No. 18-810

In the Supreme Court of the United States

JOHN MAGUIRE & MIKE POLETTO,

Petitioners,

v.

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

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners are officers with the New York Police Department (NYPD). In response to a public demonstration, they deployed a military-grade long-range acoustic device (LRAD). A label on the device itself warned against using it within 10 *meters* of targets. As the NYPD knew, doing so could cause serious injury, including permanent hearing loss. Petitioners, however, repeatedly deployed the LRAD within 10 *feet* of respondents over a period of several minutes, significantly injuring respondents.

Petitioners moved to dismiss on the pleadings, including on the basis of qualified immunity. The district court denied the motion, finding that respondents sufficiently pleaded that petitioners' use of force was excessive and thus in violation of the Fourteenth Amendment. On petitioners' interlocutory appeal, the court of appeals affirmed. It recognized that, construing the facts most favorably to respondents, *no* application of force was reasonable in these circumstances. Respondents, moreover, sufficiently allege that petitioners knew that the use of an LRAD—a device designed to obtain compliance via the infliction of pain—constituted force. The court of appeals carefully tailored its holding to the preliminary posture of the case, observing that, once a full factual record is developed, petitioners may reassert the qualified immunity defense.

The questions presented are:

1. Whether the court of appeals' application of standard qualified immunity law to the particulars of this case was error.

2. Whether the Court should overrule the doctrine of qualified immunity.

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STATEMENT

In collaboration with defense contractors, the U.S. Navy developed long-range acoustic devices (LRADs) as military-grade weapons in response to the bombing of the USS *Cole*. LRADs are pain-infliction weapons used by the military to suppress close-range attacks on Navy warships.

The New York Police Department (NYPD) acquired an LRAD Model 100X. The device itself warned the operator that, if misused, it could cause considerable injury. Pet. App. 5a. The reason for this warning was obvious and known to petitioners—at close distances, the LRAD produces concentrated sound of such great volume (approximately 136 decibels) that very short exposure can result in serious and even permanent hearing loss. *Id.* at 4a-5a. In fact, the NYPD had previously issued a report on LRADs, expressly acknowledging the severe risk that these weapons posed if deployed unreasonably.

Notwithstanding the device's clear instructions not to fire the LRAD at people less than 10 *meters* away, petitioners repeatedly fired the Model 100X at individuals, including respondents, who were within 10 *feet*. Pet. App. 5a, 7a, 44a. The results were exactly as the LRAD manufacturer indicated—respondents suffered severe, and in some cases permanent, injuries.

Petitioners moved to dismiss the complaint, including on the basis of qualified immunity. The district court denied the motion in relevant part. Following petitioners' interlocutory appeal, the court of appeals unanimously affirmed that decision. Further review is unwarranted.

The pre-discovery, interlocutory posture of this case presents several reasons to deny review. To begin with, the decision below is far from final. The court of appeals expressly "caution[ed]" that its holding turned on the preliminary status of this proceeding. Pet. App. 3a. "[O]nce both sides present evidence—especially about what the officers observed and knew—the defendants may yet be entitled to qualified immunity." *Ibid.*

What is more, petitioners ask this Court to revisit the lower courts' appraisal of the record—the complaint and what is revealed in the videos. Petitioners repeatedly assert, for example, that officers faced a violent and volatile situation. But the court of appeals, like the district court before it, held that petitioners misconstrue the record as it currently stands. Petitioners' dispute with the lower courts' construction of the record is not a basis for certiorari: the Court lacks interlocutory jurisdiction to resolve such factual quarrels, the lower courts correctly evaluated the relevant material, and this case-specific dispute does not warrant this Court's supervisory authority.

The absence of respondents' Fourth Amendment claims further renders this interlocutory petition an improper vehicle for review. And, moreover, this case will proceed regardless, including against petitioners. Review, if any, must await a later stage in litigation, after an evidentiary record has been developed and important factual and legal issues have been resolved.

On the merits, the court of appeals' qualified immunity analysis was correct and straightforward. Under the facts as alleged by respondents and confirmed by the video, no use of force was reasonable under the circumstances, much less a substantial use

of force that could cause permanent damage. Reasonable officers, moreover, would appreciate that the LRAD was an application of force. Indeed, when used in area denial mode—as petitioners repeatedly used it here—it is a pain-compliance tool.

Petitioners' two main arguments are each wrong. Petitioners assert that qualified immunity requires case law addressing the *particular weapon* at issue. Not so. Qualified immunity requires that an officer have "fair notice" of his or her constitutional obligations. That does not require a weapon-by-weapon inquiry when the underlying question is whether *any* force is warranted. Here, petitioners used the LRAD purposefully as a device to cause pain. Reasonable officers knew that this was an application of force.

Second, petitioners ask the Court to resolve the state of Fourteenth Amendment excessive force law in the Second Circuit prior to the issuance of *Kingsley* in 2015. But that question is unimportant. It is not determinative to this case—which, properly understood, includes viable Fourth Amendment claims. And there is no reason to believe that this esoteric question will have relevance elsewhere. In any event, the Second Circuit properly understood its precedent.

No further review is warranted. But, if anything, the Court should reverse—or substantially reduce—the doctrine of qualified immunity. That doctrine lacks underlying legal foundation. It has been criticized by scores of judges and academics. And, if qualified immunity attaches in a case like this, that is all the more proof that it threatens core constitutional safeguards—checks that are necessary to prevent the government from using military-grade weapons on nonviolent citizens exercising their free speech and assembly rights.

A. The NYPD's use of military-grade acoustic weapons.

Working with defense contractors, the United States military developed LRADs "in the wake of the deadly terrorist attack on the USS *Cole* in 2000." Pet. App. 4a. When "mounted aboard a Navy ship," the "area denial" feature emits a "sound at a dangerously high level * * * to cause pain/hearing damage" as a means of "repel[ing]" an attack on a warship. *Ibid.* (quotation omitted). See also C.A. J.A. A85 (NYPD report identifying the LRAD's military origin).

LRADs "produce louder sound than a traditional amplification device, such as a megaphone." Pet. App. 4a. The device used here, the Model 100X, produces a sound of 136 decibels at a range of one meter. *Id.* at 5a. The Model 100X works in two different modes—one is voice amplification, and the other is area denial, the emission of "a high-pitched, volume adjustable 'deterrent tone.'" *Id.* at 41a. When operating in the area denial mode, the LRAD is a pain-compliance device, not a communication tool.[1]

The "National Institute of Health cautions that hearing loss can result from short exposure to sounds at or above 110 to 120 decibels." Pet. App. 4a. For

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[1] In describing LRADs, petitioners focus on their use as communication tools. See Pet. 3-4. This case, however, turns on petitioners' use of the LRAD in area denial mode. Recognizing the dangers inherent in using the LRAD as a pain-compliance tool, the manufacturer notes that "[l]aw enforcement agencies with concerns about the deterrent tone [] can easily disable this option." C.A. J.A. A254. As the court of appeals analogized, a "riot stick" can "both bludgeon and direct traffic"; courts must therefore "focus on the particular action and ensuing effect." Pet. App. 34a n.6. The court of appeals acknowledged the many permissible uses of an LRAD. *Id.* at 36a.

this reason, "manufacturer guidelines caution not to use" the LRAD Model 100X "within 10 to 20 meters of people." *Id.* at 5a. To preclude all confusion, 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.'" *Ibid.* See also C.A. J.A. A23 (photo of warning on device).

In 2010, long before the events at issue here, the NYPD's Disorder Control Unit issued a "Briefing on the LRAD." C.A. J.A. A84-90. In it, the NYPD acknowledged that, when used in area denial mode, an LRAD "propel[s] piercing sound at higher levels (as measured in decibels) than are considered safe to human ears." *Id.* at A85. The NYPD specifically recognized that, "[i]n this dangerous range (above 120 decibels), the device can cause damage to someone's hearing and may be painful." *Ibid.*[2]

This briefing described an NYPD test of an LRAD. The NYPD fired an LRAD at maximum volume and noted that the "[p]otential danger area" reached 320 feet, where the sound still registered 110 decibels. C.A. J.A. A89. The NYPD did not further test the device within the range of *320 feet*, recognizing the danger to humans of doing so. See *ibid.*

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[2] Respondents incorporated this briefing into the complaint. See C.A. J.A. A19. Petitioners apparently attempt to contradict the NYPD's own findings by introducing extra-record material, including from the website of a hearing aid marketer. See Pet. 4 & n.2. Petitioners' need to depart from the record is all the more reason why this interlocutory petition is meritless.

B. Factual background.

1. On December 3, 2014, a Staten Island grand jury declined to indict a New York City police officer for choking Eric Gardner—an unarmed black man—to death. Pet. App. 6a. "In Manhattan, hundreds took to the streets to denounce police brutality." *Ibid.*

Respondents attended a related protest at the intersection of 57th Street and Madison Avenue in Manhattan at around 1 a.m. on December 5. Pet. App. 42a-43a. Officers made certain arrests there, unrelated to respondents. *Id.* at 6a. Videos of the event "show a crowd—cordoned off from the arrests by a chain of officers—gathered in a semicircle to observe." *Ibid.* None of the assembled observers "interfered with the arrests." *Ibid.*

"Then, with no warning, NYPD officers discharged pepper spray." Pet. App. 6a. Many individuals, including respondents, "who had been watching the arrests began to flee." *Ibid.*

Petitioners—Officer Maguire and Lieutenant Poletto, members of the NYPD Disorder Control Unit—then began repeatedly firing the LRAD Model 100X. Pet. App. 6a-7a. Prior to the use of this weapon, respondents "had not been ordered to disperse[,] and no such order is audible on the video." *Id.* at 7a.

Only *after* petitioners fired "several bursts [of] the alarm tone" did petitioners then broadcast commands. Pet. App. 7a. For a period of three minutes, petitioners alternated between commands and firing the area denial alarm tone. *Ibid.* Petitioners "employed the deterrent tone between fifteen to twenty times over a span of three minutes and at a rate that was 'almost continuous[].'" *Id.* at 44a.

"At various points during this three minute span, [petitioners] fired the X100 fewer than ten feet away from [respondents] and others, angling the X100 at them." Pet. App. 44a. "Although many people in the LRAD's path 'were already fleeing on the sidewalks,' [petitioners] followed close on their heels, sometimes from fewer than ten feet." *Id.* at 7a.

Respondent Shay Horse, for example, was present at the demonstration in his capacity as a photojournalist. C.A. J.A. A48-49. He carefully positioned himself to take photos of the police actions and arrests without "interfering with the officers." *Id.* at A50. Petitioners fired the LRAD directly at respondent Horse in response to a critical comment that Horse yelled at the officers—even though Horse was on the sidewalk and not interfering with any police actions. *Id.* at A51.

Horse suffered severe injuries: immediately after being shot with the LRAD, Horse had the sensation that he was "bleeding out of his nose, ears, and mouth." C.A. J.A. A52. He had migraine headaches and bleeding sensations for the following five days. *Ibid.* Because the symptoms had not cleared, he went to urgent care four days later, on December 9. *Ibid.* There, he was diagnosed with tinnitus and vertigo, and he was prescribed medication to address these symptoms. *Ibid.* Years later, Horse still experiences chronic ringing in his ears and bouts of dizziness—none of which he suffered prior to the LRAD blast. *Ibid.*

Respondent Michael Nusbaum, a filmmaker and photographer, also attended the event. C.A. J.A. A60. The LRAD was approximately 15 feet away from Nusbaum when officers deployed it in area denial mode. *Id.* at A61.

Respondent Alexander Appel was also present. C.A. J.A. A62. After being shot with the LRAD, Appel developed a very severe headache. *Id.* at A64. After experiencing extreme difficulty with his hearing for three days, he sought treatment at Mt. Sinai Eye and Ear Infirmary. *Ibid.* There, a doctor diagnosed Appel with hearing loss, "explaining 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.* at A65. Appel still experiences ringing in his ears. *Ibid.*

2. Rather than taking the allegations in the light most favorable to respondents, petitioners' factual recounting rests on construing several material disputes in their favor.

First, petitioners paint the scene as an "unruly" protest, with a "volatile crowd." Pet. 4-5. But the court of appeals disagreed. "The video footage confirms that the demonstrators were non-violent and there was a robust police presence monitoring the crowd." Pet. App. 22a. And, "[a]lthough someone may have thrown a glass bottle, this appears to have been an isolated and victimless incident." *Ibid.* Thus, "[t]he most significant problem confronting law enforcement appears to have been traffic disruption caused by protesters walking in the street." *Ibid.* But "this is the sort of public safety risk common to large public demonstrations, not necessarily an imminent threat warranting a significant use of force." *Ibid.* The district court saw it the same way: "the allegations and video make the Protest appear broadly in control." *Id.* at 52a. Ultimately, whether the situation could be described as "violent" was, "at best," "arguable" according to the court of appeals—and

one not ripe for resolution at the pleading stage. *Id.* at 26a.[3]

Second, the videos do not, as petitioners assert (Pet. 6), contradict respondents' allegations of sustaining severe injuries as a result of the LRAD deployment. According to the district court, the videos to which petitioners point are "frenetic in style" and do "not stay on any one protester for an extended period of time." Pet. App. 51a. The videos are no basis to conclude, the court found, that respondents did not "sustain[] their alleged injuries." *Ibid.*

Third, absent any evidence, petitioners speculate as to what the officers would have known about the LRAD's effects. Pet. 6. But the briefing memorandum published by the Disorder Control Unit, of which petitioners were members (and Maguire a Lieutenant), specifically described that the LRAD emits sound at "higher levels * * * than are considered safe to human ears." C.A. J.A. A85. To the extent officers were in the vicinity, there is no evidence at this stage as to whether the officers were directly shot with the LRAD. Nor is there evidence of what hearing protections officers were wearing at the time. It is a usual procedure for officers operating in the vicinity of LRADs to wear extensive hearing protection that allows them to operate effectively while the sound simultaneously disables everyone else.

Because of the interlocutory posture of this case, none of these factual disputes have been resolved.

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[3] Petitioners assert "that a glass bottle had been thrown *at* officers." Pet. 9 (emphasis added). See also Pet. i, 5. But the courts below identified "an isolated and victimless incident" of a single glass bottle being thrown—and not some targeting of officers. Pet. App. 22a.

C. Proceedings below.

Respondents brought this Section 1983 lawsuit, contending that petitioners' conduct violated their First, Fourth, and Fourteenth Amendment rights. Pet. App. 8a. Petitioners moved to dismiss the complaint.

1. The district court granted the motion as to the Fourth Amendment claims. The court concluded that police did not effect a "seizure" of respondents within the meaning of the Fourth Amendment. Pet. App. 49a. The court also dismissed respondents' First Amendment retaliation claim, concluding that respondents did not sufficiently allege that petitioners' "actions were motivated by the content of [respondents'] speech." *Id.* at 56a. The court likewise dismissed respondents' equal protection and substantive due process claims (*id.* at 58a-59a), as well as certain state-law claims (*id.* at 67a-70a).

The court concluded that respondents stated a claim that petitioners used excessive force in violation of the Fourteenth Amendment. Pet. App. 49a-54a. The court reasoned that "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," just like "concussion grenades." *Id.* at 50a. The court likewise found that, taking into account the allegations and the video, "it is reasonably plausible that there was disconnect between [petitioners'] need to use a powerfully loud device like the X100 'indiscriminately,' 'almost continuously,' and within ten feet of [respondents], and the harm alleged to be resultant from its use to those in close proximity." *Id.* at 52a (citations omitted).

The court found that petitioners had not yet established an entitlement to qualified immunity. Pet. App. 53a-54a. The court observed that "there is much case law discussing the need for careful, vicinity-specific considerations when using tools like distraction devices." *Id.* at 54a. These "analogous cases" provided petitioners notice as to their need to employ the force from an LRAD in a reasonable manner. *Ibid.*

2. On petitioners' interlocutory appeal, the court of appeals affirmed. It did so in a "narrow ruling," holding that "purposefully using a LRAD in a manner capable of causing serious injury to move nonviolent protesters" can violate the Constitution. Pet. App. 3a. The court "caution[ed] that once both sides present evidence—especially about what the officers observed and knew—the defendants may yet be entitled to qualified immunity." *Ibid.*

It was well-established that an excessive force claim may arise under the Fourteenth Amendment, in addition to the Fourth and Eighth Amendments. Pet. App. 11a-12a. Moreover, it was well-established at the time of the protest that officers may not intentionally apply force in a manner that is objectively unreasonable. *Id.* at 13a-16a.

The complaint states viable claims under this standard. Evaluating the allegations and video evidence in the light most favorable to respondents, the court concluded that "the 'severity of the security problem' was minimal and the 'threat reasonably perceived by the officers' was negligible." Pet. App. 22a. There was no active resistance. *Ibid.*

The force used, however, was disproportionate; "the disparity between the threat posed by the pro-

test and the degree of force is stark." Pet. App. 22a. The court noted that the Disorder Control Unit—of which petitioners were members—had described the dangers inherent in the LRAD. *Id.* at 23a. And the control panel on the device itself identified its capacity to injure. *Ibid.*

Altogether, respondents' "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." Pet. App. 24a. Put differently, petitioners' "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.'" *Ibid.* (quoting *County of Sacramento* v. *Lewis*, 523 U.S. 833, 846 (1998)).

The court proceeded to engage in a robust analysis regarding whether the relevant right was sufficiently established at the time to place petitioners on fair notice. Pet. App. 24a-36a. In conducting this inquiry, the court of appeals expressly did not consider this Court's *Kingsley* decision. *Id.* at 25a. Instead, it substantively cited more than a dozen different decisions, all of which established the clarity of petitioners' legal obligations when they injured respondents in late 2014.

At the outset, the court of appeals expressly rejected petitioners' preferred framing—that the inquiry is whether use of the LRAD is permissible in the face of protestors who are "obstructive and potentially violent." Pet. App. 25a. This approach ignores the substantial quantum of force used and, moreover, assumes the defendants' side of the disputes as to the circumstances present. *Id.* at 25a-26a. Instead, the relevant question, for present purposes, 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." *Id.* at 26a-27a.

Under established circuit law, the "longstanding test for excessive force claims teaches that force must be necessary and proportionate to the circumstances." Pet. App. 27a. At the present posture of this case, "the problem posed by protesters in the street did not justify the use of force" at all, "much less force capable of causing serious injury, such as hearing loss." *Ibid.*

Second Circuit precedent did not require a showing of maliciousness as a component of a Fourteenth Amendment claim. Pet. App. 27a. The court of appeals thus rejected petitioners' argument that some showing of malice was obligatory. *Ibid.*

The court of appeals also rejected petitioners' contention that "substantive due process principles" do not apply to "crowd control." Pet. App. 28a. This would be "like saying police officers who run over people crossing the street illegally can claim immunity simply because [a court has] never addressed a Fourteenth Amendment claim involving jaywalkers." *Ibid.* The "[q]ualified immunity doctrine is not so stingy." *Id.* at 28a-29a.

In any event, "a wealth of cases inform government officials that protesters enjoy robust constitutional protections." Pet. App. 29a. Focusing especially on *Jones* v. *Parmley*, 465 F.3d 46 (2d Cir. 2006), and *Amnesty America* v. *Town of West Hartford*, 361 F.3d 113 (2d Cir. 2004), the court explained that its precedent "repeatedly emphasized that officers en-

gaging with protesters must comply with the same principles of proportionality attendant to any other use of force." Pet. App. 30a-32a (summarizing cases).

The court of appeals rejected petitioners' alternative contention relating to LRADs specifically. Pet. App. 32a-34a. The court reasoned that "novel technology, without more, does not entitle an officer to qualified immunity." *Id.* at 33a. An "officer is not entitled to qualified immunity for lack of notice every time a novel method is used to inflict injury." *Ibid.* (quotation omitted). Rather, what matters is whether officers are aware of the nature of the force that the weapon they are using emits and whether use of that quantum of force is reasonable in the circumstances. See *id.* at 34a. The court observed (*ibid.*) that it had previously identified "acoustical weaponry" as among the category of "non-lethal" weapons for which "[s]ome measure of abstraction and common sense" is "required with respect to police methods and weapons in light of rapid innovation in hardware and tactics." *Terebesi* v. *Torreso*, 764 F.3d 217, 237 n.20 (2d Cir. 2014).

The court also rejected petitioners' dispute as to whether LRADs are instruments of force. Pet. App. 34a. What matters is the "physical effect," not "the mode of delivery." *Ibid.* "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." *Id.* at 35a.

Taking this law together, the court of appeals held that, "[w]hen 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." Pet. App. 36a.

The court concluded by reiterating that LRADs may often be used legally (Pet. App. 36a-37a) and, further, that petitioners "may yet be entitled to qualified immunity" in this case (*id.* at 37a). The court focused on several outstanding factual questions that may alter the calculus:

- The "state of unrest at the protest": "[t]he evidence may show that the defendants observed a more violent scene than is portrayed in the complaint and incorporated videos." *Ibid.*
- The parties must address "how the LRAD was used, most notably the volume of the device and its proximity to protesters and passersby." *Ibid.*
- The parties must also identify what petitioners "knew." *Ibid.* If, for example, petitioners "reasonably believed that they were not using the device in an unsafe or gratuitous manner," that might prove relevant. *Ibid.*

As the court summed up, "[a]ny one of these non-exhaustive factors could warrant a reappraisal of qualified immunity." *Ibid.*

Without dissent, the court of appeals denied petitioners' request for rehearing en banc. Pet. App. 73a.

REASONS FOR DENYING THE PETITION

Further review is not warranted. There are multiple prudential and jurisdictional barriers to review. The court of appeals correctly decided petitioners' interlocutory appeal. And, if anything, the Court should reconsider and reverse qualified immunity as a whole. It should not accept petitioners' invitation to eviscerate Section 1983 claims entirely by erecting a

degree of specificity that is all but impossible to satisfy.

A. The interlocutory posture is a jurisdictional and prudential barrier to review.

1. The petition rests on a quarrel with the record.

Beginning with the question presented and continuing throughout the petition, petitioners improperly characterize the allegations. Many of the factual assumptions on which petitioners rely were specifically rejected by both courts below.

In particular, petitioners bake into the question presented that this case turns on "circumstances" that are "chaotic." Pet. i. Later, petitioners assert that they used the LRAD "after a large protest became unruly." *Id.* at 4. They describe the crowd as "volatile," speculating that it "risked spiraling out of control." *Id.* at 5.

But, assessing the complaint's allegations and videos, both courts below flatly rejected petitioners' characterization of the events. As the case comes to the Court, "the 'severity of the security problem' was minimal and the 'threat reasonably perceived by the officers' was negligible." Pet. App. 22a.

To be sure, *on remand*, petitioners may attempt to assemble a factual record to establish a basis for arguing that police officers confronted a "chaotic" scenario. The court of appeals expressly left that issue open for exploration on remand. Pet. App. 37a. What petitioners cannot do, however, is ask the Court to recharacterize the factual record at this interlocutory juncture, construing it in a light most favorable to them. Petitioners' quarrel with the lower

courts' assessment of the record is a basis to deny further review for at least four reasons.

First, the Court lacks subject matter jurisdiction to review petitioners' efforts to reconfigure what it is that the record shows. The scope of an interlocutory, qualified immunity appeal is limited. Courts may review solely "abstract issues" (*Johnson* v. *Jones*, 515 U.S. 304, 317 (1995)) that test the substance and clarity of pre-existing law. *Ortiz* v. *Jordan*, 562 U.S. 180, 190 (2011). Appellate courts do not, at this early point, review "*fact*-related dispute[s] about the pretrial record." *Johnson*, 515 U.S. at 307.

In *Johnson*, the defendant officers were alleged to have mistaken a seizure, brought on by a lack of insulin, for symptoms of alcohol intoxication. The plaintiff claimed he was beaten by several officers during his arrest. Those officers, however, claimed they were not present during the event. The Court concluded that the district court's resolution of this issue was not appealable, because it rested on an underlying factual dispute. 515 U.S. at 307-308, 319-320.

Plumhoff v. *Rickard*, 572 U.S. 765 (2014), in contrast, presented the type of appealable order involving an abstract legal issue that was contemplated, but not present, in *Johnson*. In *Plumhoff*, officers shot and killed a driver and his passenger during a high-speed chase. None of the dispositive facts were disputed. Instead, the parties disagreed over whether shooting the driver violated his clearly established Fourth Amendment rights. *Id.* at 773.

This case resembles *Johnson*, not *Plumhoff*. Here, petitioners rest on several factual contentions that they hope the record later may reveal. At pre-

sent, this is nothing more than a dispute as to the construction of the record—an issue over which appellate courts lack interlocutory jurisdiction.

Second, even if the Court had jurisdiction, petitioners are simply wrong in their characterization of the record at this juncture. The court of appeals, like the district court before it, carefully addressed the factual allegations, as well as the relevant videos. Petitioners have twice lost, and their arguments remain meritless.

Third, even if, contrary to fact, there were error below, petitioners mistake the Court's role. When the Court does intervene in qualified immunity cases, it does so following a denial of summary judgment, at which point a case is otherwise bound for trial. See, *e.g.*, *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1151 (2018); *White* v. *Pauly*, 137 S. Ct. 548, 550 (2017); *Mullenix* v. *Luna*, 136 S. Ct. 305, 307 (2015); *Taylor* v. *Barkes*, 135 S. Ct. 2042, 2043 (2015).

Petitioners ask the Court to expand its qualified immunity error-correction docket to include denied motions to dismiss. See Pet. 1. Not only is petitioners' claim wrong for all the reasons we describe, but the Court should not incentivize defendants who lose a motion to dismiss sounding in qualified immunity to pursue immediate interlocutory appeals all the way up to this Court.

In fact, the court of appeals expressly recognized that its holding as to qualified immunity is tentative—and that whether defendants are ultimately entitled to qualified immunity will turn on the evidence that is later adduced in this case. See Pet. App. 37a. There has been no final resolution of the

qualified immunity defense. The Court's intervention is not warranted.

Fourth, petitioners are wrong to assert that the court of appeals somehow rendered qualified immunity a "question[] of fact for the jury." Pet. 25-28. The court of appeals was express that what is needed is the development of a factual record in order to resolve, conclusively, the question of qualified immunity. Pet. App. 38a. That accords with this Court's review of qualified immunity cases at the summary judgment stage. Not once did the court suggest that this was an automatic entitlement to a jury trial. To the contrary, the court cautioned that petitioners might still prevail on qualified immunity—presumably in a motion for summary judgment—once the record is developed. Pet. App. 3a.

2. The absence of the Fourth Amendment claims renders interlocutory review unwise.

The court of appeals correctly rejected petitioners' interlocutory appeal seeking qualified immunity for the Fourteenth Amendment claims. See pages 23-31, *infra*. But there is an additional reason to deny review at this time: because the petition is interlocutory, it does not implicate respondents' separate Fourth Amendment claims. The district court dismissed those claims, believing that there was no constitutional "seizure." Pet. App. 48a-49a. The Fourth Amendment claims were thus not within the scope of petitioners' interlocutory appeal. See *id*. at 2a-3a.

The district court's holding was error. Review now would risk artificially limiting the Court to only one facet of the relevant legal analysis. That is all the more reason why review, if any, should await

resolution of the myriad factual and legal issues that remain outstanding.

The Court has explained that "the crucial test" for identifying a "seizure" within the meaning of the Fourth Amendment "is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Florida* v. *Bostick*, 501 U.S. 429, 436-437 (1991). Put differently, "[a] person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, by means of physical force * * *, terminates or restrains his freedom of movement, through means intentionally applied." *Brendlin* v. *California*, 551 U.S. 249, 254 (2007) (cleaned up).

Petitioners' use of a military-grade acoustic weapon qualifies as a "seizure" within this definition. To begin with, an LRAD results in the application of a "physical force" to the targeted individuals. Sound is transmitted via waves of energy that, when reaching their destination (*e.g.*, a human ear drum), result in physical vibrations. See C.A. J.A. A530-532. Lest there be any doubt, the LRAD is so powerful "that the pressure of the extreme level of the noise" from the device "pushed a bone" in respondent Appel's "ear inwards, impacting and damaging a nerve in his ear." *Id.* at A65. Police use of an LRAD as a pain-compliance device constitutes the application of physical force.

The LRAD, moreover, "restrain[ed] [respondents'] freedom of movement." *Brendlin*, 551 U.S. at 254. The very reason petitioners used this weapon was to preclude where respondents could physically

move; indeed, LRADs render individuals physically incapable of ignoring the police presence and going about their business.

Finally, the LRAD creates a force that is "intentionally applied." *Brendlin*, 551 U.S. at 254 (emphasis omitted). There was nothing accidental about petitioners' repeated, sustained use of the acoustic weapon against respondents and many others. The LRAD firing was not some inadvertent slip of a trigger finger.

The use of the LRAD as a pain-compliance device qualifies as a seizure under the Court's jurisprudence. While the seizure itself may be brief in duration—it likely ends when the individual's movement is no longer restricted by the force of the LRAD—a brief seizure is governed by the Fourth Amendment all the same. See *Brendlin*, 551 U.S. at 255 (restriction on free movement qualifies as a "seizure" even if "the purpose of the stop is limited and the resulting detention quite brief"). If police sought to restrain an individual's free movement by beating him or her with a baton, there would be a "seizure" within the meaning of the Fourth Amendment. Use of an LRAD is of the same character.

The claims at issue here should thus be analyzed via both a Fourth Amendment *and* a Fourteenth Amendment lens. That would have significant practical effects. To begin with, it would render nugatory petitioners' efforts to discount Fourth Amendment law. See Pet. 19-25. The extent to which *Kingsley* did—or did not—work a change to Fourteenth Amendment jurisprudence is irrelevant to the outcome of *this* case, which should also be governed by Fourth Amendment standards.

But, because of its interlocutory nature, this petition presents solely Fourteenth Amendment claims. Further review of this case, in light of the artificially restricted legal backdrop, would waste resources and would lead to confused legal doctrine.

3. The open Monell *and state-law claims counsel against interlocutory review.*

The *Monell* claim that remains pending at the district court (see Pet. App. 59a-65a) is all the more reason why interlocutory review is unwarranted. Petitioners' request for qualified immunity is irrelevant to the municipal liability claims. See *Pearson* v. *Callahan*, 555 U.S. 223, 242 (2009) (qualified immunity "is not available" in "[Section] 1983 cases against a municipality"); *Owen* v. *City of Indep.*, 445 U.S. 622, 650 (1980) (rejecting "a construction of [Section] 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations").

Because the only issue presented here is the notice aspect of qualified immunity and not the substantive constitutional question (see Pet. i), the *Monell* claim will necessarily proceed in the district court. Not only would review of petitioners' claims now result in piecemeal adjudication, but it might be subject to revision later as the factual record is developed during the course of litigation. And, as we have said, when the Fourth Amendment claims are subject to later review, that would present additional grounds for claims against officers and the municipality alike.

Petitioners will retort that immunity avoids participation in litigation. But that observation has limited application here. To begin with, petitioners are represented by counsel for the municipality, who also

represent the *Monell* defendants. Petitioners will be called to testify as to the *Monell* claim. And New York City will likely indemnify petitioners. See N.Y. Gen. Mun. Law § 50-k.

What is more, this case *cannot* resolve all the claims against petitioners themselves. The district court denied petitioners' motion to dismiss the state-law assault and battery claims. Pet. App. 66a-67a. Those claims are not at issue here, and this case will proceed against petitioners regardless of qualified immunity.

B. The court of appeals properly resolved petitioners' interlocutory appeal.

Petitioners do not contend that the court below decided any novel question of law. They do not seriously assert that there is a split among the circuits. Rather, the petition principally argues that the court of appeals misapplied qualified immunity principles to the particulars of this case. That contention is wrong, for several reasons.

1. To begin with, the Second Circuit recognized a basic, well-established, and non-objectionable principle—a police officer's use of "force must be necessary and proportionate to the circumstances." Pet. App. 27a. And, "on the allegations that [the court] must accept as true, the problem posed by protesters in the street did not justify the use of force" *at all*—"much less force capable of causing serious injury, such as hearing loss." *Ibid.*

This law—that force must be proportionate and that some circumstances do not warrant any force—has long been established both by this Court and by the Second Circuit. Well before the events at issue here, the court of appeals stated that "individuals

possess a Fourteenth Amendment substantive due process right 'in the non-seizure, non-prisoner context' to be free from excessive force employed by government actors acting under the color of government authority." *Johnson* v. *Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 253 (2d Cir. 2001). Part of this inquiry is whether *any* force is reasonable: "whether force is excessive depends as much upon the need for force as the amount of force used." *Ibid.*

The court of appeals has placed officers on notice that, in some circumstances, *no* use of force is warranted. In *Jones* v. *Parmley*, 465 F.3d 46, 53 (2d Cir. 2006), officers approached demonstrators without "order[ing] the protesters to disperse or provid[ing] them with any warning or justification for their actions." Officers then applied force to the protesters, "beating them with * * * riot batons, dragging them by their hair and kicking them." *Ibid.* The court denied qualified immunity to their actions because reasonable officers would appreciate that force was not warranted in the circumstances. *Id.* at 63.

Likewise, the court of appeals had previously addressed the use of unnecessary "pain compliance techniques." *Amnesty Am.*, 361 F.3d at 119. Use of such techniques may be disproportionate in their entirety in the context of "the arrest of a nonviolent suspect." *Id.* at 124.

Petitioners try to distinguish this authority by characterizing it as addressing "peaceful and largely static gatherings," as opposed to what petitioners believe was "hostile" and "obstructive conduct." Pet. 18-19. But in framing the issue this way, petitioners merely ask the Court to address—without the benefit of evidence—the *factual merits* underlying the claim. As we have repeated at some length, the courts be-

low concluded that, viewing the video and allegations in the light most favorable to respondents, "the 'severity of the security problem' was minimal and the 'threat reasonably perceived by the officers' was negligible." Pet. App. 22a. And, as the court below underscored, that proposition will be tested on remand. *Id*. at 37a.

Because the allegations indicate that it was unreasonable for officers to use *any* force, respondents' claims may proceed on that basis. Petitioners' two principal rejoinders lack merit.

2. Petitioners first assert that, to be on notice of the unreasonableness of their actions, officers required cases addressing acoustic weapons themselves. Pet. 14-15. Petitioners complain that there is not "a body of case law" addressing "the use of acoustic devices." Pet. 14. This argument is flawed.

First, petitioners seek a level of granularity at odds with the Court's precedent. Indeed, if petitioners' argument were accepted, it would eviscerate Section 1983 constitutional claims as a whole.

Qualified immunity shields officers from suit when officials are "accused of violating 'extremely abstract rights.'" *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1866 (2017) (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987)). "It is not necessary, of course, that 'the very action in question has previously been held unlawful.'" *Ibid.* Thus, "an officer might lose qualified immunity even if there is no reported case 'directly on point.'" *Id*. at 1867.

The question is whether an official has "fair warning." *Hope* v. *Pelzer*, 536 U.S. 730, 739-740 (2002). The Court, accordingly, has explicitly rejected any requirement that prior cases be "materially simi-

lar" or "fundamentally similar" to the present "situation"; instead, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id*. at 739-741.

For this reason, the Second Circuit held (before the conduct at issue here) that "[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury." *Terebesi* v. *Torreso*, 764 F.3d 217, 237 (2d Cir. 2014). Indeed, the court of appeals had stated with clarity that limitations on use of force apply to novel delivery vehicles, including "acoustical weaponry." *Id*. at 237 n.20.

Second, what actually matters is whether the officers were aware that they were intentionally (as opposed to accidentally) using force and whether an officer would have known that this quantum of force was unreasonable in the circumstances. Here, the allegations make plain that the officers were aware of the severe quantum of force they deployed when using an LRAD in area denial mode—a factual allegation, of course, that petitioners may attempt to dispute on remand. Pet. App. 37a.

To begin with, petitioners' own police unit, the Disorder Control Unit, had published materials describing that, when used in this way, LRADs emit sounds at "higher levels * * * than are considered safe to human ears." Pet. App. 5a. See also C.A. J.A. A85.

And reasonable officers in petitioners' shoes certainly would have known about the dangers of using the LRAD. On the device itself, there was a diagram warning officers not to allow individuals "WITHIN 10 METERS DURING CONTINUOUS OPERA-

TION." Pet. App. 5a. The manufacturer's warning about how particular weapons should—and should not—be used can certainly inform whether an officer has "fair warning." See, *e.g.*, *Otero* v. *Wood*, 316 F. Supp. 2d 612, 622 (S.D. Ohio 2004) (evaluating manufacturer's warnings in considering whether use of a particular weapon was reasonable); *Madriz* v. *King City Police Dep't*, 2015 WL 8527517, at *6 (N.D. Cal. 2015) (same).

Petitioners' reliance (Pet. 16) on *Mattos* v. *Agarano*, 661 F.3d 433, 446 (9th Cir. 2011), is misplaced. There, the case turned on the *quantum* of force effectuated by the taser—not whether *any* force was permissible in the circumstances. So too with *Bing ex rel. Bing* v. *City of Whitehall*, 456 F.3d 555, 571 (6th Cir. 2006), where the issue turned on the quantum of force.

All told, respondents' allegations show that reasonable officers would have known not to use any (much less significant) force in the circumstances confronted, and reasonable officers certainly would have known that the LRAD Model 100X, set to area denial mode, would inflict substantial force. The whole purpose of the tool was to achieve pain compliance. The "fair warning" required by qualified immunity is satisfied here.

3. Petitioners' next main contention (Pet. 19-25) is that, when an officer acted prior to the *Kingsley* decision in 2015, he may have thought it lawful to use unreasonably excessive force in circumstances where the officer was not effectuating a constitutional seizure, so long as the officer did not use the unreasonable force maliciously. That is, while Fourth Amendment jurisprudence has long informed officers that they must act reasonably when seizing an indi-

vidual, petitioners maintain that they did not have fair notice that this same principle governs their conduct when they were not effecting a seizure. This argument lacks all merit.

First, as we have described (see pages 19-22, *supra*), this case *does* implicate the Fourth Amendment. That case law should be relevant to the qualified immunity analysis. Thus, any potential distinction between the scope of clearly established Fourth and Fourteenth Amendment rights at the time of the events here is immaterial to the ultimate resolution of this case. Interlocutory review is therefore unwarranted.

Second, petitioners mistake the relevant inquiry. Qualified immunity is not some academic exercise, whereby officers parse specific *theories* of constitutional law. Rather, it turns on whether a reasonable officer would know that his *conduct* is impermissible.

That is to say, law is clearly established "[w]here an official could be expected to know that certain *conduct* would violate statutory or constitutional rights." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819 (1982) (emphasis added). Thus, the "salient question" for the "clearly established" prong of the qualified immunity test "is whether the state of the law at the time of an incident provided fair warning to the defendants that their alleged *conduct* was unconstitutional." *Tolan* v. *Cotton*, 572 U.S. 650, 656 (2014) (emphasis added) (quotation and alteration omitted).

Here, case law demonstrated with clarity the limitations on officers' use of force. For purposes of qualified immunity, it is not relevant whether officers were put on notice by virtue of the Fourth or Fourteenth Amendment. Officers have long known

that they cannot apply unreasonably excessive force when interacting with the public.[4]

Third, petitioners seek resolution of a decidedly unimportant question—the state of Fourteenth Amendment excessive force law in the Second Circuit before the Court decided *Kingsley* in 2015. It is unlikely that this question is relevant to *any* case. It is not determinative here—as we have said, the Fourth Amendment also applies. And it is unlikely that there are any—much less many—pre-2015 excessive force cases kicking around the Second Circuit that rest exclusively on a Fourteenth Amendment theory. The issue has no prospective importance whatever.

Fourth, and in all events, the court of appeals properly understood its own pre-*Kingsley* precedent. To begin with, petitioners' assertion that *Kingsley* was a fundamental alteration to Fourteenth Amendment law should be a surprise to this Court. *Kingsley* expressly addressed the argument that, in one snippet of *Lewis*, the "Court embraced a standard for due process claims that requires a showing of subjective intent." *Kingsley* v. *Hendrickson*, 135 S. Ct. 2466, 2475 (2015). The Court disagreed: "[o]ther portions of the *Lewis* opinion make clear * * * that this statement referred to the defendant's intent to commit the *acts* in question, not to whether the force intentionally used was 'excessive.'" *Ibid*. Petitioners' argument ultimately rests on the contention that the *Kingsley* Court itself was mistaken.

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[4] The use of a military-grade acoustic weapon was unlawful in these circumstances with "obvious clarity." *United States* v. *Lanier*, 520 U.S. 259, 271 (1997). To be sure, reliance on this law is unnecessary in this case, given the robust clarity with which the constitutional rights were established.

And whatever the state of law may have been elsewhere, the court of appeals provided extensive analysis explaining why, in the Second Circuit prior to *Kingsley*, there was no ironclad requirement that a Fourteenth Amendment excessive force claimant demonstrate that the defendant acted with a "culpable mental state." Pet. 21. Of the four separate cases the court analyzed—*Glick*, *Robison*, *Bellows*, and *Newburgh*—petitioners now address precisely none of them.

This Court, however, has already endorsed the court of appeals' reading of *Johnson* v. *Glick*, 481 F.2d 1028 (2d Cir. 1973). While *Glick* does identify as one factor "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" (*id.* at 1033), the four factors in *Glick* were each nonexclusive. See Pet. App. 13a-14a. In *Kingsley*, the Court specifically addressed *Glick*, concluding that there is no "suggest[ion]" in the opinion "that the fourth factor (malicious and sadistic purpose to cause harm) is a necessary condition for liability." 135 S. Ct. at 2476. "To the contrary, the words 'such * * * as' make clear that the four factors provide examples of some considerations, among others, that might help show that the use of force was excessive." *Ibid.* This Court has already passed on—and rejected—the very same argument that petitioners repackage here.

But that is far from all. In *Robison* v. *Via*, 821 F.2d 913, 924-925 (2d Cir. 1987), the Second Circuit denied a qualified immunity defense to a Fourteenth Amendment excessive force claim—without identifying any requirement for a subjective intent showing.

And in *Newburgh*—decided after *Lewis*—the court found the requirements of a Fourteenth Amendment excessive force claim satisfied where the force used "far surpassed anything that could reasonably be characterized as serving legitimate government ends." 239 F.3d at 252. Those are the allegations here, too.

The only in-circuit case to which petitioners point, *Smith ex rel. Smith* v. *Half Hollow Hills Central School District*, 298 F.3d 168, 173 (2d Cir. 2002), did not rest on a culpable mental state. Rather, it addressed the quantum of force used.

Fifth, even if a subjective intent to harm were somehow required, respondents have adequately pleaded it. For example, a reasonable jury could infer that petitioners subjectively intended to harm respondents because they fired the LRAD at respondents repeatedly at an unsafe, high volume over an extended period of time—acts they knew or should have known would have harmed respondents. And respondent Horse pleaded that petitioners fired the LRAD at him after—and in response to—his yelling a comment critical of police abuses. See C.A. J.A. A51. That is a specific allegation supporting respondents' broader claim that petitioners acted in a "malicious" and "intentional" way. *Id.* at A28. See *Blue* v. *Koren*, 72 F.3d 1075, 1084 (2d Cir. 1995) (allegation "that the plaintiff has been singled out" is circumstantial evidence supporting subjective intent).

C. The court should overturn qualified immunity as a whole.

The Court should deny this petition—the interlocutory request for qualified immunity rests on fac-

tual disputes, and the court of appeals properly conformed to this Court's qualified immunity doctrine.

If, however, the Court grants review, it should reverse qualified immunity in its entirety. While the court of appeals was bound to apply qualified immunity, this Court may revisit that doctrine. And there is good reason for doing so. As Justice Thomas recently explained, there is significant and "growing concern" about the validity of the Court's "qualified immunity jurisprudence." *Ziglar*, 137 S. Ct. at 1870 (Thomas, J., concurring in part and concurring in the judgment). See also William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 46-49 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1800 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 11-12 (2017).

Justice Kennedy similarly observed that the Court's jurisprudence has "diverged to a substantial degree from the historical standards" of common law immunity and that the modern immunity doctrine improperly turns on "freewheeling policy choice[s]." *Wyatt* v. *Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring). According to Justice Scalia, the Court's "treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when [Section] 1983 was enacted." *Crawford-El* v. *Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting). And Justice Sotomayor recently criticized "a one-sided approach to qualified immunity," which "transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment." *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting). See also *A.M.* v. *Holmes*, 830 F.3d 1123, 1170 (10th

Cir. 2016) (Gorsuch, J.) ("Respectfully, I would have thought this authority sufficient to alert any reasonable officer in this case that arresting a now compliant class clown for burping was going a step too far.").

Lower courts have echoed this criticism of qualified immunity. Judge Willet, for example, "register[ed] [his] disquiet over the kudzu-like creep of the modern immunity regime." *Zadeh* v. *Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willet, J.). While "the entrenched, judge-made doctrine of qualified immunity seems Kevlar-coated, making even tweak-level tinkering doubtful," Judge Willet urges that "immunity ought not be immune from thoughtful reappraisal." *Ibid*. Judge Willett thus "add[ed] [his] voice to a growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence." *Id*. at 499-500.

Indeed, lower courts have broadly underscored the importance of revisiting the reaches of the qualified immunity doctrine. See *Morrow* v. *Meachum*, 917 F.3d 870, 874 n.4 (5th Cir. 2019) (Oldham, J.) ("Some—including Justice Thomas—have queried whether the Supreme Court's post-*Pierson* qualified-immunity cases are 'consistent with the common-law rules prevailing [when Section 1983 was enacted] in 1871.'"); *Rodriguez* v. *Swartz*, 899 F.3d 719, 732 n.40 (9th Cir. 2018) (Kleinfeld, J.) ("Some argue that the 'clearly established' prong of the analysis lacks a solid legal foundation."); *Thompson* v. *Cope*, 900 F.3d 414, 421 n.1 (7th Cir. 2018) (Hamilton, J.) ("Scholars have criticized [the qualified immunity] standard."); *Thompson* v. *Clark*, 2018 WL 3128975, at *10 (E.D.N.Y. 2018) (Weinstein, J.) ("The legal precedent

for qualified immunity, or its lack, is the subject of intense scrutiny.").

In an extended analysis, Judge James Browning expressed concern about qualified immunity. "Factually identical or highly similar factual cases are not * * * the way the real world works. Cases differ. Many cases have so many facts that are unlikely to ever occur again in a significantly similar way." *Quintana* v. *Santa Fe Cty. Bd. of Comm'rs*, 2019 WL 452755, at *37 n.33 (D.N.M. 2019). Police officers do not study the precise fact patterns of specific cases; instead, "in their training and continuing education, police officers are taught general principles." *Ibid.*

Expressing his "disagree[ment]" with overreaching qualified immunity, Judge Browning opined that "[t]he most conservative, principled decision is to minimize the expansion of the judicially created clearly established prong, so that it does not eclipse the congressionally enacted [Section] 1983 remedy." *Ibid.* See also *Gallegos* v. *Bernalillo Cty. Bd. of Cty. Comm'rs*, 2018 WL 3210531, at *21 n.40 (D.N.M. 2018) (same).

In this case, police addressed a situation involving "non-violent protesters who had not been ordered to disperse." Pet. App. 36a. On this record, it is not clear that *any* force was reasonable. *Id.* at 27a. And, rather than order these individuals to disperse, police resorted in the first instance to firing a military-grade acoustic weapon. Pet. App. 36a. They did so despite the NYPD's Disorder Control Unit itself recognizing the LRAD's substantial capacity to physically harm individuals. And petitioners fired the weapon in contravention of the warning label on the device itself.

The lower courts properly denied qualified immunity at this interlocutory juncture. If, contrary to fact and law, the qualified immunity doctrine actually suggested dismissal of this lawsuit at this stage, that would be confirmatory evidence that qualified immunity needs to be revisited and, at minimum, pared back substantially. Otherwise, qualified immunity would eviscerate the rights of citizens to be free from the government's unreasonable use of force.

In sum, prior to considering the application of qualified immunity to this case, the Court should revisit that doctrine entirely—reversing or substantially narrowing it.

CONCLUSION

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

Respectfully submitted.

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