No. 18-810

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

REPLY BRIEF

ZACHARY W. CARTER
Corporation Counsel
City of New York
RICHARD DEARING*
DEVIN SLACK
INGRID R. GUSTAFSON
100 Church Street
New York, NY 10007
(212) 356-2500
rdearing@law.nyc.gov

Counsel for Petitioners

* Counsel of Record

288138

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTRODUCTION

The video evidence shows how two NYPD officers used the oral announcement and alert tone functions of a portable acoustic device to gain control of a protest on the busy streets of midtown Manhattan by directing protestors out of the roadway and onto the sidewalks. To read plaintiffs' opposition, one would think the officers chose to injure protestors for no good reason. But the videos demonstrate otherwise, confirming that the officers had no cause to conclude they were injuring anyone or inflicting pain, and that they acted with speed to defuse a tense and volatile situation without resorting to arrests or traditional forms of force.

The decision below signifies that some courts still have not received, or accepted, the message carried through decades of this Court's precedent: qualified immunity is important to government officials and society as a whole, and its protections should be withheld only when clearly established law puts the lawfulness of an official's conduct beyond debate. For all of plaintiffs' rhetoric, neither they nor the courts below have cited a single precedent within a mile of this case. It is hard to imagine a clearer case for qualified immunity.

Plaintiffs ignore, mischaracterize, or confirm the petition at nearly every turn. They do not reconcile the court of appeals' failure to give any weight to the novelty of the circumstances with this Court's contrary instructions. Nor do they grapple with the absence of precedent addressing when sound might constitute force, let alone when using an acoustic device might rise to the level of excessive force.

Equally unavailing is plaintiffs' attempt to avoid review by insisting that the petition turns on disputed issues of fact. Like the court of appeals, plaintiffs are simply recasting matters of in-the-moment judgment—such as whether the streets were "volatile" and "chaotic"—as if they were factual disputes, simply because some might have interpreted the scene differently. This approach wrongly strips away the perspective of the reasonable officer on the scene, striking at the heart of the qualified immunity doctrine and pointing to another reason why certiorari is warranted.

Plaintiffs also complain that granting the writ now would be inefficient, but they offer no good reason to delay review. Their Fourth Amendment claims were rightly dismissed, and their unresolved municipal liability claim cannot deprive the officers of their individual entitlement to immunity. Nor is there any need to wait to interrogate what was in the officers' minds, as the inquiry is an objective one that should be resolved at the earliest opportunity. On this record—which unlike most includes objective video evidence—qualified immunity is warranted now.

Switching gears, plaintiffs make the half-hearted, unpreserved argument that, if this Court grants certiorari, it should overrule or limit the qualified immunity doctrine. But rather than justifying such a drastic departure from precedent and detailing a modified approach, plaintiffs simply assert that granting the officers qualified immunity here would "eviscerate" 42 U.S.C. § 1983's protections. The claim does not hold up: the officers were presented with precisely the kind of uncertain legal and operational landscape that compels qualified immunity. Summary reversal—or at a minimum, certiorari and full briefing—is warranted.

A. Plaintiffs' opposition only confirms that the decision below contravenes the core principles of qualified immunity.

The touchstone of qualified immunity is notice: whether government officials have "fair warning" about when their conduct "crosse[s] the line" into unlawfulness so that they can conform their conduct accordingly. *Hope v. Pelzer*, 536 U.S. 730, 743 (2002). But the decision below contravened or diluted every core principle on this front. It distorted this Court's cautionary note that not every novel case leads to qualified immunity into a rule rendering novelty irrelevant, treated inapt cases as providing clear legal guidance, exported the asserted standards of today to judge past conduct, and stripped from the picture any consideration of a reasonable official's perspective in the evolving and tense circumstances confronted.

Instead of meeting these points, plaintiffs repeat the analysis of the decision below and try to sidestep its flaws by twisting the petition. Plaintiffs assert that the petition argues that the lack of precedent addressing a particular technology alone entitles the officers to qualified immunity (Opp. 3, 25). But the officers never posited such a rule, and expressly recognized that the mere fact that a technology is novel is not dispositive (Pet. 16). The officers instead argued that the court of appeals failed to accord *any* weight to the novelty of the acoustic device here or the circumstances of its use (Pet. 13-17), contravening this Court's direction to treat unique facts "alone" as "an important indication" that qualified immunity applies. *White v. Pauly*, 137 S. Ct. 548, 552 (2017).

Repeating the error, plaintiffs proclaim the novelty of the device irrelevant (Opp. 25-27). But they never

grapple with the reasons why the officers could have believed that using the LRAD 100X did not constitute constitutionally significant "force" at all (Pet. 14-15). The device functions solely by sound, which no court has ever held to constitute force. Instead of incapacitating specific targets, the device is intended to give instructions to—and potentially disperse—large crowds, avoiding measures historically regarded as force. And the device shares many characteristics with sirens and bullhorns, which reach comparable decibel levels and yet have never been regarded as instruments of force. Regardless of how courts answer the question whether the use of an acoustic device constitutes force—and if so, when—what matters for qualified immunity is that the questions were not resolved with any clarity at the time.

Setting the novelty of the device itself aside, plaintiffs ignore a second, distinct point: the dramatic degree to which the circumstances here differ from those addressed by any available precedent. Plaintiffs accuse the officers of requiring excessive "granularity" on this front (Opp. 25). But the simple fact is that plaintiffs point to no case—let alone controlling precedent—addressing circumstances remotely comparable to those the officers faced here.

Instead, plaintiffs repeat, and exacerbate even, the errors below. They first rely on the same inapposite cases as the court of appeals (Opp. 24)—including those where officers allegedly choked and beat protestors gathered on private property while arresting them—violating this Court's repeated injunction not to deny qualified immunity based on cases addressing fundamentally different circumstances (Pet. 17-19). *See White*, 137 S. Ct. at 551-52. Plaintiffs then go one step further and insist

that analogous cases are not required (Opp. 25-26). But this Court has repeatedly affirmed that requirement, except in "obvious" cases. *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018). Plaintiffs do not seriously contend that this highly novel case is one of the rare obvious cases.

Plaintiffs next insist that the officers had fair warning their conduct was unlawful because it is well established "that force must be proportionate and that some circumstances do not warrant any force" (Opp. 23). That contention runs headlong into this Court's repeated injunction not to define the right "at a high level of generality," *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011), but in light of the "*particular* conduct" and "the specific context of the case," *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015). Broad principles of the law of excessive force do not apply with obvious clarity to the facts of this case. That would be true even if the relevant standard were the Fourth Amendment's bar on objectively unreasonable force. It is most certainly true where, as here, the standard is the Fourteenth Amendment's bar on conscience-shocking force.

In lieu of analogous, particularized precedent, plaintiffs offer disingenuous and overblown rhetoric about the LRAD 100X (*e.g.*, Opp. 1 (calling it a "military-grade weapon" for "pain infliction")). But their rhetoric is beside the point. Plaintiffs do not dispute that the videos show that the officers would have had no reason to conclude that they were causing pain or injury under the circumstances, and even the court of appeals recognized that the LRAD 100X is a "valuable" and "useful" tool (Pet. App. 36a). To be sure, plaintiffs pleaded that the technology was developed for the military, but the same is true of the internet

and GPS. And whatever the origins of the technology in general, plaintiffs studiously avoid claiming that the LRAD 100X—the smallest and least powerful of such devices—has any "military" application.

Plaintiffs also make much of what *the NYPD* might have known based on its prior tests of the LRAD 3300, a device that is louder and larger than the LRAD 100X (Opp. i, 1, 26). But this case is about two individual officers, and the question is what would have been clear to a reasonable officer facing the same tense and evolving circumstances. By eliminating the margin of error that qualified immunity is meant to safeguard, the decision below shifts the risks of using technologies meant to avoid more serious forms of force to individual officers.

Equally flawed is plaintiffs' insistence that a manufacturer's warning on the device clearly establishes the law (Opp. 26-27). The Court has never held that a manufacturer's warning can establish the scope of constitutional rights, and plaintiffs offer no reason why it should, especially here, when the videos show that almost no one in the area even covered their ears, that a group of protestors remained in the area by choice, and that other NYPD officers walked directly in front of the device when it was in use—apparently without any hearing protection (Pet. 6). In any event, plaintiffs ignore that the officers did not contravene the warning in the first place, because it applies only if the LRAD 100X is in "continuous" operation (Pet. App. 5a), and the videos rebut any contention that it was.

And plaintiffs embrace another error below: conflating the law at the time of the events with the law that

purportedly existed by the time of the decision below, despite significant intervening legal developments (Pet. 19-25). *See Kisela v. Hughes*, 138 S. Ct. 1148, 1154 (2018) (rejecting reliance on post-conduct cases to deny qualified immunity). Like the court of appeals, plaintiffs rely on *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015)—a decision issued after the conduct at issue—to interpret the law as it stood pre-*Kingsley* (Opp. 29-30). At the same time, plaintiffs ignore that the *Kingsley* Court recognized that there was "disagreement among the Circuits" about the relevant standard. 135 S. Ct. at 2472. And they ignore the wide gulf between the court of appeals' pre-existing framework—which left some room for unreasonable force coupled with aggravating factors to be conscience-shocking even without a culpable state of mind—with its new framework equating unreasonable and conscience-shocking force and rendering everything else irrelevant (Pet. 23-25).

In the alternative, plaintiffs make an argument they declined to make in the briefing below: that the officers' conduct shocks the conscience because they acted maliciously and sadistically for the very purpose of causing harm (Opp. 31). But that contention cannot be squared with plaintiffs' own videos, which show the officers doing their best to defuse a tense situation without resorting to further arrests or traditional forms of force, and not the images of brutality plaintiffs conjure.

B. Plaintiffs identify no adequate reason to delay review.

Plaintiffs alternatively seek to insulate the decision below from review by asserting that the petition rests

on factual disputes about the situation the officers faced (Opp. 2, 16-19). But there simply are no disputed issues of fact because this petition is before the Court on a motion to dismiss. The question is thus whether, in light of the record, and taking the allegations as true to the extent they are not contradicted by the videos, plaintiffs have plausibly pleaded that the officers violated clearly established law. That is a question of law over which this Court most certainly has jurisdiction.[1] *See City & Cnty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015).

Plaintiffs nonetheless take great issue with the officers' description of the situation as "chaotic" and the crowd as "volatile" (Opp. 8, 16). But they entirely ignore one of the petition's core arguments: even though the facts alleged in the complaint are taken as true, they must be evaluated from the perspective of a reasonable officer at the scene (Pet. 25-28). The question is what a reasonable officer in the same position "could have believed," *Saucier v. Katz*, 533 U.S. 194, 208-09 (2001), and on that foundation, whether "every reasonable official" would have understood that the use of the device would be unlawful, *Mullenix*, 136 S. Ct. at 308.

The videos speak for themselves. They show that at least some reasonable officers could have believed that the protest was unruly and volatile, and the circumstances threatening and potentially violent. Indeed, the court

1. Plaintiffs' cases stand for the different proposition that appellate courts do not have interlocutory jurisdiction over disagreements about the genuineness of fact disputes at the summary judgment stage, even if qualified immunity is at issue. *See Ortiz v. Jordan*, 562 U.S. 180, 188 (2011); *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995).

of appeals recognized as much in finding the issue "arguable" (Pet. App. 26a). Far from stripping this Court of jurisdiction, under a proper analysis, the fact that the point is arguable *compels* qualified immunity. *See Malley v. Briggs*, 475 U.S. 335, 341 (1985) (if reasonable officers could disagree, "immunity should be recognized").

Nor would resolving the question represent an expansion of this Court's qualified immunity docket, as plaintiffs insist (Opp. 18). This Court has already reversed the denial of qualified immunity on motions to dismiss. *See, e.g.*, *Wood v. Moss*, 134 S. Ct. 2056 (2014); *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011). Granting certiorari and reversing the decision below would accord with this Court's practice, not depart from it.

Plaintiffs next insist that review at this juncture would be inefficient because their Fourth Amendment claims that they were "seized" without justification are not before this Court (Opp. 19-22). But these claims present no basis to delay review, and were instead properly dismissed as meritless because plaintiffs were never arrested, detained, or stopped. Indeed, as the district court concluded, far from alleging that the officers restrained their movements, plaintiffs pleaded that they "moved around the [p]rotest area or left the vicinity of the [device] as each desired" (Pet. App. 49a). The videos even show several plaintiffs *pursuing* the officers in order to film the device's use.

Plaintiffs apparently claim they were seized because the officers used the device to aid in moving them out of the roadway. But they cite no precedent finding such measures to constitute a seizure, and the cases they do

cite point in the opposite direction. Plaintiffs were "at liberty … to go about their business," *Florida v. Bostick*, 501 U.S. 429, 436-437 (1991), and their free movement was neither restrained nor terminated, *Brendlin v. California*, 551 U.S. 249, 254 (2007). Nor does the application of force always constitute a seizure. If it did, Fourteenth Amendment claims governing the use of force in the non-seizure, non-detention context would not exist. At the very least, the officers would be entitled to qualified immunity, given the dearth of relevant precedent.

Plaintiffs' municipal liability claim is also no reason to delay review (Opp. 22-23). At the outset, plaintiffs are incorrect that the issue presented in this case does not encompass whether plaintiffs adequately pleaded a constitutional violation (Opp. 22). It certainly does (Pet. i), and if the Court holds that plaintiffs have not pleaded a constitutional violation, the municipal liability claim based on that violation would fail as a matter of law. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986).

In any event, withholding immunity based on claims against a different party would serve no purpose and defeat the doctrine's protections. Qualified immunity is held by the officers as individuals, does not turn on the City's liability, and must be resolved at the earliest opportunity. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). To be sure, as plaintiffs point out, the officers may still have to sit for a non-party deposition. But that is vastly different from defending a lawsuit and facing the possibility of a judgment in one's name.

C. Plaintiffs' alternative argument does not merit this Court's attention.

Plaintiffs alternatively argue that this Court should grant certiorari and overrule the qualified immunity doctrine, which this Court has reaffirmed dozens of times (Opp. 31-35). Even if plaintiffs had preserved that argument—and they have not—they fail to justify it. Plaintiffs merely list seriatim general criticisms of the doctrine and make no meaningful attempt to define a concrete question for this Court's review.

But stepping back, plaintiffs' premise is that the officers' conduct here was so far beyond the pale that to grant qualified immunity would indict the doctrine itself (Opp. 3, 35). Nothing could be further from the truth. 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 (Pet. App. 56a-57a). And the court of appeals acknowledged that the officers acted in circumstances that were at least arguably violent (Pet. App. 26a). Qualified immunity is intended to give government officials "breathing room to make reasonable but mistaken judgments" in precisely these circumstances, *al-Kidd*, 563 U.S. at 743, and this case is a paradigm of when qualified immunity is required. Summary reversal, or at minimum, certiorari and full briefing, is warranted.

CONCLUSION

The writ of certiorari should be granted.

April 25, 2019

Respectfully submitted,

ZACHARY W. CARTER
Corporation Counsel of the City of New York

RICHARD DEARING
Counsel of Record
DEVIN SLACK
INGRID GUSTAFSON

100 Church Street
New York, New York 10007
(212) 356-2500
rdearing@law.nyc.gov