

Qualified Immunity in Section 1983 Cases: Recent Supreme Court Decisions and Considerations for Government Practitioners

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INTRODUCTION

In 1871, intending to further safeguard the civil rights extended to newly-enfranchised Americans under the Thirteenth, Fourteenth and Fifteenth Amendments, Congress enacted 42 U.S.C. § 1983. “Section 1983” permitted any citizen or other person within the United States to seek redress in federal court against anyone who, “under color of” state law deprived the complainant of any constitutional privilege or immunity. For most of its life, Section 1983 was a relatively little-used device. But over the past 50 years, it has gradually become the primary vehicle for individuals seeking redress against state or municipal officials alleged to have abridged their constitutional protections.

Against a backdrop of ever-proliferating Section 1983 actions, a judicial doctrine arose which significantly limits the circumstances in which local government actors can be found liable: qualified immunity. This article assesses recent Supreme Court caselaw defining qualified immunity—much of it in the context of law enforcement activity—and is intended to provide municipal lawyers with practical guidance on the subject.

1. Qualified Immunity is Perhaps the Ultimate Defense in Section 1983 Cases.

Qualified immunity is a judicially-created doctrine that shields government officials from constitutional claims for money damages, even if those officials have violated plaintiffs’ constitutional rights, as long as those constitutional rights were not

clearly established. This affirmative defense balances the public interest to hold public officials accountable when they exercise power irresponsibly, against the need to shield public officials from harassment, distraction, and liability when they perform their duties reasonably. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

A. Qualified immunity is properly resolved on summary judgment because its analysis is ostensibly objective. See *Rakovich v. Wade*, 850 F.2d 1180, 1203-04 (7th Cir. 1988), cert. denied, 488 U.S. 968 (1988).

B. Although intertwined with the facts of a case, the qualified immunity issue is a question of law for the Court. *Alvarado v. Picur*, 859 F.2d 448, 452 (7th Cir. 1988).

C. In *Hunter v. Bryant*, 502 U.S. 224 (1991), the United States Supreme Court “stressed the importance of resolving immunity questions at the earliest possible stage of litigation.” *Id.* at 227. The Supreme Court reversed the Ninth Circuit’s denial of summary judgment, holding that:

[t]he decision of the Ninth Circuit ignores the import of these decisions. The Court of Appeals’ confusion is evident from its statement that “whether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment . . . based on lack of probable cause is proper only if there is only one reasonable

conclusion a jury could reach.” This statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial. Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.

Id. at 227-28 (citations omitted).

D. The defense of qualified immunity shields “government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Mullenix v. Luna*, 577 U.S. ____, ____ (2015) (Slip op. at 4-5); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citations and footnote omitted). The principle behind the doctrine is that if the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he or she fairly be said to know that the law forbade conduct not previously identified as unlawful. *Id.*

E. The Seventh Circuit has noted that “[w]hat is important, in the final analysis, is ‘whether the legal norms governing [the government official’s] behavior were clearly established at the time of the challenged actions.’” *Upton v. Thompson*, 930 F.2d 1209, 1212 (7th Cir. 1991) (citations omitted). In fact, the United States Supreme Court has recently reconfirmed the tenet that existing precedent must have placed the statutory or constitutional question beyond debate. (*Mullenix*, Slip op. at 5).

II. A Qualified Immunity Review Involves Three Analytic Components.

The question of whether qualified immunity applies is comprised of three analytic components: (1) identification of the specific right allegedly violated; (2) determination of whether that right was so “clearly established” as to alert a reasonable official to its constitutional parameters; and (3) the ultimate determination of whether a reasonable official could have believed

lawful the particular conduct at issue. See *Gooden v. Howard County*, 917 F.2d 1355, 1361 (4th Cir. 1990); *Burns v. Loranger*, 907 F.2d 233, 235-36 (1st Cir. 1990); *Robison v. Via*, 821 F.2d 913, 920-21 (2d Cir. 1987).

A. Courts have the discretion to resolve a qualified immunity challenge at the outset by utilizing the “clearly established” prong without first having to decide whether there was any underlying constitutional violation. *Camreta v. Greene*, 563 U.S. 692, 707, 131 S. Ct. 2020, 2032, 179 L. Ed. 2d 1118 (2011). In fact, the court need never decide whether the plaintiff’s claim, even though novel or otherwise unsettled, in fact has merit. *Id.*, 563 U.S. at 705-706.

B. In revisiting the defense of qualified immunity, the United States Supreme Court has held that, even assuming that a constitutional right may have been violated, a lower court must review the second question – whether the right was clearly established – in a case-specific manner. In *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 148 L.Ed. 2d 454 (2001), the Court held that “The relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was lawful in the situation he confronted...If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.” (121 S.Ct. at 2156-57) (citations omitted.)

Furthermore, the Court also held that even if the officer’s mistake as to what the law requires is reasonable, the officer is entitled to the immunity defense. (*Id.* at 2158).

C. Qualified immunity is “designed to shield from civil liability ‘all but the plainly incompetent or those who knowingly violate the law.’” *Mullenix*, slip. op. at 5; *Hughes v. Meyer*, 880 F.2d 967, 971 (7th Cir. 1989).

D. Qualified Immunity should be applied unless “it has been authoritatively decided that certain conduct is forbidden.” *Upton*, 930 F.2d at 1212 (quoting *Alliance to End Repression v. City of Chicago*, 820 F.2d 873, 875 (7th Cir. 1987)).

E. When considering the defense of qualified immunity, courts must consider only the facts that were knowable to the defendant officer. *White v. Pauly*, 580 U.S. ____,

____ (2017) (Slip op. at 3); See also *Kingsley v. Hendrickson*, 576 U.S. ____, ____ (2015) (Slip op. at 9).

F. Courts have maintained the longstanding principle that “clearly established law” should not be defined “at a high level of generality.” *White v. Pauly*, 580 U.S. ____, ____ (2017) (Slip op. at 6, citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011).) And clearly established law must be particularized to the facts of the case. (*White, Id.*, *City of Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

G. Cases from other circuits are instructive on what the law is as to constitutionally protected rights. *Spreen v. Brey*, 961 F.2d 109, 113 (7th Cir. 1992).

III. Qualified Immunity Decisions can be Immediately Appealed.

A district court’s denial of qualified immunity is an immediately appealable final decision, within the meaning of 28 U.S.C. §1291. *Behrens v. Pelletier*, 516 U.S. 299, 306-07 (1996). The Supreme Court has found this necessary because qualified immunity is important to society as a whole, and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial. *White v. Pauly, Id.* at slip op. p. 6 (citation omitted).

IV. Recent Supreme Court Decisions.

In the past seven years, the United States Supreme Court has issued a number of opinions reversing federal courts in qualified immunity cases.

A. *Camreta v. Green*, 563 U.S. 692 (2011) (Kagan, J.)

1. **Procedural posture and decision date:** This case was decided by the Supreme Court on May 26, 2011, on appeal from the Ninth Circuit. The Court vacated the lower court’s ruling on the constitutional claim and reversed the lower court’s denial of qualified immunity.

2. **Summary of facts:** Sarah Green filed suit personally, and on behalf of her two minor daughters, against Bob Camreta, an Oregon State Protective Services worker, and Deputy Sher-

iff James Alford, alleging that they violated her constitutional rights, and those of her daughter, S. G., by conducting an interview of S.G. regarding allegations that her father had sexually abused her. The interview was conducted without parental consent, and at the girl’s school. The father was criminally charged with the alleged abuse and went to trial, but the jury failed to reach a verdict, and the charges were later dismissed. Plaintiffs claimed that the in-school interview breached the Fourth Amendment’s proscription against unreasonable seizures.

The District Court granted summary judgment to the officials, and the Ninth Circuit affirmed. The Circuit ruled that interviewing the girl, absent a warrant, court order, parental consent, or exigent circumstances, violated the Constitution, but also that the defendants were entitled to qualified immunity because no clearly established caselaw had warned them of the illegality of their conduct. Although the Ninth Circuit entered judgment in their favor, Mr. Camreta and Deputy Alford petitioned the Supreme Court to review the Ninth Circuit’s ruling that the subject warrantless, in-school interview violated the Fourth Amendment. The plaintiffs declined to cross petition. The Supreme Court granted certiorari to review two questions: first, whether government officials who prevail on grounds of qualified immunity can obtain Supreme Court review of a

continued on page 8



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Court of Appeals decision that their conduct violated the constitution, and second, whether the Ninth Circuit correctly determined that the interview of the child breached the Fourth Amendment. Ultimately, the Supreme Court vacated that portion of the Ninth Circuit decision which related to its determination that the interview violated the Constitution and remanded the case for further proceedings.

3. Significant aspects of the *Camreta* decision:

- Because the child was almost 18 years old and moved across the country by the time the Supreme Court heard the case, and thus would never again be subject to the in-school interviewing practices that were at issue, the Supreme Court did not reach the Fourth Amendment question, and in line with their normal practice when mootness frustrates a right to appeal, the Court vacated that portion of the Ninth Circuit's opinion which decided the Fourth Amendment issue.
- The Court recognized that an official who regularly engages in the conduct that has been challenged as part of his job, as did Mr. Camreta, would likely suffer injury caused by the adverse constitutional ruling. As long as the adverse ruling continues to be in effect, the government official must either change the way he performs his duties or risk a meritorious damages action. The Court held that "[o]nly by overturning the ruling on appeal can the official gain clearance to engage in the conduct in the future. He thus can demonstrate, as we demand, injury, causation, and redressability. And conversely, if the person who initially brought the suit may again be subject to the challenged conduct, she has a stake in preserving the court's holding." (563 U.S. at 703) (citations omitted)
- The Court explained its reasoning behind reviewing a lower court ruling appealed by the "prevailing party." The Court noted that such rulings in the context of qualified immunity "have a significant future effect on the conduct of public officials – both the prevailing parties and their co-workers – and the policies of the government units to which they belong. . . . and more: they are rulings self-consciously designed to produce this effect, by establishing controlling law and preventing invocations of immunity in later cases. And still more: they are rulings designed this way with this Court's permission, to promote clarity – and observance – of constitutional rules. We have described in more detail below these features of the qualified immunity world and why they came to be. We hold that taken together, they support bending our usual rule to permit consideration of immunized officials' petitions." (563 U.S. at 704-705).
- The Court confirmed that its precedent clearly established that a Court need not address a constitutional claim if qualified immunity applies. The Court noted that a lower court "need never decide whether the plaintiff's claim, even though novel or otherwise unsettled, in fact has merit." (563 U.S. at 705).
- However, the Court also noted that its "regular policy of avoidance sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo." (563 U.S. at 706) (citations omitted). The Court held that "[o]ur decision today does no more than exempt one special category of cases from our usual rule against considering prevailing parties' petitions. Going forward, we will consider these petitions one by one in accord with our usual standards." (563 U.S. at 709).
- The Court also recognized that by failing to clarify uncertain questions, address novel claims, or give guidance to officials about

how to comply with legal requirements, deciding cases solely on the grounds of qualified immunity might frustrate "the development of constitutional precedent" and the "promotion of law-abiding behavior." (563 U.S. at 706). The Court noted that for this reason, it has "permitted lower courts to avoid avoidance – that is, to determine whether a right exists before examining whether it was clearly established." (563 U.S. at 706).

- The decision of whether to address the constitutional claim, even if qualified immunity applies, is left to the discretion of the lower courts. (563 U.S. at 707). The Court noted that "[i]n general, courts should think hard, and then think hard again, before turning small cases into large ones. But it remains true that following the two-step sequence – defining constitutional rights and only then conferring immunity – is sometimes beneficial to clarify the legal standards governing public officials." (563 U.S. at 707).
- The Court concluded that this case was moot as to S.G. because she could no longer claim that she was in any need of protection from the challenged interviewing practice. The Court determined that it would vacate that portion of the Ninth Circuit's decision which addressed the constitutionality of the subject warrantless, in-school interview of S.G. (563 U.S. at 710). The Court explained that "a constitutional ruling in a qualified immunity case is a legally consequential decision; that is the very reason we think it appropriate for review even at the behest of a prevailing party. . . . [w]hen happenstance prevents that review from occurring, the normal rule should apply: Vacatur then rightly "strips the decision below of its binding effect," and "clears the path for future relitigation." (563 U.S. at 713) (citations omitted).

4. Constitutional right clarified?

The Supreme Court vacated the Ninth Circuit's ruling on the con-

stitutional issue, and thus did not provide guidance as to whether interviewing a minor at her school, without either a warrant or parental consent, regarding sexual misconduct allegations made against one parent, violated the Fourth Amendment. What was decided, evidenced by the affirmance of qualified immunity, was that, at the time of the interview in 2001, such a constitutional right was not clearly established.

B. *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011) (Scalia, J.)

1. Procedural posture and decision date: *Ashcroft* was decided on May 31, 2011, on appeal from the Ninth Circuit. The Supreme Court reversed the Circuit's determination that 1) the Attorney General violated the Fourth Amendment by allowing the unlawful issuance of federal material-witness subpoenas, and 2) the Attorney General was not entitled to qualified immunity.

2. Summary of Facts: Plaintiff Abdullah al-Kidd alleged that, after the September 11th terrorist attacks, then Attorney General John Ashcroft authorized federal officials to detain terrorism suspects using the federal material-witness statute. He claimed that this pretextual detention policy led to his material-witness arrest, as he was boarding a plane to Saudi Arabia. al-Kidd was apprehended in March, 2003. He was held in federal custody for 16 days, and he remained on supervised release until the trial of an alleged terrorist was concluded 14 months later. Mr. al-Kidd was never called as a witness in that trial, and he alleged that government officials had never intended to call him as a witness. In March 2005, he filed a *Bivens* action, challenging the constitutionality of the Attorney General's policy. The Attorney General filed a motion to dismiss, based on absolute and qualified immunity, which the District Court denied. A divided panel of the Ninth Circuit affirmed, holding that the Fourth Amendment prohibits pretextual arrests absent probable cause of criminal wrongdoing, and that Mr. Ashcroft could not claim qualified or absolute immunity. (563 U.S. at 734).

The *al-kidd* Court instructed that in deciding qualified immunity, reviewing courts are "not to define clearly established law at a high level of generality," and that "[t]he general proposition, for example, that an unreasonable search and seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established."

Mr. al-Kidd conceded that individualized suspicion supported the issuance of the underlying material-witness arrest warrant, and he did not assert that his arrest would have been unconstitutional absent the alleged pretextual use of the warrant. Therefore, the Supreme Court found no Fourth Amendment violation. In so holding, the Court ruled that "[e]fficient and evenhanded application of the law demands that we look to whether the arrest is objectively justified, rather than to the motive of the arresting officer." (536 U.S. at 740).

3. Significant aspects of the *Ashcroft* decision:

- The Supreme Court reiterated that qualified immunity "shields federal and state officials from money damages unless the 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," and that "lower courts have the discretion to decide which of the two prongs of [the] qualified immunity analysis to tackle first." (563 U.S. at 735).
- The Court held that lower courts "should think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.' . . . When, however, a Court of Appeals does address both prongs

of [the] qualified-immunity analysis, we have discretion to correct its errors at each step. Although not necessary to reverse an erroneous judgment, doing so ensures that courts do not insulate constitutional decisions at the frontiers of the law from our review or inadvertently undermine the values qualified immunity seeks to promote. The former occurs when the constitutional-law question is wrongly decided; the latter when what is not clearly established is held to be so. In this case, the Court of Appeals' analysis at both steps of the qualified-immunity inquiry needs correction." (563 U.S. at 735).

- The Court reaffirmed its prior holdings that determining Fourth Amendment reasonableness involves a predominantly objective inquiry, which "recognizes that the Fourth Amendment regulates conduct rather than thoughts . . . and it promotes evenhanded, uniform enforcement of the law." (563 U.S. at 736).
- The Court noted that there are two "limited exceptions" to this general rule, which are "special-needs" and "administrative-search" cases. (563 U.S. at 736). The Court noted that "[a]part from those cases, we have almost uniformly rejected invitations to probe subjective intent." (563 U.S. at 737).
- With reference to reviewing the qualified immunity issue at hand, the Court noted that at the time of "al-Kidd's arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional." (536 U.S. at 741). The Court further noted that even "a district judge's *ipse dixit* of a holding is not 'controlling authority' in any jurisdiction, much less in the entire United States; and his *ipse dixit* of a footnoted dictum falls far short of what is necessary absent controlling authority: a robust 'consensus of cases of persuasive authority.'" (563 U.S. at 741-742) (citation omitted).
- The *al-kidd* Court instructed that in deciding qualified immunity, reviewing courts are "not to define clearly established law at a high level of generality," and that "[t]he general proposition,

continued on page 10

for example, that an unreasonable search and seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established.” (563 U.S. at 742).

- With specific reference to the underlying case, the Court held that “[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects ‘all but the plainly incompetent or those who knowingly violate the law.’ . . . Ashcroft deserves neither label, not least because eight Court of Appeals judges agreed with his judgment in a case of first impression. . . . He deserves qualified immunity even assuming – contra-factually – that his alleged detention policy violated the Fourth Amendment.” (563 U.S. at 743) (citations omitted).

4. Constitutional Right Clarified? The Court’s decision confirmed that in March 2003, it was not unconstitutional for the Attorney General to maintain a policy which allowed the pretextual use of a material-witness warrant under the federal material-witness statute, as long as the arrest warrant itself was based upon individualized suspicion.

C. *Plumhoff v. Rickard*, 572 U.S. ____ (2014) (Alito, J.)

1. Procedural posture and decision date:

Plumhoff was decided on May 24, 2014, on appeal from the Sixth Circuit Court of Appeals. The Supreme Court held that police officers did not violate the Fourth Amendment by shooting at a motorist who had engaged in a dangerous, high speed pursuit, and also concluded that the officers were entitled to qualified immunity, reversing the decision of the Sixth Circuit.

2. Summary of facts: Donald Rickard led police officers on a high-speed car chase that came to a temporary halt when his vehicle spun out in a parking lot. He continued to use his car as a weapon, accelerating as it pressed against a patrol car. Officers fired

three shots into Rickard’s car, but he managed to drive away, almost hitting an officer in the process. Officers fired additional shots, striking both Rickard and his passenger; both died. Mr. Rickard’s minor daughter filed under 42 U.S.C. § 1983, alleging that the officers used excessive force in violation of the Fourth and Fourteenth Amendments. The Tennessee District Court denied the officers’ motion for summary judgment based on qualified immunity, holding that their conduct violated the Fourteenth Amendment and was contrary to clearly established law. On review, the Sixth Circuit affirmed the District Court. The Supreme Court reversed.

3. Significant aspects of decision:

- The Court noted that its prior decision in *Saucier* should not be regarded as an “inflexible requirement,” but reaffirmed that the two-step procedure for analyzing qualified immunity in *Saucier* is often beneficial because it promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable. (134 S. Ct. at 2020).
- The Court reaffirmed that it had previously held that “a police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.” (134 S. Ct. at 2021).
- Salient facts were generally not disputed. The chase exceeded 100 miles per hour and lasted for over five minutes, during which time Rickard passed more than two dozen other vehicles, several of which were forced to alter course. His car eventually collided with a police car, and came temporarily to a standstill, but less than three seconds later, Rickard resumed maneuvering his car. Just before shots were fired by the police, the front bumper of his car was flush with that of one of the police cruisers, and Rickard was pushing down on his accelerator. He threw the car into reverse, in an attempt to escape. (134 S. Ct. at 2021).
- The Court held that “[u]nder the circumstances at the moment when the shots

were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road. Rickard’s conduct even after the shots were fired – as noted, he managed to drive away despite the efforts of the police to block his path – underscores the point. In light of the circumstances we have discussed, it is beyond serious dispute that Rickard’s flight posed a great public safety risk, and here, as in *Scott*, the police acted reasonably in using deadly force to end that risk.” (134 S. Ct. at 2022).

- The Court also rejected the petitioner’s argument that the firing of a total of 15 shots was itself excessive force. The Court held that “[w]e reject that argument. It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended. As petitioners noted below, ‘if lethal force is justified, officers are taught to keep shooting until the threat is over.’” (134 S. Ct. at 2022).
- The Court noted that it surveyed lower court decisions regarding the reasonableness of lethal force as a response to vehicular flight, and observed that “this is an area ‘in which the result depends very much on the facts of each case’ and that the cases ‘by no means ‘clearly establish[ed]’ that [the officer’s] conduct violated the Fourth Amendment.’” (134 S. Ct. at 2023).
- The Court found that the *Brosseau* case made it plain that as of February 21, 1999, which was the date of the events at issue in that case, it was not clearly established that it was unconstitutional to shoot a fleeing driver to protect those whom his flight might endanger. Therefore, the Court held that to “defeat immunity here, then, respondent must show at a minimum either (1) that the officers’ conduct in this case was materially different from the conduct in *Brosseau* or (2) that between February 21, 1999, and July 18, 2004, there emerged either ‘controlling authority’ or a ‘robust consensus of cases of persuasive authority’ . . . that would alter our analysis of the qualified immunity question.” (134 S. Ct. at 2023).

- The Court found that the respondent could not meaningfully distinguish *Brosseau* and had not pointed “to any case – let alone a controlling case or a robust consensus of cases – decided between 1999 and 2004 that could be said to have clearly established the unconstitutionality of using legal force to end a high-speed car chase. And respondent receives no help on this from the opinions below. The District Court cited only a single case decided between 1999 and 2004 that identified a possible constitutional violation by an officer who shot a fleeing driver, and the facts of that case – where a reasonable jury could have concluded that the subject merely ‘accelerated to eighty-five miles per hour, in a seventy-miles-per-hour zone’ and did not ‘engag[e] in any evasive maneuvers’ . . . bear little resemblance to those here.” (134 S.Ct. at 224). Therefore, the Court found that the officers in this case were also entitled to the defense of qualified immunity.

4. Constitutional right clarified? The *Plumhoff* Court reminded that it held in 1999 that a police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of officers and/or innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death, and that if lethal force is justified, officers can lawfully continue to shoot until the threat has ceased (i.e., the number of shots fired does not determine the constitutionality of the officer’s decision to shoot.)

D. City and County of San Francisco v. Sheehan, 575 U.S. ___, 135 S.Ct. 1765 (2015) (Alito, J.)

1. Procedural posture and decision date: This case was decided on May 18, 2015, on appeal from the United States Court of Appeals for the Ninth Circuit. The Supreme Court reversed in part and remanded, determining that officers’ entry and use of potentially deadly force were lawful, and that they were entitled to qualified immunity.

2. Summary of facts: Teresa Sheehan was living in a San Francisco group home for individuals with mental illness. She began behaving erratically and threatened to kill her social worker. Officers Reynolds and Holder were sent to help escort

The *Plumhoff* Court reminded that it held in 1999 that a police officer’s attempt to terminate a dangerous high-speed car chase that threatens the lives of officers and/or innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death, and that if lethal force is justified, officers can lawfully continue to shoot until the threat has ceased (i.e., the number of shots fired does not determine the constitutionality of the officer’s decision to shoot.)

Sheehan to a mental health facility. The officers entered her room, using a key provided to them by an employee of the group home. When the officers first entered, Ms. Sheehan grabbed a knife and threatened to kill them. The officers then retreated and closed the door. However, they were concerned about what Ms. Sheehan might do to herself in that room, and admitted that, without considering if they could accommodate her disability, they reentered her room. Ms. Sheehan again confronted the officers with a knife, and after pepper spray proved ineffective, the officers shot her multiple times. Ms. Sheehan survived, and filed suit against the City and County of San Francisco, asserting that her rights under the Americans with Disability Act were violated, along with those under 42 U.S.C. § 1983.

The District Court granted summary judgment, concluding that officers are not required to determine whether their actions complied with the ADA before protecting themselves and others, and also holding that the officers did not violate the Constitution. Vacating in part, the Ninth Circuit held that the ADA applied, and that a jury must decide whether the officers should have accommodated Ms. Sheehan’s disability. The Circuit also held that the officers were not entitled to qualified immunity, because it was clearly established that, absent an objective need for immediate entry, officers cannot forcibly enter the home of an armed, mentally ill person who

has been acting irrationally and has threatened anyone who enters. The Supreme Court dismissed the ADA-related question because it determined that certiorari was improvidently granted on that claim. The Court held that the officers did not violate the Constitution when they opened Ms. Sheehan’s door the first time, and that their use of force was reasonable. As to the question of whether or not they violated the Constitution when they entered her room the second time, the Court determined that such a Fourth Amendment right was not clearly established, and that therefore, the officers were entitled to qualified immunity.

3. Significant aspects of decision:

- The Court reiterated its holdings in *Plumhoff* and *Ashcroft* that any alleged constitutional right must be clearly established at the time of the challenged conduct, and that an officer cannot violate a clearly established right unless the right’s contours were sufficiently definite such that **any** reasonable official would have understood that he was violating it. (135 S.Ct. at 1774) (emphasis added).
- The Court reaffirmed its previous ruling that “officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.” (135 S.Ct. at 1775).
- The Court noted that [t]he real question, then, was “whether, despite these dangerous circumstances, the officers violated the Fourth Amendment when they decided to reopen Sheehan’s door rather than attempting to accommodate her disability. Here we come to another problem. San Francisco, whose attorneys represent Reynolds and Holder, devotes scant briefing to this question. Instead, San Francisco argues almost exclusively that even if it is assumed that there was a Fourth Amendment violation, the right was not clearly established. This Court, of course, could decide the constitutional question anyway. See *Pearson v. Callahan*, 555 U.S. 223, 242, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (recognizing discretion). But because this question has not been adequately briefed, we decline to do so. See *id.*, at 239, 129 S.Ct. 808. Rather, we

continued on page 12

simply decide whether the officers' failure to accommodate Sheehan's illness violated clearly established law. It did not." (135 S.C. at 1775).

- The Court noted that asserting that the objective reasonableness test applies to excessive force claims under the Fourth Amendment is "far too general a proposition to control this case." (*Id.*)
- The Ninth Circuit had relied solely on *Graham* to deny the officers qualified immunity. The Supreme Court held that "[e]ven a cursory glance at the facts of *Graham* confirms just how different that case is from this one. That case did not involve a dangerous, obviously unstable person making threats, much less was there a weapon involved. There is a world of difference between needlessly withholding sugar from an innocent person who is suffering from an insulin reaction, see *Graham*, *supra*, at 388-389, 109 S. Ct. 1865, and responding to the perilous situation Reynolds and Holder confronted. *Graham* is a nonstarter." (135 S.C. at 1775).
- The Court held that "[e]ven if an officer acts contrary to her training, however, (and here, given the generality of that training, it is not at all clear that Reynolds and Holder did so), that does not itself negate qualified immunity where it would otherwise be warranted. Rather, so long as "a reasonable officer could have believed that his conduct was justified," a plaintiff cannot "avoid[] summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless." (135 S.C. at 1777).
- The Court also held that "[n]o precedent clearly established that there was not "an objective need for immediate entry" here. No matter how carefully a reasonable officer read *Graham*, *Deorle*, and *Alexander* beforehand, that officer could not know that reopening Sheehan's door to prevent her from escaping or gathering more

weapons would violate the Ninth Circuit's test, even if all the disputed facts are viewed in respondent's favor. Without that "fair notice," an officer is entitled to qualified immunity. See, e.g. *Plumhoff*, 572 U.S., at _____, 134 S. Ct., at 2023."

- The Court found that "[u]nder Ninth Circuit law, an entry that otherwise complies with the Fourth Amendment is not rendered unreasonable because it provokes a violent reaction. . . . Under this rule, qualified immunity necessarily applies here because, as explained above, competent officers could have believed that the second entry was justified under both continuous search and exigent circumstance rationales. Indeed, even if Reynolds and Holder misjudged the situation, Sheehan cannot 'establish a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided.' . . . Courts must not judge officers with 'the 20/20 vision of hindsight.'" (135 S. Ct. at 1776-1777) (citations omitted).
- The Court concluded that no robust consensus of cases of persuasive authority existed to guide the officers involved with this case. (135 S. Ct. at 1778).

4. Constitutional right clarified? The Court reaffirmed its previous ruling that officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. The Court did not provide guidance as to whether, under the ADA, an officer must accommodate the special needs of a mentally ill subject in such a situation. Rather, the Court concluded that the law was not clearly established on this point in August, 2008; thus qualified immunity applied.

E. *Mullenix v. Luna*, 577 U.S. ____ (2015) (per curiam).

1. Procedural posture and decision date: *Mullenix* was decided on November 9, 2015, on appeal from the Fifth Circuit. The Supreme Court issued a per curiam decision granting Officer Mullenix the protection of qualified immunity.

2. Summary of facts: This case stems from a police pursuit on the Texas interstate on March 23, 2010. An individual fleeing from the police led officers on an 18-minute chase, reaching speeds between 85 and 110 miles per hour. Twice during the chase, the fleeing subject, Israel Leija, Jr., called the police dispatcher, claiming to have a gun and threatening to shoot at officers if they did not abandon their pursuit. The dispatcher relayed these threats, together with a report that Leija might be intoxicated, to all of the involved officers. As two officers maintained their pursuit of Mr. Leija, others set up tire spikes at three locations. Texas Trooper Chadrin Mullenix responded to the situation. He drove to an overpass, initially intending to set up a spike strip there. However, upon learning of other spike strip locations, Mullenix considered the alternative tactic of shooting at Leija's car in order to disable it. Trooper Mullenix did not receive training in employing this tactic, and he had not attempted it before. He relayed his idea to another officer, who agreed with it. Trooper Mullenix then asked the DPS dispatcher to inform his supervisor of his plan. Mullenix got out of his vehicle with his service rifle and positioned himself on the overpass, about twenty feet above the interstate. The respondents alleged that from this position, Mullenix could hear his supervisor respond with the words "stand by" and "see if the spikes work first." (577 U.S. ____ (Slip op. at pg. 2)).

Approximately three minutes after Mullenix took up his shooting position, he spotted Leija's vehicle, and also observed that another officer was in pursuit. Mullenix explained that he feared that Leija might attempt to shoot at or run over the officers manning the spike strips located below him, and also that if Leija hit the spike strips, he might still be able to continue driving in the direction of other officers. As Leija approached the overpass, the trooper fired six shots. Mr. Leija's vehicle continued forward and engaged a spike strip that was located beneath the overpass, hit the median, and rolled 2 ½ times. It was later determined that Leija had been killed by Mullenix's shots, four of which

continued on page 36

had struck his upper body. There was no evidence that any of Trooper Mullenix's shots hit the car's radiator, hood, or engine block. The estate sued Trooper Mullenix under 42 U.S.C. § 1983, alleging that he had violated the Fourth Amendment by using excessive force against Mr. Leija.

The District Court denied Mullenix's motion for summary judgment, finding that there were genuine issues of fact as to whether or not he acted recklessly or unreasonably, and denied qualified immunity. The Fifth Circuit Court of Appeals affirmed, agreeing with the District Court that the immediacy of the risk posed by Mr. Leija was a disputed fact, and that this factual issue precluded the court from reaching a conclusion as to whether or not Mullenix acted objectively reasonably as a matter of law. The Fifth Circuit denied a Motion to Rehear En Banc. The Supreme Court addressed only the qualified immunity question, and reversed the Fifth Circuit.

3. Significant aspects of decision:

- The Court noted that the Fifth Circuit held that "Mullenix violated the clearly established rule that a police officer may not 'use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others.' 773 F. 3d, at 725. Yet this Court has previously considered – and rejected – almost that exact formulation of the qualified immunity question in the Fourth Amendment context. In *Brosseau*, which also involved the shooting of a suspect fleeing by car, the Ninth Circuit denied qualified immunity on the ground that the officer had violated the clearly established rule, set forth in *Tennessee v. Garner*, 471 U.S. 1 (1985), that 'deadly force is only permissible where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.' *Haugen v. Brosseau*, 339 F. 3d 857, 873 (CA9 2003) (internal quotation marks omitted). The Court summarily reversed, holding that use of *Garner*'s "general" test for excessive force was "mistaken." *Brosseau*, 543 U.S., at 199. The correct inquiry, the Court explained, was whether it was clearly established that

the Fourth Amendment prohibited the officer's conduct in the 'situation [she] confronted': whether to shoot a disturbed felon, set on avoiding capture through vehicle flight, when persons in the immediate area are at risk from that flight.' *Id.*, at 199-200. The Court considered three court of appeals cases discussed by the parties, noted that 'this area is one in which the result depends very much on the facts of each case,' and concluded that the officer was entitled to qualified immunity because '[n]one of [the cases] squarely governs the case here.' *Id.*, at 201 (emphasis added)." (577 U.S. _____) (Slip op. at pp. 5 and 6).

- The Court reminded that "*Anderson v. Creighton*, 483 U.S. 635 (1987), is also instructive on the required degree of specificity. There, the lower court had denied qualified immunity based on the clearly established 'right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances.' *Id.*, at 640. This Court faulted that formulation for failing to address the actual question at issue: whether 'the circumstances with which Anderson was confronted . . . constitute[d] probable cause and exigent circumstances.' *Id.*, at 64-641. Without answering that question, the Court explained, the conclusion that Anderson's search was objectively unreasonable did not 'follow immediately' from – and thus was not clearly established by – the principle that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment. *Id.*, at 641. "(577 U.S. _____) (Slip op. at pp. 6 and 7).
- The Court held that "[f]ar from clarifying the issue, excessive force cases involving car chases reveal the hazy legal backdrop against which Mullenix acted." (577 U.S. _____) (Slip op. at p. 7).
- The Court held that it had "never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone to be a basis for denying qualified immunity. . . . [and that] none of our precedents 'squarely governs' the facts here. Given Leija's conduct, we

cannot say that only someone 'plainly incompetent' or who 'knowingly violate[s] the law' would have perceived a sufficient threat and acted as Mullenix did. *Malley*, 475 U.S., at 341." (577 U.S. _____) (Slip op. at p. 8).

- The Court stated that the "dissent can cite no case from this Court denying qualified immunity because officers entitled to terminate a high speed chase selected one dangerous alternative over another." (577 U.S. _____) (Slip op. at p. 9).
- The Court held that Fifth Circuit case-law did not "clearly dictate the conclusion that Mullenix was unjustified in perceiving grave danger and responding accordingly, given that Leija was speeding towards a confrontation with officers he had threatened to kill." (577 U.S. _____) (Slip op. at p. 10).
- The Court concluded that "[t]he fact is that when Mullenix fired, he reasonably understood Leija to be a fugitive fleeing arrest, at speeds over 100 miles per hour, who was armed and possibly intoxicated, who had threatened to kill any officer he saw if the police did not abandon their pursuit, and who was racing towards Officer Ducheneaux's position. Even accepting that these circumstances fall somewhere between the two sets of cases respondents discuss, qualified immunity protects actions in the 'hazy border between excessive and acceptable force.' *Brosseau*, *supra*, at 201 (quoting *Saucier*, 533 U.S., at 206; some internal quotation marks omitted)." (577 U.S. _____) (Slip op. at p. 12).

4. Constitutional right clarified? The Supreme Court only addressed the qualified immunity issue, so it did not take on the Fourth Amendment seizure issue addressed by the lower courts. However, the Court discussed the issue of whether a police officer may "use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officers or others," and reminded that in *Brosseau*, it had "previously considered – and rejected – almost that exact formulation of the qualified immunity question in the Fourth Amendment context, " and that the Court had already clarified in that case that the "correct inquiry . . . was whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the 'situation [she] confronted':

whether to shoot a disturbed felon, set on avoiding capture through vehicle flight, when persons in the immediate area are at risk from that flight.”

F. White v. Pauly, 580 U.S. ____ (2017) (per curiam)

1. Lower court and decision date: This case was decided on January 9, 2017, on appeal from the Tenth Circuit. The Supreme Court issued a per curiam decision overturning the decisions of both lower courts, which had denied Officer White qualified immunity.

2. Summary of facts: This case stemmed from a road-rage incident which occurred on a highway near Santa Fe, New Mexico in October of 2011. Motorists reported what appeared to be drunk driving and road rage behavior and provided the responding officers with a license plate number. That license plate number led officers to the address for Daniel and Samuel Pauly. Upon arrival at their home, there was some verbal interaction between the two responding officers and the two Pauly brothers. Officer White also responded to the Pauly brothers’ home, arriving just as one of the brothers said “we have guns.” (580 U.S. ____) (Slip op. p. 3) The officers took up defensive positions around the house. One brother fired shotgun blasts out the back door, while another aimed a handgun in Officer White’s direction. White shot and killed Samuel Pauly.

The District Court denied Officer White qualified immunity. A divided panel of the Court of Appeals for the Tenth Circuit affirmed. The Supreme Court vacated and remanded.

3. Significant aspects of decision:

- The Court held that the case concerned qualified immunity, and so it would consider “only the facts that were knowable to the defendant officers.” (580 U.S. ____) (Slip op. p. 3) (citing *Kingsley*)
- The Court suggested that the Tenth Circuit panel majority properly analyzed Officer White’s claim separately from claims against the two other officers, because Officer White did not participate in the events leading up to the armed confrontation, nor was he there to hear the other officers ordering the Pauly brothers to come out of

the house. (580 U.S. ____) (Slip op. p. 4)

- Despite the fact that White arrived on scene and heard only the “we-have-guns” statement before he took cover, the Circuit concluded that White’s use of deadly force was not reasonable, because the “rule” that “a reasonable officer in White’s position would believe that a warning was required despite the threat of serious harm – was clearly established at the time of Samuel’s death,” (580 U.S. ____) (Slip op. p. 4) and Officer White did not give such a warning. (*Id.*, pp. 4-5).

- The Court reminded that while its previous decisions do not require a case directly on point for a right to be “clearly established,” “existing precedent” must have placed the statutory or constitutional question beyond debate.” (580 U.S. ____) (Slip op. p. 6).

- The Supreme Court chastised the Tenth Circuit by noting that “[t]oday, it is again necessary to reiterate the longstanding principle that ‘clearly established law’ should not be defined ‘at a high level of generality.’ . . . [a]s this Court explained decades ago, the clearly established law must be ‘particularized’ to the facts of the case. . . . [o]therwise, ‘[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violations of extremely abstract rights.” (580 U.S. ____) (Slip op. p. 6) (citations omitted)

- The Court held that the panel majority misunderstood the “clearly established” analysis, because it “failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment. Instead, the majority relied on *Graham*, *Gamer*, and their Court of Appeals progeny, which – as noted above – lay out excessive-force principles at only a general level.” (580 U.S. ____) (Slip op. pp. 6-7) The Court reminded that neither *Gamer* nor *Graham* by themselves create “clearly established” law outside “an obvious case.” (580 U.S. ____) (Slip op. p. 7)

- The Court held that this “is not a case where it is obvious that there was a violation of clearly established law under *Gamer* and *Graham*. Of note, the majority did not conclude that [Officer] White’s conduct – such as his failure to shout a warning – constituted a run-of-the-mill

Fourth Amendment violation. Indeed, it recognized that ‘this case presents a unique set of facts and circumstances’ in light of [Officer] White’s late arrival on the scene. (814 F.3d, at 1077). This alone should have been an important indication to the majority that [Officer] White’s conduct did not violate a ‘clearly established’ right. Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one [Officer] White confronted here.” (580 U.S. at ____) (Slip op. p. 7).

- The Court also noted that there was a question as to whether, in light of its holding in this case, the other two officers were entitled to qualified immunity as well. (580 U.S. ____) (Slip op. p. 8). (On remand, the Court of Appeals held that Officers White, Truesdale, and Mariscal were each entitled to qualified immunity, and dismissed the claims against them. (*Pauly v. White*, ____ Fed. 3d ____ (10th Cir. 2017) (decided October 31, 2017)).

4. Constitutional Right Clarified? As described above, the Court determined that this case presented a unique set of circumstances not squarely addressed by caselaw, and that therefore, Officer White was entitled to qualified immunity. The Court noted that “[c]learly established federal caselaw does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed.”

Conclusion

Although some recent undercurrents seem to advocate narrowing the scope of qualified immunity, it continues to provide a vital defense to municipal actors who have not violated “clearly established” rights. In defending the actions of their local government constituents, municipal lawyers should not hesitate to seek qualified immunity and remain aware of its parameters as applicable to the specific facts confronting them.