); *Hudson v. McMillian*, 503 U.S. 1, 9, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992) (drawing on *Glick* in the Eighth Amendment context); *Medeiros v. O'Connell*, 150 F.3d 164, 170 (2d Cir. 1998) (analyzing Eighth Amendment case law to define a Fourteenth Amendment right).

did not apply to LRADs. This argument has two parts: First, defendants contend that the officers cannot be liable because no decision from this Court or the Supreme Court "held or clearly foreshadowed that it would be unconstitutional to use an acoustic device under any circumstances," much less "under circumstances like those faced by the officers." Appellants' Br. at 19, 36-37 (emphasis omitted). Second, defendants insist that, because LRADs "function[] solely by sound," which is not an "instrument[] of force," a reasonable officer would not think that the Fourteenth Amendment applied. *Id.* at 23; *see also id.* at 35. We disagree on both fronts.

Defendants' first argument echoes a common refrain in qualified immunity cases—"pointing to the absence of prior case law concerning the precise weapon, method, or technology employed by the police." *Terebesi*, 764 F.3d at 237 n.20. But novel technology, without more, does not entitle an officer to qualified immunity. *See Hope v. Pelzer*, 536 U.S. 730, 731, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) ("[O]fficials can be on notice that their conduct violates established law even in novel factual situations."). In our first encounter with stun grenades, we concluded that, although neither this Court nor the Supreme Court had addressed that particular technology, "the Fourth Amendment principles governing police use of force apply with obvious clarity[] to the unreasonable deployment of an explosive device in the home." *Terebesi*, 764 F.3d. at 237 (internal quotation marks and citation omitted). Drawing on a decision from the Ninth Circuit, we declared, "[a]n officer is not entitled to qualified immunity" for lack of notice "every time a novel method is used to inflict injury."

Id. (quoting *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994)). Instead, we instructed that "[s]ome measure of abstraction and common sense is required with respect to police methods and weapons." *Id.* at 237 n.20. To drive the point home, we listed a series of innovative non-lethal weapons to which officers should apply common sense, including "sound guns" or "acoustical weaponry." *Id.* Given our call for common sense in the face of new technology, defendants cannot credibly complain they lacked notice that the proscription on excessive force applied to acoustic devices.

As to whether LRADs are instruments of force, defendants go astray by focusing on the mode of delivery rather than the physical effect. Under this Court's precedent, a device that has "incapacitating and painful effects" when used on a person is considered an instrument of force. *Tracy v. Freshwater*, 623 F.3d 90, 98 (2d Cir. 2010). Applying this standard, we have held that pepper spray, which employs chemical reactions rather than kinetic energy, "constitutes a significant degree of force." *Id.*[6] Drawing on well-established principles, we added that because "gratuitous force is unreasonable and therefore

6. Defendants claim that an LRAD differs from pepper spray because "it includes a highly effective loudspeaker mode that can help *avoid* the need for measures historically regarded as force." Appellants' Br. at 23. This is effectively an argument that LRAD's are dual-use devices capable of both exerting dangerous force and serving valuable, non-forceful functions. But the same is true of a riot stick, which can both bludgeon and direct traffic. Rather than absolving the riot stick from scrutiny, this dual functionality is all the more reason to focus on the particular action and ensuing effect, not the device itself.

excessive[,] . . . we presume that no reasonable officer could have believed that he was entitled to use pepper spray gratuitously against a restrained and unresisting arrestee." *Id.* at 99 n.5. In support, we relied on a First Circuit case concluding that unprovoked use of pepper spray against members of a nonthreatening crowd was excessive, an indication that this sort of gratuitous force against crowds is verboten. *Id.* (citing *Asociacion de Periodistas*, 529 F.3d at 60-62).

In *Terebesi*, to add just one more example, we followed the same approach. There, the officers urged that they were immune because no precedent established that the right against excessive force applied to stun grenades. 764 F.3d at 236. But we rejected that argument. Emphasizing the dangerous effects of these devices, which "cause[] fires, burns, and other injuries," we held that "a reasonable officer would [not] think it was constitutional to use these devices in routine searches." *Id.* at 236, 238.

We reach the same conclusion here. Even though sound waves are a novel method for deploying force, the effect of an LRAD's area denial function is familiar: pain and incapacitation. *See Tracy*, 623 F.3d at 98. In fact, this is what the LRAD was designed for. As explained in the NYPD's own report, the purpose of the area denial function is to "cause pain/hearing damage" that repels those in its path. App. at 85. Using common sense, any reasonable officer with knowledge of the LRAD's operations would understand that the area denial function represents a "significant degree of force." *See Tracy*, 623 F.3d at 98.

To recap, assuming the truthfulness of the allegations in the complaint, and drawing all reasonable inferences in plaintiffs' favor, the defendants knew or should have known that the area denial function could cause serious injury. When engaging with non-violent protesters who had not been ordered to disperse, no reasonable officer would have believed that the use of such dangerous force was a permissible means of moving protesters to the sidewalks. Whatever legitimate interest the officers had in clearing the street, the use of sound capable of causing pain and hearing loss in the manner alleged in the complaint was not rationally related to this end. We therefore conclude that the district court properly denied the defendants' motion to dismiss based on qualified immunity.

* * *

Our decision regarding the defendants' use of the LRAD is a narrow one. We do not hold that the Fourteenth Amendment bars law enforcement from using LRADs. To the contrary, we are confident that, in appropriate circumstances, following careful study and proper training, LRADs can be a valuable tool for law enforcement. Their usefulness as a long-range communications device is plain. We also think that, under certain conditions, an LRAD that is properly calibrated might be a lawful means of ordering (or perhaps even compelling) protesters to disperse. We merely hold (1) that, on the allegations before us, which we must accept as true, the plaintiffs have stated a Fourteenth Amendment excessive force claim and (2) that purposefully using the LRAD in a manner capable of causing serious injury to

move non-violent protesters to the sidewalks violated law that was clearly established as of 2014.

We are also mindful that the complaint before us is just one side of the story, told from the perspective of the plaintiffs. But courts and juries must assess excessive force claims from "the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight." *Kingsley*, 135 S. Ct. at 2473. It follows that, once the allegations are tested by evidence, particularly evidence about what the officers saw and knew, the defendants may yet be entitled to qualified immunity.

We can envision various factual showings that would change the calculus. One key variable is the state of unrest at the protest. The evidence may show that the defendants observed a more violent scene than is portrayed in the complaint and incorporated videos. Another key consideration is how the LRAD was used, most notably the volume of the device and its proximity to protesters and passersby. And, third, as *Kingsley* acknowledges, much hinges on what the defendants knew. Perhaps the defendants had not seen the report on the Model 3300 and lacked knowledge of the LRAD's harmful effects. The complaint alleges that the NYPD "has not properly trained its officers" on LRAD use and acknowledges that Department's use of force protocols "do not account for LRAD use." FAC ¶¶ 98, 412. So perhaps the defendants had received training but reasonably believed that they were not using the device in an unsafe or gratuitous manner. Any one of these non-exhaustive factors could warrant a reappraisal of qualified immunity.

Finally, we emphasize that when viewing the evidence from the perspective of a reasonable officer a factfinder must afford "ample room for mistaken judgments." *Malley v. Briggs*, 475 U.S. 335, 343, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). This is particularly true where officers "have obligations that tend to tug against each other." *Lewis*, 523 U.S. at 853.

> Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made in haste, under pressure, and frequently without the luxury of a second chance.

Id. (internal quotation marks omitted). It follows that a jury or a court viewing events from the defendants' perspective must consider not just what the officers saw and knew, but also the rapidly evolving, uncertain, and tense circumstances in which they acted. We trust that discovery will provide fuller insight into this perspective.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's order insofar as it denied defendants qualified immunity for the Fourteenth Amendment claim. This case is REMANDED for further proceedings.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED MAY 31, 2017

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

16 Civ. 1652 (RWS)

ANIKA EDREI, *et al.*,

Plaintiffs,

- against –

CITY OF NEW YORK, *et al.*,

Defendants.

May 31, 2017, Decided
May 31, 2017, Filed

Sweet, D.J.

Plaintiffs Anika Edrei ("Edrei"), Shay Horse ("Horse"), James Craven ("Craven"), Keegan Stephan ("Stephan"), Michael Nusbaum ("Nusbaum"), and Alexander Appel ("Appel") (collectively, the "Plaintiffs") have brought the following lawsuit under 42 U.S.C. § 1983 against Defendants The City of New York ("NYC"), William Bratton ("Bratton"), John Maguire ("Maguire"), and Mike Poletto ("Poletto") (collectively, the "Defendants"). Plaintiffs allege Defendants have violated their rights under the First, Fourth, and Fourteenth

Amendments of the United States Constitution, and New York State claims of assault and battery, arrest and false imprisonment, constitutional tort, negligence, and negligent hiring, screening, retention, supervision and training. Defendants have moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Plaintiffs' First Amended Complaint ("FAC"). As set forth below, the motion is granted in part and denied in part.

Prior Proceedings

Plaintiffs commenced this action on March 3, 2016. (Dkt. 1.) Plaintiffs filed their FAC on August 1, 2016, which expanded certain allegations from the initial complaint, added Plaintiff Appel, inserted Defendants Maguire and Poletto for previous "John Doe" defendants, and added a claim for municipal liability against NYC. (Dkt. 21.)

The instant motion to dismiss was heard and marked fully submitted on January 26, 2017. (Dkt. 35.)

Facts

The following facts are taken from the Plaintiffs' FAC. (Dkt. 21.) They are taken as true for purposes of the motion to dismiss.

i. Long Range Acoustic Devices ("LRADs") And The X100

LRAD devices were first developed around 2000, initially for the military as a tool for ships to amplify

and project noise to ward off other ships. (FAC ¶ 3, 11.) The device has also been marketed for non-military, loudspeaker-like purposes: to produce "highly intelligible voice messages . . . and powerful alarm tones over large distances." (FAC ¶ 5.) LRADs are marketed as louder than traditional megaphones by around 20-35 decibels ("dBs"), and have the capacity to disseminate messages to large crowds over ten blocks away. (FAC ¶ 9, 13.) In addition to amplifying sound, LRAD devices can possess a high-pitched, volume adjustable "deterrent tone" that is marketed to law enforcement as useful for crowd control by creating audible discomfort when used at close range. (FAC ¶¶ 11-12.)

The 100X Model LRAD ("100X") is a type of LRAD device manufactured by the LRAD Corporation. (FAC ¶¶ 1, 80.) The 100X can project messages up to 600 meters away, produce a maximum continuous output of 136 dB at one meter away, and has the capacity to overcome 88 dBs of background noise at 250 meters. (FAC ¶ 80.)

ii. The New York Police Department's ("NYPD") Use Of LRADs

The New York Police Department ("NYPD") has owned and employed LRAD devices since 2004, when it purchased two LRAD Model 3300s ("Model 3300"). (FAC ¶ 57.) At the time of purchases, the NYPD stated it intended to use the LRAD devices to disseminate information to large crowds, such as during demonstrations or following terrorist attacks. (FAC ¶ 59.) Between 2004 and 2011, the NYPD used LRADs infrequently, principally as loudspeakers. (FAC ¶¶ 64-65, 67.)

In 2010, the NYPD conducted tests using the Model 3300. (FAC ¶ 73.) These tests concluded that when LRAD device volume was at around maximum, it resulted in a sound volume of around 100 to 110 dB at a distance of 320 feet away. (FAC ¶¶ 73-75.) The NYPD did not take readings of the Model 3300 within 320 feet of the device, a zone labeled a "potential danger area." (FAC ¶ 77.)[1]

Sometime between 2010 and 2011, the NYPD purchased an X100. (FAC ¶ 78.) However, the NYPD did not start using LRAD devices regularly at demonstrations until around December 2014. (FAC ¶¶ 71-72, 105.) From the initial purchase of LRADs through to the instant action, the NYPD did not have written policies and training materials in place for police officers using LRAD devices in the field. (*See* FAC ¶¶ 94-104.)

iii. The December 4 And 5, 2014 Protest

On the evening of December 4, 2014 through the morning of December 5, 2014, protests and demonstrations took place around New York City in response to a Staten Island grand jury's decision not to indict an NYPD officer for the death of Eric Gardner. (FAC ¶¶ 107-08.) Plaintiffs were present at one of these protests in the capacity of photojournalists, filmmakers, observers, or active protestors. (FAC ¶¶ 1, 109.) At around 1 am on December 5, 2014, each of the Plaintiffs were part of a protest taking place at the intersection of 57th Street and Madison

1. For point of reference, sound levels starting around 85 to 90 dBs and louder can cause human discomfort and damage a person's hearing. (FAC ¶ 80-83.)

Avenue in Manhattan (the "Protest"). (FAC ¶¶ 109-11, 142, 207-08, 260-61, 298, 328, 352-56.) Around this time, police officers arrested some of the protesters, which Plaintiffs and others witnessed from the intersection but without interfering. (FAC ¶¶ 111-14, 144-45, 148, 213-14, 260-61, 298-99, 328, 356; Declaration of Ashley R. Garman dated October 25, 2016 ("Garman Decl.") Ex. C at 00:14-01:24.[2]) During the arrests, other unidentified protesters threw objects, likely glass bottles, towards where the police were making the arrests. (FAC ¶¶ 115, 149, 212, 262, 329.) Other unidentified protesters threw garbage into the air and the street. (Garman Decl. Ex. C at 01:49-01:59.) Some police officers used pepper spray on the crowd. (FAC ¶¶ 117, 211, 301.) Many who had been watching the Protest events began to run in different directions. (FAC ¶¶ 118, 151-52, 305, 358-59.) The police ordered those present at the Protest to return to the sidewalk. (FAC ¶ 215.)

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2. Defendants contend that videos taken by Plaintiffs Craven and Nusbaum were incorporated by reference into the FAC at ¶ 315 and are properly considered by the Court in their Motion to Dismiss. (Supp. Mem. at 2 n.2.) Although Plaintiffs disagree as to whether they incorporated the videos into their FAC, they do not object to the videos' consideration, and in fact cite to it in their reply motion papers. (Opp. Mem. at 5.) The Court will consider them. *See Blue Tree Hotels Inv. v. Starwood Hotels & Resorts*, 369 F.3d 212, 217 (2d Cir. 2004) (permitting consideration of "any documents that are either incorporated into the complaint by reference or attached to the complaint as exhibits"); *Hershey v. Goldstein*, 938 F. Supp. 2d 491, 498 n.1 (S.D.N.Y. 2013) (considering video footage on motion to dismiss that is referenced in complaint and referenced by defendant in reply brief).

Appendix B

Defendants Maguire and Poletto, members of the NYPD Disorder Control Unit, were at this time standing in the street at 57th Street and Madison Avenue. (FAC ¶¶ 1, 119-21.) In response to these events, the officers began using the X100's deterrent tone and broadcasting a message that identified themselves as NYPD and directed people to get on the sidewalk and out of the street. (FAC ¶¶ 122, 125, 160, 221, 333, 363.) In response to the amplified sound from the X100, Plaintiff Nusbaum used earplugs he brought with him and proceeded to film the officers (FAC ¶¶ 337-38); the other Plaintiffs moved away from the area of the X100 to escape the noise (FAC ¶¶ 163-64, 230-31, 272, 308, 361-6.) During this time, Defendants Maguire and Poletto employed the deterrent tone between fifteen to twenty times over a span of three minutes and at a rate that was "almost continuously." (FAC ¶¶ 125, 219, 271.) At various points during this three minute span, Defendants Maguire and Poletto fired the X100 fewer than ten feet away from Plaintiffs and others, angling the X100 at them. (FAC ¶ 131.)

As a result of their exposure to the X100's sound, Plaintiffs have suffered sustained physical injuries, such as migraines, sinus pain, dizziness, facial pressure, ringing in ears, and sensitivity to noise. (FAC ¶¶ 158, 165-72, 175-79, 182-83, 235-44, 273-79, 311-14, 341, 345, 367-70, 380.) Plaintiff Horse was diagnosed with tinnitus in both ears and vertigo. (FAC ¶¶ 239-42.) Plaintiff Appel was diagnosed with hearing loss caused by nerve damage, although his prognosis is positive. (FAC ¶¶ 371-76.) As a result of their experience during the Protest, Plaintiffs are fearful of and deterred from attending future protests,

which has adversely affected their respective careers. (*See* FAC ¶ 187-96, 245-49, 281-84, 316-19, 343, 377-79.)

Applicable Standard

On a Rule 12(b)(6) motion to dismiss, all factual allegations in the complaint are accepted as true and all inferences are drawn in favor of the pleader. *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1174 (2d Cir. 1993). A complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 663 (quoting *Twombly*, 550 U.S. at 556). In other words, the factual allegations must "possess enough heft to show that the pleader is entitled to relief." *Twombly*, 550 U.S. at 557 (internal quotation marks omitted).

Additionally, while "a plaintiff may plead facts alleged upon information and belief 'where the belief is based on factual information that makes the inference of culpability plausible,' such allegations must be 'accompanied by a statement of the facts upon which the belief is founded.'" *Munoz-Nagel v. Guess, Inc.*, No. 12 Civ. 1312 (ER), 2013 U.S. Dist. LEXIS 61710, 2013 WL 1809772, at *3 (S.D.N.Y. Apr. 30, 2013) (quoting *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010)); *Prince v. Madison Square*

Garden, 427 F. Supp. 2d 372, 384 (S.D.N.Y. 2006); *Williams v. Calderoni*, 11 Civ. 3020 (CM), 2012 U.S. Dist. LEXIS 28723, 2012 WL 691832, at *7 (S.D.N.Y. Mar. 1, 2012)). The pleadings, however, "must contain something more than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Twombly*, 550 U.S. at 555 (citation and internal quotation omitted).

Defendants' Motion To Dismiss Plaintiffs' FAC Is Granted In Part And Denied In Part

To state a claim under 42 U.S.C. § 1983, a plaintiff must show that "(1) the challenged conduct was attributable at least in part to a person who was acting under color of state law and (2) the conduct deprived the plaintiff of a right guaranteed under the Constitution of the United States." *Snider v. Dylag*, 188 F.3d 51, 53 (2d Cir. 1999). For each respective alleged offense, Defendants were plausibly acting under color of state law. Plaintiffs claim that Defendants are liable under Section 1983 for First, Fourth, and Fourteenth Amendment violations, and municipal liability under *Monell v. Dep't of Soc. Servs. of the City of N.Y.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Plaintiffs also allege violations of state and common law. Claims are addressed by FAC count below.

i. Unreasonable Seizure and Excessive Force Claims Under The Fourth and Fourteenth Amendment (Count One)

Plaintiffs allege that Defendants Maguire and Poletto's use of the 100X violated Plaintiffs' Fourth and

Fourteenth Amendment rights, specifically by causing an unlawful seizure of Plaintiffs' persons and by Defendants' use of excessive force against Plaintiffs. (FAC ¶¶ 383-90) .

A person has been "seized" within the meaning of the Fourth Amendment when an "officer, by means of physical force or show of authority, . . . in some way restrain[s] the liberty of a citizen." *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Put another way, an encounter between a police officer and an individual "constitutes a 'seizure' for the purposes of the Fourth Amendment . . . 'if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Sheppard v. Beerman*, 18 F.3d 147, 153 (2d Cir. 1994) (quoting *United States v. Mendenhall*, 446 U.S. 544, 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)); *see also Salmon v. Blesser*, 802 F.3d 249, 253 & n.3 (2d Cir. 2015) (observing that the inquiry could also be framed as whether "a reasonable person would feel free to . . . otherwise terminate the encounter," but noting that 'departure is the most obvious way' to terminate encounters" (citations omitted)).

Outside of an unlawful seizure, a plaintiff can still try to state a Section 1983 claim of excessive force under the Fourteenth Amendment's Due Process Clause. *Hemphill v. Schott*, 141 F.3d 412, 418 (2d Cir. 1998); *see also Tierney v. Davidson*, 133 F.3d 189, 199 (2d Cir. 1998) ("Plaintiffs do not assert that they were arrested or seized, and therefore these [Section 1983] claims fall outside the Fourth Amendment protections . . . and are governed instead by the Due Process Clause of the

Fourteenth Amendment.") To determine whether an action is unconstitutionally excessive force, a four-part test is used: "[1] the need for the application of force, [2] the relationship between the need and the amount of force that was used, [3] the extent of injury inflicted, and [4] whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Tierney*, 133 F.3d at 199 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)) (alteration in original). Excessive force claims must show "conscience-shocking" action by a government actor. *Johnson v. Newburgh Enlarged School Dist.*, 239 F.3d 246, 252 (2d Cir. 2001). Where an officer's use of force was "*de minimis*, necessary, appropriate, and benign," a claim of excessive force under the Fourteenth Amendment should not stand. *Id.* However, the "'[r]ules of due process are not . . . subject to mechanical application,'" and "var[y] according to the different environments in which the alleged excessive force occurs." *Ali v. Szabo*, 81 F. Supp. 2d 447, 455 (S.D.N.Y. 2000) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 848, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)).

Under the allegations put forward by Plaintiffs, their Fourth Amendment claims cannot survive. Plaintiffs allege that the blocking the 57th Street roadway by Defendants Maguire and Poletto while firing the X100's amplified sound at Plaintiffs resulted in Plaintiffs' "seizure" because the officers' actions forced Plaintiffs to move from where they were. (Opp. Mem. at 7; FAC ¶ 121.) This claim fails for several reasons.

An officer's request to leave an area, even with use of force, is not a seizure unless "accompanied by the use of sufficient force intentionally to restrain a person and gain control of his movements." *Salmon*, 802 F.3d at 255 (reversing dismissal of seizure claim when officer ejected plaintiff from courthouse by grabbing plaintiff's collar and "violently" twisting plaintiff's arm). While exposed to the X100, none of the Plaintiffs have plausibly alleged that their movements were restrained. Rather, Plaintiffs state that while the X100 was used by Defendants Maguire and Poletto, each Plaintiff moved around the Protest area or left the vicinity of the X100 as each desired, generally to escape the noise. (*See* FAC ¶ 164, 220, 223, 268, 272, 308, 337-38, 364, 366.) Other than being requested to leave the street and inclined to leave the Protest intersection by the noise, the Plaintiffs have not alleged they were not "free to go anywhere else that [they] desired." *Sheppard*, 18 F.3d at 153 (rejecting Fourth Amendment seizure claim when plaintiff was required to leave a courthouse at officer's command). Under the FAC, it cannot be plausibly argued that Defendants Maguire and Poletto "gain[ed] control" of Plaintiffs' moments. *Salmon*, 802 F.3d at 255. Therefore, Plaintiffs' unreasonable seizure claim is dismissed.

With regard to their excessive force claim under the Fourteenth Amendment, however, Plaintiffs have put forward a cognizable claim. As a preliminary matter, Defendants contest whether the use of the X100 and amplified sound can constitute force. (Supp. Mem. at 12 & n.7.) The parties have not provided, and the Court has been unable to locate, case law addressing LRAD-type devices and the use of high-volume sound alone by the

police. In support of their position, however, Defendants point to two New York Supreme Court cases which stand for the proposition that "sound is not a substance but a physical phenomenon." *Martzloff v. City of New York*, 238 A.D.2d 115, 117, 655 N.Y.S.2d 43 (N.Y. App. Div. 1st Dep't 1997); *see also Casson v. City of New York*, 269 A.D.2d 285, 286, 703 N.Y.S.2d 134 (N.Y. App. Div. 1st Dep't 2000) (applying *Martzloff*). These cases neither bind this Court nor are persuasive. They discuss sound in application to New York Civil Law Section 214-c, New York State's statute of limitations rules for personal injury claims arising from exposure to harmful substances. *See* N.Y. C.P.L.R. § 214-c. In rejecting sound in this context, the *Martzloff* court reasoned that, "All cases within the ambit of CPLR 214-c involve the ingestion of a substance," and therefore sound would not apply. *Martzloff*, 238 A.D.2d at 117. Whether sound can be ingested is a narrower, substantively different question than whether sound can be used as a force.

The use of the X100 as a projector of powerfully amplified sound is no different than other tools in law enforcement's arsenal that have the potential to be used either safely or harmfully, one example being distraction devices—items like stun grenade, flash bang, or concussion grenades—which "detonate with a blinding flash of light and a deafening explosion" and whose purpose is to be "extremely loud" and distracting. *Terebesi v. Torreso*, 764 F.3d 217, 236 (2d Cir. 2014). "When used properly [these tools] cause minimal damage," but some courts have held their usage "to be excessive force where the police used clear disregard for the safety of [those in the vicinity]."

Ramage v. Louisvile/Jefferson Cnty. Metro Gov't, 520 Fed. App'x 341, 346-47 (6th Cir. 2013) (citing cases). Although distraction devices have the potential to be more harmful than LRAD devices because of injury from explosion, both tools can result in comparable bodily injury if used improperly. *Compare Bantum v. City of N.Y.*, No. 97 Civ. 4221, 2001 U.S. Dist. LEXIS 8381, 2001 WL 705889, at *1 (S.D.N.Y. June 21, 2001) (plaintiff alleged that police's use of a distraction device "caused him to suffer a broken eardrum and emotional trauma"), *with* (FAC ¶ 30 (noting that loud sounds "have the potential to cause significant harm to the eardrums and delicate organs of the ears")). This is force, and the kind which could be used excessively.

Construed most favorably to the Plaintiffs, their alleged injuries go beyond the *de minimis* threshold. As a result of exposure to the X100's sound, Plaintiffs allege acute head pain and hearing loss for differing periods of time following the Protest. (FAC ¶¶ 168, 175, 194, 232, 273-75, 313-15, 345, 367-70.) Plaintiff Appel states that doctors found that the noise from the X100 caused bones to move in his ear, damaging a nerve. (FAC ¶ 372.) Defendants point to Plaintiffs' video evidence to show that while the X100 was in use, protestors are visible not exhibiting signs of pain from the noise. (Supp. Mem. at 9.) While suggestive evidence to the contrary, the angles and nature of the video make details difficult to discern absolutely. It is reasonably plausible that the video, which is frenetic in style and does not stay on any one protester for an extended period of time, does not rebut the claim that Plaintiffs, if situated where and when they claimed to have been in relation to the X100, sustained their alleged injuries. (*See* Garman Decl. Ex. C.)

Furthermore, based on the written allegations and video evidence, it can be plausibly inferred that the use of a high-powered sound magnifier in "close proximity" to Plaintiffs was not appropriate. *United States v. Morris*, 349 F.3d 1009, 1012 (7th Cir. 2003) (discussing the dangers and limited reasonable contexts for using flash-bang devices). The Protest involved large numbers of people, and so it is understandable that the officers would want to increase the volume of their message to reach the largest number of people. (*See* Garman Decl. Ex. C at 00:14-01:24; FAC ¶ 261, 300.) However, the allegations and video make the Protest appear broadly in control, even when glass bottles were thrown from the crowd toward the police. (*See* German Decl. Ex. C at 1:24-1:35; FAC ¶¶ 115, 149, 212, 262, 358.) Under these circumstances, it is reasonably plausible that there was disconnect between Defendants Maguire and Poletto's need to use a powerfully loud device like the X100 "indiscriminately," (FAC ¶ 225), "almost continuously," (FAC ¶ 338), and within ten feet of Plaintiffs, (FAC ¶ 131), and the harm alleged to be resultant from its use to those in close proximity.

Defendants respond that even if the X100 was unnecessary and injurious, Plaintiffs' allegations do not demonstrate that Defendants Maguire and Poletto's actions rose to the level of malice or sadism to amount to excessive force claim because the officers are alleged to be requesting that those attending the Protest leave the street. (Supp. Mem. at 10-11.) Based on the allegations, crowd control was part of officers' objectives. However, Plaintiffs have also alleged that the X100 was used by Defendants Maguire and Poletto by deliberately pointing

and angling it at Plaintiffs and others during the protest (FAC ¶¶ 131, 229.) Viewed in the light most favorable to Plaintiffs, Plaintiffs' allegations about the manner in which the X100 was used, that Defendants Maguire and Poletto knew, or should have known, that Plaintiffs would be harmed, "plausibly suggesting a claim for excessive force." *Coleman v. City of Syracuse*, No. 09 Civ. 1391 (GTS) (GHL), 2011 U.S. Dist. LEXIS 456, 2011 WL 13808, at *4 (N.D.N.Y. Jan. 4, 2011) (denying motion to dismiss for Fourteenth Amendment excessive force claim when plaintiff alleged defendant police officer's "unjustified" strike on plaintiff's person resulted in bone fractures).

Defendants' qualified immunity defense at the motion to dismiss stage is unavailing. A defendant is entitled to qualified immunity "if either (1) his actions did not violate clearly established law or (2) it was objectively reasonable for him to believe that his actions did not violate clearly established law." *Iqbal v. Hasty*, 490 F.3d 143, 152 (2d Cir. 2007). "A right is clearly established if (1) the law is defined with reasonable clarity, (2) the Supreme Court or the Second Circuit has recognized the right, and (3) a reasonable defendant [would] have understood from the existing law that [his] conduct was unlawful." *Anderson v. Recore*, 317 F.3d 194, 197 (2d Cir. 2003) (alterations in original) (internal quotation marks and citation omitted). However, "[u]sually, the defense of qualified immunity cannot support the grant of a [Rule] 12(b) (6) motion." *McKenna v. Wright*, 386 F.3d 432, 435 (2d Cir. 2004) (quoting *Green v. Maraio*, 722 F.3d 1013, 1018 (2d Cir. 1983)). At this stage, "[n]ot only must the facts supporting the defense appear on the face of the complaint, but, as

with all Rule 12(b)(6) motions, . . . the plaintiff is entitled to all reasonable inferences from the facts alleged, not only those that support his claim, but also those that defeat the immunity defense." *Id.* at 436.

Defendants argue that the unconstitutionality of the officers' actions, specifically that amplified noise can constitute unconstitutional force, was not established at the Protest, entitling them to qualified immunity. (Supp. Mem. at 12-14.) While there is little case law discussing the precise issues present in the instant complaint, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). As discussed above, while LRADs might be new police device developments, there is much case law discussing the need for careful, vicinity-specific considerations when using tools like distraction devices. These "analogous cases" could have informed the officers that their actions, if as Plaintiffs allege, were unreasonable. *Negron v. City of N.Y.*, 976 F. Supp. 2d 360, 370-71 (E.D.N.Y. 2013) (quoting *Landis v. Baker*, 297 Fed. App'x 453, 463 (6th Cir. 2008)). As it is not "beyond doubt" that Plaintiffs "can prove no set of facts in support of [their] claim," dismissing Plaintiffs' claim on the grounds of qualified immunity at this time would be inappropriate. *McKenna*, 386 F.3d at 436 (quoting *Citibank, N.A. v. K-H Corp.*, 968 F.2d 1489, 1494 (2d Cir. 1992)).

Accordingly, to the extent that Plaintiffs' claim is premised on a Fourteenth Amendment excessive force violation, Defendants' motion to dismiss Count One of the FAC is denied.

ii. First Amendment Violation Claims (Count Two)

Plaintiffs have alleged that Defendants' use of the X100 violated their First Amendment right to assemble and express protected speech. Specifically, Plaintiffs' allege that Defendants' actions were a retaliation in response to Plaintiffs' exercise of free speech, which has consequently chilled Plaintiffs' speech, and that Defendants Maguire and Poletto's use of the X100 was a dispersal order that impermissibly regulated Plaintiff's speech because it was either not content-neutral or insufficiently narrowly-tailored. (*See* FAC ¶¶ 399-408.)

"To plead a First Amendment retaliation claim a plaintiff must show: (1) he has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by his exercise of that right; and (3) the defendant's actions caused him some injury." *Dorsett v. Cnty. of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013) (citing *Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001)); *see also Higginbotham v. City of N.Y.*, 105 F. Supp. 3d 369, 378 (S.D.N.Y. 2015). Police dispersal orders where "political speech [becomes] unconditionally silenced" requires analysis under the "clear and present danger standard." *Wiles v. City of N.Y.*, No. 13 Civ. 2898 (TPG), 2016 U.S. Dist. LEXIS 148024, 2016 WL 6238609, at *5 (S.D.N.Y. Oct. 25, 2016) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 308, 60 S. Ct. 900, 84 L. Ed. 1213 (1940)). If, however, a dispersal order made during a demonstration only relocates demonstrators, the Second Circuit instructs courts to review those actions like a "time, place, and

manner [regulation] restriction on speech." *Id.*, 2016 U.S. Dist. LEXIS 148024, [WL], at *5 & n.1 (citing *Zalaski v. City of Hartford*, 723 F.3d 382, 388 (2d Cir. 2013)). Time, place, and manner restrictions are permissible if they "(1) are justified without reference to the content of the regulated speech, (2) are narrowly tailored to serve a significant governmental interest, and (3) leave open ample, alternative channels for communication of the information." *Marcavage v. City of N.Y.*, 689 F.3d 98, 104 (2d Cir. 2012).

Defendants argue that several Plaintiffs are not entitled to First Amendment protection because they were only present at the protest to document it rather than protest, which Defendants argue falls outside the realm of protected political speech. (Supp. Mem. at 6 n.7; *see* FAC ¶¶ 139, 202, 288.) The Court need not parse which Plaintiffs may or may not have been be entitled to speech protection while at the Protest because even if they were all present to protest, Plaintiffs have still failed to state First Amendment violations claims.

With regard to the retaliation claim, Plaintiffs have not plausibly pled that Defendants' actions were motivated by the content of Plaintiffs' speech. Rather, Plaintiffs state that Defendants used the X100 to instruct Plaintiffs and others at the Protest to "get or stay on the sidewalk and out of the street" in the midst of an increasingly confrontational, though not yet uncontrollable, period. (FAC ¶ 122; *see supra* at 16-17.) This is a reasonable motivation: States have "a strong interest in ensuring the public safety and order" and "in promoting the free

flow of traffic on public streets and sidewalks." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994). In addition, Plaintiffs have failed to alleged plausible facts to show that Defendants Maguire and Poletto's use of the X100 was based on Plaintiffs' exercise of free speech.[3]

Plaintiffs' claim as to the dispel order similarly fails. First, "the clear and present danger standard" is inappropriate here, as Plaintiffs' FAC pleads only that the officers were trying to move the people onto the sidewalk, not end the demonstration in full. Thus, to the extent that Defendants' use of the X100 constitutes a dispel order, the actions are properly analyzed as a time, place, manner restriction. Under that metric, the claim first fails because the officers left open an adequate alternative location within "close proximity" to the original location in the street: the sidewalk. *Wiles*, 2016 U.S. Dist. LEXIS 148024, 2016 WL 6238609, at *5 (accepting a park a few blocks away from the current protest area as sufficiently proximate). The State has a strong interest in permitting free flowing traffic on public streets and sidewalks, "which is sufficient to justify a narrowly tailored injunction." *Id.* And as already discussed, there are no plausible

3. The one exception is Plaintiff Horse's claim that Defendants Maguire and Poletto targeted him due to a "critical comment" Horse made towards them. (FAC ¶ 228.) Given the context of the officer's actions and their use of the X100 directed at all surrounding protestors and demonstration attendees, even Plaintiff Horse's claim does not "plausibly establish" that Defendants' actions were inspired by his shout. *Iqbal*, 556 U.S. at 681.

allegations that Defendants Maguire and Poletto used the X100 because of the content of any speech by Plaintiffs.

Accordingly, Defendants' motion to dismiss Count Two of the FAC is granted.

iii. Equal Protection And Substantive Due Process Violation Claims Under The Fourteenth Amendment (Count Three)

Plaintiffs allege that Defendants violated their rights to equal protection and substantive due process under the Fourteenth Amendment. (FAC ¶¶ 409-411.) With regard to their substantive due process claim, Plaintiffs specifically contend that Defendants' actions violated their constitutionally protected "right to remain" and "right to travel" and that Defendants' actions "shocked the conscious." (Opp. Mem. at 12-13.) None of these claims can survive.

The Plaintiffs' additional substantive due process claim fails. A police officer requesting that protestors move from the street to the sidewalk is in furtherance of a reasonable State interest and is the kind of "minor restriction[] on travel [that] simply do[es] not amount to the denial of a fundamental right." *Selevan v. N.Y. Thruway Auth.*, 711 F.3d 253, 257 (2d Cir. 2013). The Court has already addressed Plaintiffs' excessive force claim as part of the FAC's Count One. *See* Section (i) *supra*.

Plaintiffs' equal protection claim is insufficiently pled. A plaintiff can maintain an equal protection claim "so

long as he establishes that he was treated differently than similarly situated persons and that the unequal treatment he received was motivated by personal animus." *Jackson v. Roslyn Bd. of Educ.*, 438 F. Supp. 2d 49, 55 (E.D.N.Y. 2006) (citing *Harlen Assocs. v. Inc. Village of Mineola*, 273 F.3d 494, 500 (2d Cir. 2001)); *see also Brown v. City of Oneonta, N.Y.*, 221 F.3d 329, 337 (2d Cir. 2000) ("The Equal Protection Clause 'is essentially a direction that all persons similarly situated should be treated alike.'" (citation omitted)). Plaintiffs' FAC fails to plausibly allege that Plaintiffs were treated any differently than any other persons present at the protest. Instead, as Defendants note, the FAC repeatedly alleges the opposite: that the Defendants Maguire and Poletto used the 100X "indiscriminately," (FAC ¶ 225), and against "all people in the area," (FAC ¶ 396; *see also* FAC ¶¶ 120, 406).

Accordingly, Defendants' motion to dismiss Count Three of the FAC is granted.

iv. Municipal Liability Claims (Count Four)

Plaintiffs also bring claims against Defendants alleging that (1) Defendants Maguire and Poletto possessed final authority to enact policies that caused their alleged constitutional violations, which were later ratified by Defendant Bratton and (2) that Defendant NYC failed to enact proper policies, supervision, and training, which resulted in the violation of Plaintiffs' constitutional rights.[4]

4. Although Plaintiffs state in their reply papers that they have "sufficient allege[d] municipal liability based on each of four

(FAC ¶¶ 412-22; *see* Opp. Mem. at 23-25 & n.61.) *See also Monell v. Dep't of Soc. Servs. of the City of N.Y.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

To hold a municipal entity liable under Section 1983, a plaintiff must plead and prove that his constitutional rights were violated, that the alleged actions by the employees were the result of an official policy, custom, or practice of the municipal defendant, and that the policy, custom, or practice caused the plaintiff's alleged injuries. *City of Canton v. Harris*, 489 U.S. 378, 385, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989); *Monell*, 436 U.S. at 690-95. A plaintiff may satisfy *Monell*'s "policy, custom or practice" requirement in one of four ways. *See Moray v. City of Yonkers*, 924 F. Supp. 8, 12 (S.D.N.Y. 1996). The plaintiff may allege the existence of: "(1) a formal policy which is officially endorsed by the municipality; (2) actions taken or decisions made by government officials responsible for

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familiar theories of *Monell* liability," (Opp. Mem. at 23), their reply papers only discuss the second and fourth *Monell* theories, (*see* Opp. Mem. at 23-26). To the extent that Plaintiffs alleges the remaining *Monell* theories, they are not plausibly plead. For the first theory, Plaintiffs only provide a conclusory allegation that Defendants Bratton and NYC "developed, adopted, and/or endorsed formal policies" with regard to LRAD use, (FAC ¶ 419), which cannot be reasonably pled while alleging that the NYPD did not appear to have any policies regarding LRAD use through Fall 2012 and without any additional facts alleged, (*see* FAC ¶ 106). For the third theory, Plaintiffs have alleged that the NYPD only started using LRADs at protests with any regularity shortly before the Protest, making it implausible to sustain a claim based on a "persistent and widespread" practice of LRAD abuse. (*See* FAC ¶ 71.)

establishing municipal policies which caused the alleged violation of the plaintiff's civil rights; (3) a practice so persistent and widespread that it constitutes a 'custom or usage' and implies the constructive knowledge of policy-making officials; or (4) a failure by official policy-makers to properly train or supervise subordinates to such an extent that it amounts to deliberate indifference to the rights of those with whom municipal employees will come into contact." *Moray*, 924 F. Supp. at 12 (internal citations and quotation marks omitted). Proof of a single incident of unconstitutional activity is usually insufficient to demonstrate the existence of a policy, unless "the unconstitutional consequences of failing to train could be so patently obvious that a city should be liable under [Section] 1983" and that violation of constitutional rights must be a "highly predictable consequence" of the failure to train. *Connick*, 563 U.S. at 63-64.

Under the second theory of *Monell* liability, the complaint must contain allegations that the defendant-official had final policy making authority in order to subject the municipality to liability. *See Schwab v. Smalls*, 435 F. App'x 37, 40 (2d Cir. 2011) (affirming the district court's dismissal of a Section 1983 claim where the complaint contained little more than a "vague assertion" that defendants had final policymaking authority). It is ultimately the plaintiff's burden to establish, as a matter of law, "that [an] official had final policymaking authority in the particular area involved . . . . It does not suffice for these purposes that the official has been granted discretion in the performance of his duties. Only those municipal officials who have final policymaking authority

may by their actions subject the government to [Section] 1983 liability." *Jeffes v. Barnes*, 208 F.3d 49, 57 (2d Cir. 2000) (internal quotations and citations omitted).

Under the fourth theory of *Monell* liability, a plaintiff can establish deliberate indifference by demonstrating that: "(1) a policymaker knows to a moral certainty that her employees will confront a given situation; (2) the situation either presents the employee with a difficult choice of the sort that training . . . will make less difficult or that there is a history of employees mishandling the situation; and (3) the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights." *Chamberlain v. City of White Plains*, 986 F. Supp. 2d 363, 391 (S.D.N.Y. 2013) (quoting *Walker v. City of N.Y.*, 974 F.2d 293, 297-98 (2d Cir. 1992)) (internal quotation marks omitted). "[D]emonstration of deliberate indifference requires a showing that the official made a conscious choice, and was not merely negligent." *Id.* (quoting *Jones v. Town of E. Haven*, 691 F.3d 72, 81 (2d Cir. 2012)). The failure to train municipal employees may constitute an actionable policy, but only when a plaintiff can "identify a specific deficiency in the city's training program and establish that that deficiency is 'closely related to the ultimate injury,' such that it 'actually caused' the constitutional deprivation." *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 129 (2d Cir. 2004) (citation omitted).

Plaintiffs have not plausibly pled liability under *Monell*'s second theory. Plaintiffs allege that Defendants Maguire and Poletto were authorized to make final policy with respect to LRAD use because they did not consult

supervisors or obtain permission before using the LRAD, (*see* FAC ¶¶ 426-28), and that their policy was later ratified by Defendant Bratton, (FAC I 424). As the Second Circuit has stated, just because an officer has "discretion to determine how to handle the particular situation" does not make that person a final decision-maker. *Anthony v. City of N.Y.*, 339 F.3d 129, 139 (2d Cir. 2003) (finding a police sergeant not a final decision-maker). Police officers using equipment as part of their day-to-day operations cannot reasonably be argued to be "responsible under state law for making policy in that area of the [municipality's] business." *Jeffes*, 208 F.3d at 57 (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988)). Furthermore, with regard to allegations of Defendant Bratton's ratification, "[t]he one-off instance of 'ratification and approval' asserted in the complaint . . . does not support 'an inference of an unlawful municipal policy of ratification of unconstitutional conduct within the meaning of *Monell*.'" *Waller v. City of Middletown*, 89 F. Supp. 3d 279, 287 n.3 (D. Conn. 2015) (quoting *Batista v. Rodriguez*, 702 F.2d 393, 397 (2d Cir. 1983)).

As for *Monell*'s fourth theory of liability, Defendants argue Plaintiffs have not plausibly alleged that Defendant NYC was on notice as to an omission in their training program with regard to LRAD devices. (*See* Supp. Mem. at 23-24.) Assuming the allegations to be true and in the light most favorable to the Plaintiffs, the FAC puts forward plausible claims that, by the night of the Protest, Defendant NYC knew that police officers were using LRAD devices as part of protest, (FAC ¶¶ 70-71), had considered the LRAD devices' noise-magnifying capacities important enough to study, (FAC ¶ 73-77), was

aware of the devices' noise-magnifying hazards[5], (*see* FAC ¶ 75), and did not change NYPD policies or practices to discuss the proper usage of LRAD devices in the field, (*see* FAC ¶¶ 97, 99-103).[6] The *Chamberlain* court's reasoning in allowing a *Monell* liability claim against the City of White Plain for failing to train police officers on how to deal with emotionally disturbed persons ("EDPs") to survive a motion to dismiss is instructive here:

> The Amended Complaint essentially asserts that WPPD officials knew to a "moral certainty," *Walker*, 974 F.2d at 297, that [White Plains police] officers would encounter EDPs in the course of their duties . . . . Furthermore, given the extreme volatility of such individuals and the need for caution when dealing with them to prevent unnecessary escalation, it is plausible that interactions with EDPs present officers with "difficult choice[s] of the sort that training . . . will make less difficult," *Walker*, 974 F.2d at

5. Defendants argue that the tests performed by the NYPD were for the Model 3300, not the X100, and are therefore "completely irrelevant." (Supp. Mem. at 25.) While the precise readings from the tests to not speak to the exact impact of the X100 on a listener, the tests demonstrate the range of power of the new LRAD tools and the plausibly pled need for training on LRAD equipment generally.

6. Defendants point to the NYPD's Patrol Guide at proof of training, which Plaintiffs allege included instructions to police officers to use "the minimal necessary force" while on patrol. (Reply Mem. at 11; FAC ¶ 393.) That is not substantively sufficient guidance to ensure that officers know how to safely and effectively use potentially hazard equipment like LRAD devices.

> 297, and that a "highly predictable consequence" of officers making the wrong choices, *Connick*, 131 S.Ct. at 1361 (internal quotation marks omitted), would be "the deprivation of a citizen's constitutional rights," *Walker*, 974 F.2d at 298.

Chamberlain, 986 F. Supp. 2d at 393. A comparable situation is present here. Plaintiff's allegations paint a reasonably plausible picture of Defendant NYC arming officers with powerful, potentially harmful LRAD devices and placing those officers in expectantly volatile protests, where officers would be presented with opportunities to use the LRAD device. Even in the absence of prior similar violations, the NYC knew that officers with LRADs in the field were likely to face difficult scenarios, such as increasingly agitated protests, where the risk and harm of improperly using LRAD devices are great—problems that could have been avoided with proper training. Thus, "[t]he complaint states a claim under the single-incident theory of liability contemplated in *City of Canton*, and recognized by the cited authority post-*Connick*." *Waller*, 89 F. Supp. 3d at 286-87.

Accordingly, to the extent that Plaintiffs' municipal liability claim is premised on Defendant NYC's failure to properly train under *Monell*, Defendants' motion to dismiss Count Four of the FAC is denied.

v. State And Common Law Claims (Counts Five Through Nine)

Plaintiffs' fifth through ninth claims assert causes of actions under New York State and common law. The

Court will exercise supplemental jurisdiction over those claims that "form part of the same case or controversy" of Plaintiffs' surviving Fourteenth Amendment excessive force and *Monell* claims. 28 U.S.C. § 1367(a). Claims form part of the same case or controversy when they "derive from a common nucleus of operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). "[I]n other words, they must be such that the plaintiff 'would ordinarily be expected to try them all in one judicial proceeding." *Montefiore Med. Ctr. v. Teamsters Local 272*, 642 F.3d 321, 332 (2d Cir. 2011) (quoting *Gibbs*, 383 U.S. at 725). In deciding whether to exercise supplemental jurisdiction under Section 1367(c)(3), a district court must balance "the traditional 'values of judicial economy, convenience, fairness, and comity'" *Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)).

a. Assault And Battery (Count Five)

Plaintiffs allege state-law claim for assault and battery. (FAC ¶¶ 433-39.) The elements of assault and battery in New York are "substantially identical" to those of a Section 1983 claim for excessive force. *Caravalho v. City of N.Y.*, No. 13 Civ. 174 (PKC) (MHD), 2016 U.S. Dist. LEXIS 44280, 2016 WL 1274575, at *22 (S.D.N.Y. Mar. 31, 2016) (quoting *Posr v. Doherty*, 944 F.2d 91, 95 (2d Cir. 1991)). Defendants make similar arguments in seeking to dismiss this claim as with Plaintiffs' excessive force claim, in addition to seeking shelter under state law qualified immunity. Having denied Defendants' motion to dismiss

Plaintiff's excessive force claim, it is proper for the Court to exercise supplemental jurisdiction over this claim, as both turn on the similar questions of the necessity in using the X100, the strength of the X100's force, and the intentionality of the Defendant officers when using the X100. At this early stage and "without a factual resolution . . . it is not possible to determine whether defendants are qualifiedly immune," making it inappropriate to dismiss the claim. *Papineau v. Parmley*, 465 F.3d 46, 64 (2d Cir. 2006) (quoting *Simpkin v. City of Troy*, 224 A.D.2d 897, 638 N.Y.S.2d 231, 232 (N.Y. App. Div. 3d Dep't 1996)).

Accordingly, Defendants' motion to dismiss Count Five of the FAC is denied.

b. False Arrest And False Imprisonment (Count Six)

Plaintiffs allege common law claims of false arrest and imprisonment. (FAC ¶¶ 440-44.) Under New York law, the tort of false arrest is synonymous with that of false imprisonment. *Kraft v. City of N.Y.*, 696 F. Supp. 2d 403, 421 n.8 (S.D.N.Y. 2010) (quoting *Posr*, 944 F.2d at 96). "To state a claim for false arrest under New York law, a plaintiff must show that '(1) the defendant intended to confine the plaintiff, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged.'" *Savino v. City of N.Y.*, 331 F.3d 63, 75 (2d Cir. 2003) (quoting *Bernard v. United States*, 25 F.3d 98, 102 (2d Cir. 1994)). As Plaintiffs were never confined as a result of the Defendants' use of the X100, *see* Section (i) *supra*, this claim will be dismissed.

Accordingly, Defendants' motion to dismiss Count Six of the FAC is granted.

c. Negligence (Count Seven)

Plaintiffs allege common law negligence by Defendants in use of the X100. (FAC ¶¶ 445-50.) To state a claim for negligence, under New York Law a plaintiff must show: "(i) a duty owed to the plaintiff by the defendant; (ii) breach of that duty; and (iii) injury substantially caused by that breach." *Lombard v. Booz-Allen & Hamilton, Inc.*, 280 F.3d 209, 215 (2d Cir. 2002). Defendants contend that because Plaintiffs have alleged intentional conduct on the part of Defendants they cannot also allege negligence conduct for the same action. Plaintiffs are correct: under New York State law, "when a plaintiff brings excessive force . . . claims which are premised upon a defendant's allegedly intentional conduct, a negligence claim with respect to the same conduct will not lie." *Clayton v. City of Poughkeepsie*, No. 06 Civ. 4881 (SCR), 2007 U.S. Dist. LEXIS 55082, 2007 WL 2154196, at *6 (S.D.N.Y. June 21, 2007) (citations omitted). As Plaintiffs have pled sufficient facts to support an excessive force claim, they "cannot additionally argue that the same facts would give rise to a claim for . . . negligence." *Id.*

Accordingly, Defendants' motion to dismiss Count Seven of the FAC is granted.

d. Constitutional Torts (Count Eight)

Plaintiffs allege Defendants violated their rights under Article I, Sections 8, 9, 11, and 12 of the New York

Constitution, which address the right to speak freely, peaceably assembly, to be afforded equal protection of the law, and protection against unreasonable seizures. (FAC ¶¶ 451-54.) The New York Court of Appeals has recognized that a plaintiff may bring constitutional tort claims for damages independent of a common law cause of action. *Brown v. States*, 89 N.Y.2d 172, 674 N.E.2d 1129, 1137-41, 652 N.Y.S.2d 223 (N.Y. 1996). However, this claim is a "narrow remedy" available only when there is no alternative remedy, such as actions at common law or under Section 1983. *Biswas v. City of N.Y.*, 973 F. Supp. 2d 504, 522 (S.D.N.Y. 2013) (quoting *Martinez v. City of Schenectady*, 97 N.Y.2d 78, 761 N.E.2d 560, 735 N.Y.S.2d 868 (2001). As Plaintiffs have remedies for these alleged violates based on similar grounds, all of which have been asserted in the FAC, Plaintiffs' "state constitutional tort claim[s] [are] redundant and precluded." *Id.*

Accordingly, Defendants' motion to dismiss Count Eight of the FAC is granted.

e. Negligent Hiring, Screening, Retention, Supervision And Training (Count Nine)

Plaintiffs allege that Defendant NYC negligently hired, screened, retained, supervised, and trained the Defendant officers in violation of Plaintiffs' rights under New York State law. (FAC ¶¶ 455-59.) New York law does not permit of a claim for negligent hiring, screening, retention, supervision, and training where defendants act within the scope of their employment. *See Schoolcraft v. City of N.Y.*, 103 F. Supp. 3d 465, 521 (S.D.N.Y.) (collecting cases), *on reconsideration in part*, 133 F. Supp. 3d 563

(S.D.N.Y. 2015). The FAC alleges and Defendants have not denied that Defendants Maguire and Poletto were acting within the scope of their employment during the Protest. (*See* FAC ¶¶ 50, 458; Supp. Mem. at 30.) "[W]here a defendant employer admits its employees were acting within the scope of their employment, an employer may not be held liable for negligent hiring, training, and retention as a matter of law." *Rowley v. City of N.Y.*, No. 00 Civ. 1793 (DAB), 2005 U.S. Dist. LEXIS 22241, 2005 WL 2429514, at *13 (S.D.N.Y. Sept. 30, 2005).

Additionally, "an essential element of a cause of action in negligent hiring, retention, supervision, and training is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury." *Bouche v. City of Mount Vernon*, No. 11 Civ. 5246 (SAS), 2012 U.S. Dist. LEXIS 40246, 2012 WL 987592, at *9 (S.D.N.Y. Mar. 23, 2012) (quoting *Saldana v. Village of Port Chester*, No. 09 Civ. 6268 (SCR) (GAY), 2010 U.S. Dist. LEXIS 142099, 2010 WL 6117083, at *5 (S.D.N.Y. July 10, 2010)). Plaintiffs have also not alleged facts sufficient to infer that Defendant NYC knew of the Defendant officers' propensity to act in the manner alleged, namely using a powerful sound magnifier in an unnecessarily forceful manner.

Accordingly, Defendants' motion to dismiss Count Nine of the FAC is granted.

vi. Claims Against Defendant Bratton

Plaintiffs have named former NYPD Police Commissioner Bratton as a Defendant in his individual

capacity. "[E]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Iqbal*, 556 U.S. at 677. Plaintiffs have failed to plausibly allege that Defendant Bratton was present at the time of the Protest or that he was personally involved in any decisions non-duplicative of those included in the surviving *Monell* claims against Defendant NYC. Accordingly, all claims against Bratton in his individual capacity are dismissed. *See Williams v. City of N.Y.*, No. 14 Civ. 5123 (NRB), 2015 U.S. Dist. LEXIS 94895, 2015 WL 4461716, at *7 (S.D.N.Y. July 21, 2015).[7]

Conclusion

For the foregoing reasons, Defendants' motion to dismiss is granted with regards to Counts Two, Three, Six, Seven, Eight, and Nine, and denied with regards to Counts One, Four, and Five.

It is so ordered.

New York, NY
May 31, 2017

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

7. These same conclusions would apply were Bratton to have been replaced with now-NYPD Commissioner James O'Neill under Fed. R. Civ. P. 25(d).

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 30, 2018

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Docket No: 17-2065

ANIKA EDREI, SHAY HORSE, JAMES CRAVEN, KEEGAN STEPHAN, MICHAEL NUSBAUM AND ALEXANDER APPEL,

Plaintiffs-Appellees,

v.

LIEUTENANT JOHN MAGUIRE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, OFFICER MIKE POLETTO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, SHIELD NO. 3762,

Defendants-Appellants,

WILLIAM JOSPEH BRATTON, NEW YORK CITY POLICE DEPARTMENT (NYPD) COMMISSIONER, CITY OF NEW YORK,

Defendants.

Appendix C

ORDER

Appellants, John Maguire and Mike Poletto, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/_____

Catherine O'Hagan Wolfe, Clerk

APPENDIX D — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT XIV

Section 1.

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.

Appendix D

42 USCS § 1983

§ 1983. Civil action for deprivation of rights

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.