Qualified Immunity Update

Recent Developments in Qualified Immunity & Qualified Immunity at Trial

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Seminar Materials

- **Cases** 3
  - ***Supreme Court Cases*** 4
    - *City of Escondido v. Emmons*, 139 S.Ct. 500 (2019) 5
    - *Kisela v. Hughes*, 138 S.Ct. 1148 (2018) 9
    - *District of Columbia v. Wesby*, 138 S.Ct. 577 (2018) 21
    - *White v. Pauly*, 137 S. Ct. 548, 552 (2017) 35
    - *Salazar-Limon v. City of Houston*, 137 S.Ct. 1277 (2017) 40
    - *City & Cnty. of San Francisco v. Sheehan,* 135 S. Ct. 1765 (2015) 46
  - ***Circuit Court Cases*** 59
    - *Doe v. Jackson Local Sch. Dist. Bd. of Educ*., 2020 U.S. App. LEXIS 10238 (6th Cir. April 1, 2020) 60
    - *Fijalkowski v. Wheeler,* 2020 U.S. App. LEXIS 7243 (4th Cir. March 9, 2020) 70
    - *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019) 78
    - *Muschette v. Gionfriddo*, 910 F.3d 65 (2d Cir. 2018) 96
    - *Estate of Jaquez v. City of New York, et al.* 706 Fed. Appx. 709 (2d Cir. 2017) 101
- **Verdict Sheets** 108
    - *Vargas v. Detective Marquez,* 14 Civ. 2511 (KBF) 109
    - *Estate of Jaquez v. Sergeant Flores,* 10 Civ. 2881 (KBF) 111
    - *Noboa v. Police Officers Alan Ward, et al.*, 15 Civ. 5159 (AMD) 115
    - *Johnson v. Burns, et al.*, 15 Civ. 4789 (PAE) 116
- **Scholarly Perspectives** 120
    - Schwartz, Joanna C., *Qualified Immunity's Selection Effects*, 114 Nw. U. L. Rev. 1101 (2020) 121
    - Reinert, Alexander A., *Qualified Immunity at Trial*, 93 Notre Dame L. Rev. 2065 (2018) 219
    - Schwartz, Joanna C., *How Qualified Immunity Fails*, 127 Yale L.J. 2 (2017) 238

Cases

Supreme Court Cases

City of Escondido v. Emmons

Supreme Court of the United States

January 7, 2019, Decided

No. 17-1660.

Reporter
139 S. Ct. 500 *; 202 L. Ed. 2d 455 **; 2019 U.S. LEXIS 11 ***; 27 Fla. L. Weekly Fed. S 608; 2019 WL 113027

CITY OF ESCONDIDO, CALIFORNIA, et al., Petitioners v. MARTY EMMONS

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: On remand at Emmons v. City of Escondido, 2019 U.S. App. LEXIS 4129 (9th Cir. Cal., Feb. 11, 2019)

On remand at Emmons v. City of Escondido, 2019 U.S. App. LEXIS 12257 (9th Cir., Apr. 25, 2019)

Prior History: [***1] ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Emmons v. City of Escondido, 716 Fed. Appx. 724, 2018 U.S. App. LEXIS 7995 (9th Cir. Cal., Mar. 29, 2018)

Judges: Roberts, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh.

Opinion

[*501] [**457] PER CURIAM.

The question in this qualified immunity case is whether two police officers violated clearly established law when they forcibly apprehended a man at the scene of a reported domestic violence incident.

The record, viewed in the light most favorable to the plaintiff, shows the following. In April 2013, Escondido police received a 911 call from Maggie Emmons about a domestic violence incident at her apartment. Emmons lived at the apartment with her husband, her two children, and a roommate, Ametria Douglas. Officer Jake Houchin responded to the scene and eventually helped take a domestic violence report from Emmons about injuries caused by her husband. The officers arrested her husband. He was later released.

A few weeks later, on May 27, 2013, at about 2:30 p.m., Escondido police received a 911 call about another possible domestic disturbance at Emmons' apartment. That 911 call came from Ametria Douglas' mother, Trina Douglas. Trina Douglas was not at the apartment, but she was on the phone with her daughter [***2] Ametria, who was at the apartment. Trina heard her daughter Ametria and Maggie Emmons yelling at each other and heard her daughter screaming for help. The call then disconnected, and Trina Douglas called 911.

Officer Houchin again responded, along with Officer Robert Craig. The dispatcher informed the

officers that two children could be in the residence and that calls to the apartment had gone unanswered.

Police body-camera video of the officers' actions at the apartment is in the record.

The officers knocked on the door of the apartment. No one answered. But a side window was open, and the officers spoke with Emmons through that window, attempting to convince her to open the door to the apartment so that they could conduct a welfare check. A man in the apartment also told Emmons to back away from the window, but the officers said they [*502] could not identify the man. At some point during this exchange, Sergeant Kevin Toth, Officer Joseph Leffingwell, and Officer Huy Quach arrived as backup.

A few minutes later, a man opened the apartment door and came outside. [**458] At that point, Officer Craig was standing alone just outside the door. Officer Craig told the man not to close the door, but the man [***3] closed the door and tried to brush past Officer Craig. Officer Craig stopped the man, took him quickly to the ground, and handcuffed him. Officer Craig did not hit the man or display any weapon. The video shows that the man was not in any visible or audible pain as a result of the takedown or while on the ground. Within a few minutes, officers helped the man up and arrested him for a misdemeanor offense of resisting and delaying a police officer.

The man turned out to be Maggie Emmons' father, Marty Emmons. Marty Emmons later sued Officer Craig and Sergeant Toth, among others, under Rev. Stat. §1979, 42 U. S. C. §1983. He raised several claims, including, as relevant here, a claim of excessive force in violation of the Fourth Amendment. The suit sought money damages for which Officer Craig and Sergeant Toth would be personally liable. The District Court held that the officers had probable cause to arrest Marty Emmons for the misdemeanor offense. The Ninth Circuit did not disturb that finding, and there is no claim presently before us that the officers lacked probable cause to arrest Marty Emmons. The only claim before us is that the officers used excessive force in effectuating the arrest.

The District Court rejected the [***4] claim of excessive force. 168 F. Supp. 3d 1265, 1274 (SD Cal. 2016). The District Court stated that the "video shows that the officers acted professionally and respectfully in their encounter" at the apartment. *Id.*, at 1275. Because only Officer Craig used any force at all, the District Court granted summary judgment to Sergeant Toth on the excessive force claim.

Applying this Court's precedents on qualified immunity, the District Court also granted summary judgment to Officer Craig. According to the District Court, the law did not clearly establish that Officer Craig could not take down an arrestee in these circumstances. The court explained that the officers were responding to a domestic dispute, and that the encounter had escalated when the officers could not enter the apartment to conduct a welfare check. The District Court also noted that when Marty Emmons exited the apartment, none of the officers knew whether he was armed or dangerous, or whether he had injured any individuals inside the apartment.

The Court of Appeals reversed and remanded for trial on the excessive force claims against both Officer Craig and Sergeant Toth. 716 Fed. Appx. 724 (CA9 2018). The Ninth Circuit's entire relevant analysis of the qualified immunity question consisted of the following: "The right to be free of excessive [***5] force was clearly established at the time of the events in question. *Gravelet-Blondin* v. *Shelton*, 728 F. 3d 1086, 1093 (9th Cir. 2013)." *Id.*, at 726.

We reverse the judgment of the Court of Appeals as to Sergeant Toth, and vacate and remand as to Officer Craig.

With respect to Sergeant Toth, the Ninth Circuit offered no explanation for its decision. The court's unexplained reinstatement of the excessive

[**459] force claim against Sergeant Toth was erroneous—and quite puzzling in light of the District Court's conclusion that "only Defendant Craig was involved in the excessive force claim" and that Emmons "fail[ed] to identify [*503] contrary evidence." 168 F. Supp. 3d, at 1274, n. 4.

As to Officer Craig, the Ninth Circuit also erred. As we have explained many times: [1] "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Kisela* v. *Hughes*, 584 U. S. ___, ___, 138 S. Ct. 1148, 200 L. Ed. 2d 449, 453 (2018) (*per curiam*) (internal quotation marks omitted); see *District of Columbia* v. *Wesby*, 583 U. S. ___, ___-___, 138 S. Ct. 577, 199 L. Ed. 2d 453, 467 (2018); *White* v. *Pauly*, 580 U. S. ___, ___-___, 137 S. Ct. 548, 196 L. Ed. 2d 463, 468 (2017) (*per curiam*); *Mullenix* v. *Luna*, 577 U. S. ___, ___-___, 136 S. Ct. 305, 193 L. Ed. 2d 255, 259 (2015) (*per curiam*).

Under our cases, [2] the clearly established right must be defined with specificity. "This Court has repeatedly told courts . . . not to define clearly established law at a high level of generality." *Kisela*, 584 U. S., at ___, 138 S. Ct. 1148, 200 L. Ed. 2d 449, at 454 (internal quotation marks omitted). That is particularly important in excessive force [***6] cases, as we have explained:

> "Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue. . . .
>
> "[I]t does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Id*., at ___, 138 S. Ct. 1148, 200 L. Ed. 2d 449, at 454 (quotation altered).

In this case, the Court of Appeals contravened those settled principles. The Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in [***7] these circumstances. Instead, the Court of Appeals defined the clearly established right at a high level of generality by saying only that the "right to be free of excessive force" was clearly established. With the right defined at that high level of generality, the Court of Appeals then denied qualified immunity to the officers and remanded the case for trial. 716 Fed. Appx., at 726.

Under our precedents, the Court of Appeals' formulation of the clearly established right was far too general. To be sure, the Court of Appeals cited the *Gravelet-Blondin* case from that Circuit, which described a right to be "free from the application of non-trivial [**460] force for engaging in mere passive resistance. . . ." 728 F. 3d, at 1093. Assuming without deciding that a court of appeals decision may constitute clearly established law for purposes of qualified immunity, see *City and County of San Francisco* v. *Sheehan*, 575 U. S. ___, ___, 135 S. Ct. 1765, 191 L. Ed. 2d 856, 870 (2015), the Ninth Circuit's *Gravelet-Blondin* case law involved police force against individuals engaged in *passive* resistance. The Court of Appeals made no effort to explain how that case law prohibited Officer Craig's actions in [*504] this case. That is a problem under our precedents:

> [3] "[W]e have stressed the need to identify a case where an officer acting under similar circumstances was [***8] held to have violated the Fourth Amendment. . . . While

> there does not have to be a case directly on point, existing precedent must place the lawfulness of the particular [action] beyond debate. . . . Of course, there can be the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances. . . . But a body of relevant case law is usually necessary to clearly establish the answer . . . ." *Wesby*, 583 U. S., at ___, 138 S. Ct. 577, 199 L. Ed. 2d 453, at 468 (internal quotation marks omitted).

The Court of Appeals failed to properly analyze whether clearly established law barred Officer Craig from stopping and taking down Marty Emmons in this manner as Emmons exited the apartment. Therefore, we remand the case for the Court of Appeals to conduct the analysis required by our precedents with respect to whether Officer Craig is entitled to qualified immunity.

The petition for certiorari is granted, the judgment of the Court of Appeals is reversed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

References

U.S.C.S., Constitution, Amendment 4; 42 U.S.C.S. § 1983

5 Antieau on Local Government Law § 77.04 (Matthew Bender 2d ed.)

L Ed Digest, Public Officers § 56

L Ed Index, [***9] Qualified Immunity

Supreme Court's views as to application or applicability of doctrine of qualified immunity in action under 42 U.S.C.S. § 1983 or in Bivens action, seeking damages for alleged civil rights violations. 116 L. Ed. 2d 965.

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Kisela v. Hughes

Supreme Court of the United States

April 2, 2018, Decided

No. 17-467.

Reporter

138 S. Ct. 1148 *; 200 L. Ed. 2d 449 **; 2018 U.S. LEXIS 2066 ***; 86 U.S.L.W. 4173; 27 Fla. L. Weekly Fed. S 152; 2018 WL 1568126

ANDREW KISELA, Petitioner v. AMY HUGHES

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: Later proceeding at Hughes v. Kisela, 2018 U.S. App. LEXIS 13416 (9th Cir. Ariz., May 16, 2018)

Prior History: [***1] ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Hughes v. Kisela, 862 F.3d 775, 2017 U.S. App. LEXIS 11465 (9th Cir. Ariz., June 27, 2017)

Judges: Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch.

Opinion

[*1150] [**451] PER CURIAM.

Petitioner Andrew Kisela, a police officer in Tucson, Arizona, shot respondent Amy Hughes. Kisela and two other officers had arrived on the scene after hearing a police radio report that a woman was engaging in [**452] erratic behavior with a knife. They had been there but a few minutes, perhaps just a minute. When Kisela fired, Hughes was holding a large kitchen knife, had taken steps toward another woman standing nearby, and had refused to drop the knife after at least two commands to do so. The question is whether at the time of the shooting Kisela's actions violated clearly established law.

The record, viewed in the light most favorable to Hughes, shows the following. [*1151] In May 2010, somebody in Hughes' neighborhood called 911 to report that a woman was hacking a tree with a kitchen knife. Kisela and another police officer, Alex Garcia, heard about the report over the radio in their patrol car and responded. A few minutes later the person who had called 911 flagged down the officers; gave them a description of the [***2] woman with the knife; and told them the woman had been acting erratically. About the same time, a third police officer, Lindsay Kunz, arrived on her bicycle.

Garcia spotted a woman, later identified as Sharon Chadwick, standing next to a car in the driveway of a nearby house. A chain-link fence with a locked gate separated Chadwick from the officers. The officers then saw another woman, Hughes, emerge from the house carrying a large knife at her side. Hughes matched the description of the woman who had been seen hacking a tree. Hughes walked

toward Chadwick and stopped no more than six feet from her.

All three officers drew their guns. At least twice they told Hughes to drop the knife. Viewing the record in the light most favorable to Hughes, Chadwick said "take it easy" to both Hughes and the officers. Hughes appeared calm, but she did not acknowledge the officers' presence or drop the knife. The top bar of the chain-link fence blocked Kisela's line of fire, so he dropped to the ground and shot Hughes four times through the fence. Then the officers jumped the fence, handcuffed Hughes, and called paramedics, who transported her to a hospital. There she was treated for non-life-threatening [***3] injuries. Less than a minute had transpired from the moment the officers saw Chadwick to the moment Kisela fired shots.

All three of the officers later said that at the time of the shooting they subjectively believed Hughes to be a threat to Chadwick. After the shooting, the officers discovered that Chadwick and Hughes were roommates, that Hughes had a history of mental illness, and that Hughes had been upset with Chadwick over a $20 debt. In an affidavit produced during discovery, Chadwick said that a few minutes before the shooting her boyfriend had told her Hughes was threatening to kill Chadwick's dog, named Bunny. Chadwick "came home to find" Hughes "somewhat distressed," and Hughes was in the house holding Bunny "in one hand and a kitchen knife in the other." Hughes asked Chadwick if she "wanted [her] to use the knife on the dog." The officers knew none of this, though. Chadwick went outside to get $20 from her car, which is when the officers first saw her. In her affidavit Chadwick said that she did not feel endangered at any time. *Ibid.* Based on her experience as Hughes' roommate, Chadwick stated that Hughes "occasionally has episodes in which she acts inappropriately," [**453] but [***4] "she is only seeking attention." 2 Record 108.

Hughes sued Kisela under Rev. Stat. §1979, 42 U. S. C. §1983, alleging that Kisela had used excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Kisela, but the Court of Appeals for the Ninth Circuit reversed. 862 F. 3d 775 (2016).

The Court of Appeals first held that the record, viewed in the light most favorable to Hughes, was sufficient to demonstrate that Kisela violated the Fourth Amendment. See *id.*, at 782. The court next held that the violation was clearly established because, in its view, the constitutional violation was obvious and because of Circuit precedent that the court perceived to be analogous. *Id.*, at 785. Kisela filed a petition for rehearing en banc. Over the dissent of seven judges, the Court of Appeals denied it. Kisela then filed a petition [*1152] for certiorari in this Court. That petition is now granted.

In one of the first cases on this general subject, *Tennessee* v. *Garner*, 471 U. S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), the Court addressed the constitutionality of the police using force that can be deadly. There, the Court held that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." [***5] *Id.*, at 11, 105 S. Ct. 1694, 85 L. Ed. 2d.

In *Graham* v. *Connor*, 490 U. S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), the Court held that the question whether an officer has used excessive force "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Ibid.* And "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to

make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.*, at 396-397, 109 S. Ct. 1865, 104 L. Ed. 2d 443.

Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity.

"Qualified immunity attaches when an official's conduct does not violate clearly established statutory [***6] or constitutional rights of which a reasonable person would have known." *White* v. *Pauly*, 580 U. S. ___, ___ , 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017) (*per curiam*) (alterations and internal quotation marks omitted). "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Brosseau* [**454] v. *Haugen*, 543 U. S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (*per curiam*).

Although "this Court's caselaw does 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." *White*, 580 U. S., at ___, 137 S. Ct. 548, 196 L. Ed. 2d 463, at 468) (internal quotation marks omitted). "In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law." *Ibid.* (internal quotation marks omitted). This Court has "'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'" *City and County of San Francisco* v. *Sheehan*, 575 U. S. ___, ___, 135 S. Ct. 1765, 191 L. Ed. 2d 856 (2015)) (quoting *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 742, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)); see also *Brosseau*, *supra*, at 198-199, 125 S. Ct. 596, 160 L. Ed. 2d 583.

"[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Mullenix* v. *Luna*, 577 U. S. ___, ___, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (*per curiam*) [*1153] (internal quotation marks [***7] omitted). Use of excessive force is an area of the law "in which the result depends very much on the facts of each case," and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue. *Id.*, at ___, 136 S. Ct. 305, 193 L. Ed. 2d 255, at 260 (internal quotation marks omitted and emphasis deleted). Precedent involving similar facts can help move a case beyond the otherwise "hazy border between excessive and acceptable force" and thereby provide an officer notice that a specific use of force is unlawful. *Id.*, at ___, 136 S. Ct. 305, 193 L. Ed. 2d 255, at 263 (internal quotation marks omitted).

"Of course, general statements of the law are not inherently incapable of giving fair and clear warning to officers." *White*, 580 U. S., at ___, 137 S. Ct. 548, 196 L. Ed. 2d 463, at 468) (internal quotation marks omitted). But the general rules set forth in "*Garner* and *Graham* do not by themselves create clearly established law outside an 'obvious case.'" *Ibid.* Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer "cannot be said to have violated a clearly established right [***8] unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff* v. *Rickard*, 572 U. S. ___, ___, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014). That is a necessary part of the qualified-immunity standard, and it is a part of the standard

that the Court of Appeals here failed to implement in a correct way.

Kisela says he shot Hughes because, although the officers themselves were in no apparent danger, he believed she was a threat to Chadwick. Kisela had mere seconds to assess the potential danger to Chadwick. [**455] He was confronted with a woman who had just been seen hacking a tree with a large kitchen knife and whose behavior was erratic enough to cause a concerned bystander to call 911 and then flag down Kisela and Garcia. Kisela was separated from Hughes and Chadwick by a chain-link fence; Hughes had moved to within a few feet of Chadwick; and she failed to acknowledge at least two commands to drop the knife. Those commands were loud enough that Chadwick, who was standing next to Hughes, heard them. This is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment.

The Court of Appeals made additional [***9] errors in concluding that its own precedent clearly established that Kisela used excessive force. To begin with, "even if a controlling circuit precedent could constitute clearly established law in these circumstances, it does not do so here." *Sheehan*, *supra*, at ___, 135 S. Ct. 1765, 191 L. Ed. 2d 856, at 869. In fact, the most analogous Circuit precedent favors Kisela. See *Blanford* v. *Sacramento County*, 406 F. 3d 1110 (CA9 2005). In *Blanford*, the police responded to a report that a man was walking through a residential neighborhood carrying a sword and acting in an erratic manner. *Id.*, at 1112. There, as here, the police shot the man after he refused their commands to drop his weapon (there, as here, the man might not have heard the commands). *Id.*, at 1113. There, as here, the police believed (perhaps mistakenly), that the man posed an immediate threat to others. *Ibid.* There, the Court of Appeals determined that the use of deadly force did not violate the Fourth Amendment. *Id.*, at 1119. Based on that decision, a reasonable officer [*1154] could have believed the same thing was true in the instant case.

In contrast, not one of the decisions relied on by the Court of Appeals—*Deorle* v. *Rutherford*, 272 F. 3d 1272 (CA9 2001), *Glenn* v. *Washington County*, 673 F. 3d 864 (CA9 2011), and *Harris* v. *Roderick*, 126 F. 3d 1189 (CA9 1997)—supports denying Kisela qualified immunity. As for *Deorle*, this Court has already instructed the Court of Appeals not to read its decision in that case too broadly in deciding whether [***10] a new set of facts is governed by clearly established law. *Sheehan*, 575 U. S., at ___-___, 135 S. Ct. 1765, 191 L. Ed. 2d 856, at 868. *Deorle* involved a police officer who shot an unarmed man in the face, without warning, even though the officer had a clear line of retreat; there were no bystanders nearby; the man had been "physically compliant and generally followed all the officers' instructions"; and he had been under police observation for roughly 40 minutes. 272 F. 3d, at 1276, 1281-1282. In this case, by contrast, Hughes was armed with a large knife; was within striking distance of Chadwick; ignored the officers' orders to drop the weapon; and the situation unfolded in less than a minute. "Whatever the merits of the decision in *Deorle*, the differences between that case and the case before us leap from the page." *Sheehan*, *supra*, at ___, 135 S. Ct. 1765, 191 L. Ed. 2d 856, at 869.

Glenn, which the panel described as "[t]he most analogous Ninth Circuit case," 862 F. 3d, at 783, was decided after the shooting at issue here. Thus, *Glenn* "could not have given fair notice to [Kisela]" because a reasonable [**456] officer is not required to foresee judicial decisions that do not yet exist in instances where the requirements of the Fourth Amendment are far from obvious. *Brosseau*, 543 U. S., at 200, n. 4, 125 S. Ct. 596, 160 L. Ed. 2d 583. *Glenn* was therefore "of no use in the clearly established inquiry." *Brosseau*, *supra*, at 200, n. 4, 125 S. Ct. 596, 160 L. Ed. 2d 583. Other judges brought this mistaken or misleading citation [***11] to the panel's attention while Kisela's petition for rehearing en banc was pending

before the Court of Appeals. 862 F.3d, at 795, n. 2 (Ikuta, J., dissenting from denial of rehearing en banc). The panel then amended its opinion, but nevertheless still attempted to "rely on *Glenn* as illustrative, not as indicative of the clearly established law in 2010." *Id.*, at 784, n. 2 (majority opinion). The panel failed to explain the difference between "illustrative" and "indicative" precedent, and none is apparent.

The amended opinion also asserted, for the first time and without explanation, that the Court of Appeals' decision in *Harris* clearly established that the shooting here was unconstitutional. *Id.*, at 785. The new mention of *Harris* replaced a reference in the panel's first opinion to *Glenn*—the case that postdated the shooting at issue here. Compare 841 F. 3d 1081, 1090 (CA9 2016) ("As indicated by *Glenn* and *Deorle*, . . . that right was clearly established"), with 862 F. 3d, at 785 ("As indicated by *Deorle* and *Harris*, . . . that right was clearly established").

The panel's reliance on *Harris* "does not pass the straight-face test." 862 F. 3d, at 797 (opinion of Ikuta, J.). In *Harris*, the Court of Appeals determined that an FBI sniper, who was positioned safely on a hilltop, used excessive force [***12] when he shot a man in the back while the man was retreating to a cabin during what has been referred to as the Ruby Ridge standoff. 126 F. 3d, at 1202-1203. Suffice it to say, a reasonable police officer could miss the connection between the situation confronting the sniper at Ruby Ridge and the situation confronting Kisela in Hughes' front yard.

For these reasons, the petition for certiorari is granted; the judgment of the [*1155] Court of Appeals is reversed; and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Dissent by: SOTOMAYOR

Dissent

Justice **Sotomayor**, with whom Justice **Ginsburg** joins, dissenting.

Officer Andrew Kisela shot Amy Hughes while she was speaking with her roommate, Sharon Chadwick, outside of their home. The record, properly construed at this stage, shows that at the time of the shooting: Hughes stood stationary about six feet away from Chadwick, appeared "composed and content," Appellant's Excerpts of Record 109 (Record), and held a kitchen knife down at her side with the blade facing away from Chadwick. Hughes was nowhere near the officers, had committed no illegal act, was suspected of no crime, and did not raise the knife in the direction of Chadwick or anyone else. Faced [***13] with these facts, the two other responding officers held their fire, and one testified that he "wanted to continue trying verbal command[s] and see if that would work." *Id.*, at 120. [**457] But not Kisela. He thought it necessary to use deadly force, and so, without giving a warning that he would open fire, he shot Hughes four times, leaving her seriously injured.

If this account of Kisela's conduct sounds unreasonable, that is because it was. And yet, the Court today insulates that conduct from liability under the doctrine of qualified immunity, holding that Kisela violated no "clearly established" law. See *ante*, at 5-6. I disagree. Viewing the facts in the light most favorable to Hughes, as the Court must at summary judgment, a jury could find that Kisela violated Hughes' clearly established Fourth Amendment rights by needlessly resorting to lethal force. In holding otherwise, the Court misapprehends the facts and misapplies the law, effectively treating qualified immunity as an absolute shield. I therefore respectfully dissent.

I

This case arrives at our doorstep on summary judgment, so we must "view the evidence . . . in the light most favorable to" Hughes, the nonmovant,

"with respect to the central facts of this case." *Tolan* v. *Cotton*, 572 U. S. ___, ___, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014) [***14] (*per curiam*). The majority purports to honor this well-settled principle, but its efforts fall short. Although the majority sets forth most of the relevant events that transpired, it conspicuously omits several critical facts and draws premature inferences that bear on the qualified-immunity inquiry. Those errors are fatal to its analysis, because properly construing all of the facts in the light most favorable to Hughes, and drawing all inferences in her favor, a jury could find that the following events occurred on the day of Hughes' encounter with the Tucson police.

On May 21, 2010, Kisela and Officer-in-Training Alex Garcia received a "'check welfare'" call about a woman chopping away at a tree with a knife. 862 F. 3d 775, 778 (CA9 2016). They responded to the scene, where they were informed by the person who had placed the call (not Chadwick) that the woman with the knife had been acting "erratically." *Ibid.* A third officer, Lindsay Kunz, later joined the scene. The officers observed Hughes, who matched the description given to the officers of the woman alleged to have been cutting the tree, emerge from a house with a kitchen knife in her hand. Hughes exited the front door and approached Chadwick, who was [***15] standing outside in the driveway.

Hughes then stopped about six feet from Chadwick, holding the kitchen knife down at her side with the blade pointed away [*1156] from Chadwick. Hughes and Chadwick conversed with one another; Hughes appeared "composed and content," Record 109, and did not look angry. See 862 F. 3d, at 778. At no point during this exchange did Hughes raise the kitchen knife or verbally threaten to harm Chadwick or the officers. Chadwick later averred that, during the incident, she was never in fear of Hughes and "was not the least bit threatened by the fact that [Hughes] had a knife in her hand" and that Hughes "never acted in a threatening manner." Record 110-111. The officers did not observe Hughes commit any crime, nor was Hughes suspected of committing one. See 862 F. 3d, at 780.

Nevertheless, the officers hastily drew their guns and ordered Hughes [**458] to drop the knife. The officers gave that order twice, but the commands came "in quick succession." *Id.*, at 778. The evidence in the record suggests that Hughes may not have heard or understood the officers' commands and may not have been aware of the officers' presence at all. Record 109-110, 195, 323-324 (Officer Kunz's testimony that "it seemed as though [Hughes] didn't [***16] even know we were there," and "[i]t was like she didn't hear us almost"); *id.*, at 304 (Officer Garcia's testimony that Hughes acted "almost as if we weren't there"). Although the officers were in uniform, they never verbally identified themselves as law enforcement officers.

Kisela did not wait for Hughes to register, much less respond to, the officers' rushed commands. Instead, Kisela immediately and unilaterally escalated the situation. Without giving any advance warning that he would shoot, and without attempting less dangerous methods to deescalate the situation, he dropped to the ground and shot four times at Hughes (who was stationary) through a chain-link fence. After being shot, Hughes fell to the ground, screaming and bleeding from her wounds. She looked at the officers and asked, "'Why'd you shoot me?'" *Id.*, at 308. Hughes was immediately transported to the hospital, where she required treatment for her injuries. Kisela alone resorted to deadly force in this case. Confronted with the same circumstances as Kisela, neither of his fellow officers took that drastic measure.

II

Police officers are not entitled to qualified immunity if "(1) they violated a federal statutory or constitutional right, and (2) [***17] the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia* v. *Wesby*, 583 U. S. ___, ___, 138 S. Ct. 577, 199 L. Ed. 2d 453 (2018) (quoting *Reichle* v. *Howards*, 566 U. S. 658, 664, 132 S. Ct. 2088, 182 L. Ed. 2d

985 (2012)). Faithfully applying that well-settled standard, the Ninth Circuit held that a jury could find that Kisela violated Hughes' clearly established Fourth Amendment rights. That conclusion was correct.

A

I begin with the first step of the qualified-immunity inquiry: whether there was a violation of a constitutional right. Hughes alleges that Kisela violated her Fourth Amendment rights by deploying excessive force against her. In assessing such a claim, courts must ask "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Graham* v. *Connor*, 490 U. S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). That inquiry "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, [*1157] and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*, at 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443; see also *Tennessee* v. *Garner*, 471 U. S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). All of those factors (and others) support the Ninth Circuit's conclusion that a jury could find that Kisela's use of deadly force was objectively unreasonable. 862 F. 3d, at 779-782. Indeed, the panel's resolution of this question was so convincing that [***18] not a single judge on the Ninth Circuit, including [**459] the seven who dissented from denial of rehearing en banc, expressly disputed that conclusion. See *id.*, at 791-799 (opinion of Ikuta, J.). Neither does the majority here, which simply assumes without deciding that "a Fourth Amendment violation occurred." *Ante*, at 4.

First, Hughes committed no crime and was not suspected of committing a crime. The officers were responding to a "check welfare" call, which reported no criminal activity, and the officers did not observe any illegal activity while at the scene. The mere fact that Hughes held a kitchen knife down at her side with the blade pointed away from Chadwick hardly elevates the situation to one that justifies deadly force.

Second, a jury could reasonably conclude that Hughes presented no immediate or objective threat to Chadwick or the other officers. It is true that Kisela had received a report that a woman matching Hughes' description had been acting erratically. But the police officers themselves never witnessed any erratic conduct. Instead, when viewed in the light most favorable to Hughes, the record evidence of what the police encountered paints a calmer picture. It shows that Hughes was several feet from Chadwick [***19] and even farther from the officers, she never made any aggressive or threatening movements, and she appeared "composed and content" during the brief encounter.

Third, Hughes did not resist or evade arrest. Based on this record, there is significant doubt as to whether she was aware of the officers' presence at all, and evidence suggests that Hughes did not hear the officers' swift commands to drop the knife.

Finally, the record suggests that Kisela could have, but failed to, use less intrusive means before deploying deadly force. 862 F. 3d, at 781. For instance, Hughes submitted expert testimony concluding that Kisela should have used his Taser and that shooting his gun through the fence was dangerous because a bullet could have fragmented against the fence and hit Chadwick or his fellow officers. *Ibid.*; see also *Bryan* v. *MacPherson*, 630 F. 3d 805, 831 (CA9 2010) (noting that "police are required to consider what other tactics if any were available to effect the arrest" and whether there are "clear, reasonable, and less intrusive alternatives" (internal quotation marks and alteration omitted)). Consistent with that assessment, the other two officers on the scene declined to fire at Hughes, and one of them explained that he was inclined to use "some [***20] of the lesser means" than shooting, including verbal commands, because he believed there was time "[t]o try to talk [Hughes] down." Record 120-121. That two officers on the scene,

presented with the same circumstances as Kisela, did not use deadly force reveals just how unnecessary and unreasonable it was for Kisela to fire four shots at Hughes. See *Plumhoff* v. *Rickard*, 572 U. S. ___, ___, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014) ("We analyze [the objective reasonableness] question from the perspective of a reasonable officer on the scene" (internal quotation marks omitted)).

Taken together, the foregoing facts would permit a jury to conclude that Kisela acted outside the bounds of the Fourth Amendment [*1158] by shooting Hughes four times.

[**460] B

Rather than defend the reasonableness of Kisela's conduct, the majority sidesteps the inquiry altogether and focuses instead on the "clearly established" prong of the qualified-immunity analysis. *Ante*, at 4. To be "'clearly established' . . . [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson* v. *Creighton*, 483 U. S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). That standard is not nearly as onerous as the majority makes it out to be. As even the majority must acknowledge, *ante,* at 4, this Court has long rejected the notion that "an [***21] official action is protected by qualified immunity unless the very action in question has previously been held unlawful," *Anderson*, 483 U. S., at 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523. "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope* v. *Pelzer*, 536 U. S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002). At its core, then, the "clearly established" inquiry boils down to whether Kisela had "fair notice" that he acted unconstitutionally. See *ibid.*; *Brosseau* v. *Haugen*, 543 U. S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (*per curiam*) ("[T]he focus" of qualified immunity "is on whether the officer had fair notice that her conduct was unlawful").

The answer to that question is yes. This Court's precedents make clear that a police officer may only deploy deadly force against an individual if the officer "has probable cause to believe that the [person] poses a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U. S., at 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 ; see also *Graham*, 490 U. S., at 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443. It is equally well established that any use of lethal force must be justified by some legitimate governmental interest. See *Scott* v. *Harris*, 550 U. S. 372, 383, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007); *Mullenix* v. *Luna*, 577 U. S. ___, ___-___, 136 S. Ct. 305, 193 L. Ed. 2d 255, 266 (2015) (Sotomayor, J., dissenting). Consistent with those clearly established principles, and contrary to the majority's conclusion, Ninth Circuit precedent predating these events further confirms that Kisela's conduct was clearly unreasonable. See *Brosseau*, 543 U. S., at 199, 125 S. Ct. 596, 160 L. Ed. 2d 583 ("[A] body of relevant case law" [***22] may "'clearly establish'" the violation of a constitutional right); *Ashcroft* v.*al-Kidd*, 563 U. S. 731, 746, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (Kennedy, J., concurring) ("[Q]ualified immunity is lost when plaintiffs point either to 'cases of controlling authority in their jurisdiction at the time of the incident' or to 'a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful'" (quoting *Wilson* v. *Layne*, 526 U. S. 603, 617, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999))). Because Kisela plainly lacked any legitimate interest justifying the use of deadly force against a woman who posed no objective threat of harm to officers or others, had committed no crime, and appeared calm and collected during the police encounter, he was not entitled to qualified immunity.

The Ninth Circuit's opinion in *Deorle* v. *Rutherford*, 272 F. 3d 1272 [**461] (2001) proves the point. In that case, the police encountered a man who had reportedly been acting "erratically." *Id.,* at 1276. The man was "verbally abusive," shouted "'kill me'" at the officers, screamed that he would

"'kick [the] ass'" of one of the officers, and "brandish[ed] a hatchet at a police officer," ultimately throwing it "into a clump of trees when told to put it down." *Id.,* at 1276-1277. The officers also observed [*1159] the man carrying an unloaded crossbow in one hand and what appeared to be "a can or a bottle of [***23] lighter fluid in the other." *Id.,* at 1277. The man discarded the crossbow when instructed to do so by the police and then steadily walked toward one of the officers. *Ibid.* In response, that officer, without giving a warning, shot the man in the face with beanbag rounds. *Id.,* at 1278. The man suffered serious injuries, including multiple fractures to his cranium and the loss of his left eye. *Ibid.*

The Ninth Circuit denied qualified immunity to the officer, concluding that his use of force was objectively unreasonable under clearly established law. *Id.*, at 1285-1286. The court held, "Every police officer should know that it is objectively unreasonable to shoot . . . an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals." *Id.*, at 1285.

The same holds true here. Like the man in *Deorle*, Hughes committed no serious crime, had been given no warning of the imminent use of force, posed no risk of flight, and presented no objectively reasonable threat to the safety of officers or others. In fact, Hughes presented [***24] even less of a danger than the man in *Deorle*, for, unlike him, she did not threaten to "kick [their] ass," did not appear agitated, and did not raise her kitchen knife or make any aggressive gestures toward the police or Chadwick. If the police officers acted unreasonably in shooting the agitated, screaming man in *Deorle* with beanbag bullets, *a fortiori* Kisela acted unreasonably in shooting the calm-looking, stationary Hughes with real bullets. In my view, *Deorle* and the precedent it cites place the unlawfulness of Kisela's conduct "'beyond debate.'" *Wesby*, 583 U. S., at ___, 138 S. Ct. 577, 199 L. Ed. 2d 453, at 467).

The majority strains mightily to distinguish *Deorle*, to no avail. It asserts, for instance, that, unlike the man in *Deorle*, Hughes was "armed with a large knife." *Ante*, at 7. But that is not a fair characterization of the record, particularly at this procedural juncture. Hughes was not "armed" with a knife. She was holding "a kitchen knife—an everyday household item which can be used as a weapon but ordinarily is a tool for safe, benign purposes"—down at her side with the blade pointed away from Chadwick. 862 F. 3d, at 788 (Berzon, J., concurring in denial of rehearing en banc). Hughes also spoke calmly with Chadwick during the events at issue, did not raise [***25] the knife, and made no other aggressive movements, undermining any suggestion that she was a threat to Chadwick or anyone else. Similarly, the majority asserts that Hughes was "within striking distance" of Chadwick, *ante*, at [**462] 7, but that stretches the facts and contravenes this Court's repeated admonition that inferences must be drawn in the exact opposite direction, *i.e.,* in favor of Hughes. See *Tolan*, 572 U. S., at ___, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (slip op., at 8). The facts, properly viewed, show that, when she was shot, Hughes had stopped and stood still about six feet away from Chadwick. Whether Hughes could "strik[e]" Chadwick from that particular distance, even though the kitchen knife was held down at her side, is an inference that should be drawn by the jury, not this Court.

The majority next posits that Hughes, unlike the man in *Deorle*, "ignored the officers' orders to drop the" kitchen knife. *Ante*, at 7. Yet again, the majority here draws inferences in favor of Kisela, instead of Hughes. The available evidence would [*1160] allow a reasonable jury to find that Hughes did not hear or register the officers' swift commands and that Kisela, like his fellow officers on the scene, should have realized that as well. See *supra*, at 3-4. Accordingly, at least at the summary-judgment stage, [***26] the Court is mistaken in

distinguishing *Deorle* based on Hughes' ostensible disobedience to the officers' directives.

The majority also implies that *Deorle* is distinguishable because the police in that case observed the man over a 40-minute period, whereas the situation here unfolded in less than a minute. *Ante*, at 7. But that fact favors Hughes, not Kisela. The only reason this case unfolded in such an abrupt timeframe is because Kisela, unlike his fellow officer, showed no interest in trying to talk further to Hughes or use a "lesser means" of force. See Record 120-121, 304.

Finally, the majority passingly notes that "this Court has already instructed the Court of Appeals not to read [*Deorle*] too broadly." *Ante*, at 7 (citing *City and County of San Francisco* v. *Sheehan*, 575 U. S. ___, ___-___ , 135 S. Ct. 1765, 191 L. Ed. 2d 856, 869 (2015)). But the Court in *Sheehan* concluded that *Deorle* was plainly distinguishable because, unlike in *Deorle*, the officers there confronted a woman who "was dangerous, recalcitrant, law-breaking, and out of sight." 575 U. S., at ___, 135 S. Ct. 1765, 191 L. Ed. 2d 856, at 869. As explained above, however, Hughes was none of those things: She did not threaten or endanger the officers or Chadwick, she did not break any laws, and she was visible to the officers on the scene. See *supra*, at 2-4. Thus, there simply is no basis for the Court's [***27] assertion that "'the differences between [*Deorle*] and the case before us leap from the page.'" *Ante*, at 7 (quoting *Sheehan*, 575 U. S., at ___, 135 S. Ct. 1765, 191 L. Ed. 2d 856, at 869).

Deorle, moreover, is not the only case that provided fair notice to Kisela that shooting Hughes under these circumstances was unreasonable. For instance, the Ninth Circuit has held that the use of deadly force against an individual holding a semiautomatic rifle was unconstitutional where the individual "did not point the gun at the officers and apparently was not facing them when they shot him the first time." *Curnow* v. *Ridgecrest Police*, 952 F. 2d 321, 325 (1991). Similarly, in *Harris* v. *Roderick*, [**463] 126 F. 3d 1189 (1997), the Ninth Circuit held that the officer unreasonably used deadly force against a man who, although armed, made "no threatening movement" or "aggressive move of any kind." *Id.*, at 1203. [1] Both *Curnow* and *Harris* establish that, where, as here, an individual with a weapon poses no objective and immediate threat to officers or third parties, law enforcement cannot resort to excessive force. See *Harris*, 126 F. 3d, at 1201 ("Law enforcement officers may not shoot to kill unless, at a minimum, the suspect presents an immediate threat to the officers, or is fleeing and his escape will result in a serious threat of injury to persons").

If all that were not enough, [***28] decisions from several other Circuits illustrate that the Fourth Amendment clearly forbids the use of deadly force against a person who is [*1161] merely holding a knife but not threatening anyone with it. See, *e.g.*, *McKinney* v. *DeKalb County*, 997 F. 2d 1440, 1442 (CA11 1993) (affirming denial of summary judgment based on qualified immunity to officer who shot a person holding a butcher knife in one hand and a foot-long stick in the other, where the person threw the stick and began to rise from his seated position); *Reyes* v. *Bridgwater*, 362 Fed. Appx. 403, 404-405 (CA5 2010) (reversing grant of summary judgment based on qualified immunity to officer who shot a person holding a kitchen knife in his apartment entryway, even though he refused to follow the officer's multiple commands to drop the knife); *Duong* v. *Telford Borough*, 186 Fed. Appx. 214, 215, 217 (CA3 2006) (affirming denial of summary judgment based on qualified immunity to officer who shot a person holding a knife because a reasonable jury could conclude that the plaintiff was sitting down and pointing the knife away from

[1] The majority insists that reliance on *Harris* fails the "'straight-face test'" because *Harris* involved an FBI sniper on a hilltop who shot a man while he was retreating to a cabin during a standoff. *Ante*, at 8 (quoting 862 F. 3d, at 797 (opinion of Ikuta, J.)). If anything, though, the context of *Harris* could be viewed as more dangerous than the context here because, unlike Hughes, the suspect in *Harris* had engaged in a firefight with other officers the previous day, during which an officer was shot. See 126 F. 3d, at 1193-1194.

the officer at the time he was shot and had not received any warnings to drop the knife).

Against this wall of case law, the majority points to a single Ninth Circuit decision, *Blanford* v. *Sacramento County*, 406 F. 3d 1110 (2005), as proof that Kisela reasonably could have believed that Hughes posed an immediate danger. But *Blanford* involved far different circumstances. [***29] In that case, officers observed a man walking through a neighborhood brandishing a 2½-foot cavalry sword; officers commanded the man to drop the sword, identified themselves as police, and warned "'We'll shoot.'" *Id.*, at 1112-1113. The man responded with "a loud growling or roaring sound," which increased the officers' concern that he posed a risk of harm. *Id.*, at 1113. In an effort to "evade [police] authority," the man, while still wielding the sword, tried to enter a home, thus prompting officers to open fire to protect anyone who might be inside. *Id.*, at 1113, 1118. The Ninth Circuit concluded that use of deadly force was reasonable in those circumstances. See *id.*, at 1119.

This case differs significantly from *Blanford* in several key respects. Unlike the man in *Blanford*, Hughes [**464] held a kitchen knife down by her side, as compared to a 2½-foot sword; she appeared calm and collected, and did not make threatening noises or gestures toward the officers on the scene; she stood still in front of her own home, and was not wandering about the neighborhood, evading law enforcement, or attempting to enter another house. Moreover, unlike the officers in *Blanford*, Kisela never verbally identified himself as an officer and never warned Hughes that he [***30] was going to shoot before he did so. Given these significant differences, no reasonable officer would believe that *Blanford* justified Kisela's conduct. The majority's conclusion to the contrary is fanciful.

***

In sum, precedent existing at the time of the shooting clearly established the unconstitutionality of Kisela's conduct. The majority's decision, no matter how much it says otherwise, ultimately rests on a faulty premise: that those cases are not identical to this one. But that is not the law, for our cases have never required a factually identical case to satisfy the "clearly established" standard. *Hope*, 536 U. S., at 739, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666. It is enough that governing law places "the constitutionality of the officer's conduct beyond debate." *Wesby*, 583 U. S., at ___, 138 S. Ct. 577, 199 L. Ed. 2d 453, at 467 (internal quotation marks omitted). Because, taking the facts in the light most favorable to Hughes, it is "beyond debate" that Kisela's use of deadly force was objectively unreasonable, he was not entitled to summary judgment on the basis of qualified immunity.

[*1162] III

For the foregoing reasons, it is clear to me that the Court of Appeals got it right. But even if that result were not so clear, I cannot agree with the majority's apparent view that the decision below was so manifestly [***31] incorrect as to warrant "the extraordinary remedy of a summary reversal." *Major League Baseball Players Assn.* v. *Garvey*, 532 U. S. 504, 512-513, 121 S. Ct. 1724, 149 L. Ed. 2d 740 (2001) (Stevens, J., dissenting). "A summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker* v. *Hansen*, 450 U. S. 785, 791, 101 S. Ct. 1468, 67 L. Ed. 2d 685 (1981) (Marshall, J., dissenting); *Office of Personnel Management* v. *Richmond*, 496 U. S. 414, 422, 110 S. Ct. 2465, 110 L. Ed. 2d 387 (1990) ("Summary reversals of courts of appeals are unusual under any circumstances"). This is not such a case. The relevant facts are hotly disputed, and the qualified-immunity question here is, at the very best, a close call. Rather than letting this case go to a jury, the Court decides to intervene prematurely, purporting to correct an error that is not at all clear.

This unwarranted summary reversal is symptomatic of "a disturbing trend regarding the use of this Court's resources" in qualified-immunity cases. *Salazar-Limon* v. *Houston*, 581 U. S. ___, ___ , 137 S. Ct. 1277, 197 L. Ed. 2d 751 (2017) (Sotomayor, J., dissenting from denial of certiorari). As I have previously noted, this Court routinely displays an unflinching willingness "to summarily reverse courts for wrongly denying officers the protection [**465] of qualified immunity" but "rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases." *Id.*, at ___-___, 137 S. Ct. 1277, 197 L. Ed. 2d 751; see [***32] also Baude, Is Qualified Immunity Unlawful? 106 Cal. L. Rev. 45, 82 (2018) ("[N]early all of the Supreme Court's qualified immunity cases come out the same way—by finding immunity for the officials"); Reinhardt, The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences, 113 Mich. L. Rev. 1219, 1244-1250 (2015). Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.

The majority today exacerbates that troubling asymmetry. Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right or just under the law about this, I respectfully dissent.

References

U.S.C.S., Constitution, Amendment 4; 42 U.S.C.S. § 1983

Antieau on Local Government Law § 77.04 (Matthew Bender 2d ed.)

L Ed Digest, Civil Rights § 32; Public Officers § 56

L Ed Index, Qualified Immunity

Supreme Court's views as to application or applicability of doctrine of qualified immunity in action [***33] under 42 U.S.C.S. § 1983 or in Bivens action, seeking damages for alleged civil rights violations. 116 L. Ed. 2d 965.

Supreme Court's construction of Civil Rights Act of 1871 (42 U.S.C.S. § 1983) providing private right of action for violation of federal rights. 43 L. Ed. 2d 833.

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District of Columbia v. Wesby

Supreme Court of the United States

October 4, 2017, Argued; January 22, 2018, Decided

No. 15-1485.

Reporter

138 S. Ct. 577 *; 199 L. Ed. 2d 453 **; 2018 U.S. LEXIS 760 ***; 86 U.S.L.W. 4017; 27 Fla. L. Weekly Fed. S 37; 2018 WL 491521

DISTRICT OF COLUMBIA, et al., Petitioners v. THEODORE WESBY, et al.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: On remand at, Remanded by Wesby v. District of Columbia, 719 Fed. Appx. 7, 2018 U.S. App. LEXIS 7614 (D.C. Cir., Mar. 26, 2018)

Prior History: [***1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Wesby v. District of Columbia, 765 F.3d 13, 412 U.S. App. D.C. 246, 2014 U.S. App. LEXIS 16893 (Sept. 2, 2014)

Disposition: Reversed and remanded.

Syllabus

[*580] District of Columbia police officers responded to a complaint about loud music and illegal activities in a vacant house. Inside, they found the house nearly barren and in disarray. The officers smelled marijuana and observed beer bottles and cups of liquor on the floor, which was dirty. They found a make-shift strip club in the living room, and a naked woman and several men in an upstairs bedroom. Many partygoers scattered when they saw the uniformed officers, and some hid. The officers questioned everyone and got inconsistent stories. Two women identified "Peaches" as the house's tenant and said that she had given the partygoers permission to have the party. But Peaches was not there. When the officers spoke by phone to Peaches, she was nervous, agitated, and evasive. At first, she [**458] claimed that she was renting the house and had given the partygoers permission to have the party, but she eventually admitted that she did not have permission to use the house. The owner confirmed that he had not given anyone permission to be there. The [*581] officers then arrested the partygoers [***2] for unlawful entry.

Several partygoers sued for false arrest under the Fourth Amendment and District law. The District Court concluded that the officers lacked probable cause to arrest the partygoers for unlawful entry and that two of the officers, petitioners here, were not entitled to qualified immunity. A divided panel of the D. C. Circuit affirmed.

Held:

1. The officers had probable cause to arrest the partygoers. Pp. ___ - ___, 199 L. Ed. 2d, at 463-466.

(a) Considering the "totality of the circumstances," *Maryland* v. *Pringle*, 540 U. S. 366, 371, 124 S. Ct. 795, 157 L. Ed. 2d 769, the officers made an "entirely reasonable inference" that the partygoers knew they did not have permission to be in the house, *id.*, at 372, 124 S. Ct. 795, 157 L. Ed. 2d 769. Taken together, the condition of the house and the conduct of the partygoers allowed the officers to make several " 'common-sense conclusions about human behavior.' " *Illinois v. Gates*, 462 U. S. 213, 231, 103 S. Ct. 2317, 76 L. Ed. 2d 527. Because most homeowners do not live in such conditions or permit such activities in their homes, the officers could infer that the partygoers knew the party was not authorized. The officers also could infer that the partygoers knew that they were not supposed to be in the house because they scattered and hid when the officers arrived. See *Illinois* v. *Wardlow*, 528 U. S. 119, 124-125, 120 S. Ct. 673, 145 L. Ed. 2d 570. The partygoers' vague and implausible answers to questioning also gave the officers reason [***3] to infer that the partygoers were lying and that their lies suggested a guilty mind. Cf. *Devenpeck* v. *Alford*, 543 U. S. 146, 149, 155-156, 125 S. Ct. 588, 160 L. Ed. 2d 537. Peaches' lying and evasive behavior gave the officers reason to discredit everything she said. The officers also could have inferred that she lied when she said she had invited the partygoers to the house, or that she told the partygoers that she was not actually renting the house. Pp. ___ - ___, 199 L. Ed. 2d, at 463-465.

(b) The panel majority failed to follow two basic and well-established principles of law. First, it viewed each fact "in isolation, rather than as a factor in the totality of the circumstances." *Pringle*, *supra*, at 372, n. 2, 124 S. Ct. 795, 157 L. Ed. 2d 769. Second, it believed that it could dismiss outright any circumstances that were "susceptible of innocent explanation," *United States* v. *Arvizu*, 534 U. S. 266, 277, 122 S. Ct. 744, 151 L. Ed. 2d 740. Instead, it should have asked whether a reasonable officer could conclude--considering all of the surrounding circumstances, including the plausibility of the explanation itself--that there was a "substantial chance of criminal activity," *Gates*, *supra*, at 244, n. 13, 103 S. Ct. 2317, 76 L. Ed. 2d 527. Pp. ___ - ___, 199 L. Ed. 2d, at 465-466.

2. The officers are entitled to qualified immunity. Pp. ___ - ___, 199 L. Ed. 2d, at 466-471.

(a) As relevant here, officers are [**459] entitled to qualified immunity under 42 U. S. C. §1983 unless the unlawfulness of their conduct was "clearly established at the time," *Reichle* v. *Howards*, 566 U. S. 658, 664, 132 S. Ct. 2088, 182 L. Ed. 2d 985. To be clearly [***4] established, a legal principle must be "settled law," *Hunter* v. *Bryant*, 502 U. S. 224, 228, 112 S. Ct. 534, 116 L. Ed. 2d 589, and it must clearly prohibit the officer's conduct in the particular circumstances before him, see *Saucier* v. *Katz*, 533 U. S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272. In the warrantless arrest context, "a body of relevant case law" is usually necessary to " 'clearly establish' the answer" with respect to probable cause. *Brosseau* v. *Haugen*, 543 U. S. 194, 199, 125 S. Ct. 596, 160 L. Ed. 2d 583.

Even assuming that the officers lacked actual probable cause to arrest [*582] the partygoers, they are entitled to qualified immunity because, given "the circumstances with which [they] w[ere] confronted," they "reasonably but mistakenly conclude[d] that probable cause [wa]s present." *Anderson* v. *Creighton*, 483 U. S. 635, 640, 641, 107 S. Ct. 3034, 97 L. Ed. 2d 523. The panel majority and the partygoers have failed to identify a single precedent finding a Fourth Amendment violation "under similar circumstances." *White* v. *Pauly*, 580 U. S. ___, ___, 137 S. Ct. 548, 196 L. Ed. 2d 463. And this is not an "obvious case" where "a body of relevant case law" is unnecessary. *Brosseau*, *supra*, at 199, 125 S. Ct. 596. Pp. ___ -

___, 199 L. Ed. 2d, at 466-469.

(b) Instead of following this straightforward analysis, the panel majority reasoned that, under clearly established District law, a suspect's bona fide belief of a right to enter vitiates probable cause to arrest for unlawful entry. Thus, it concluded that the "uncontroverted evidence" of an invitation in this case meant that the officers could not infer the partygoers' intent from [***5] other circumstances or disbelieve their story. But looking at the entire legal landscape at the time of the arrests, a reasonable officer could have interpreted the law as permitting the arrests here. There was no controlling case holding that a bona fide belief of a right to enter defeats probable cause, that officers cannot infer a suspect's guilty state of mind based on his conduct alone, or that officers must accept a suspect's innocent explanation at face value. And several precedents suggested the opposite. Pp. ___ - ___, 199 L. Ed. 2d, at 469-471.

765 F. 3d 13, 412 U.S. App. D.C. 246, reversed and remanded.

Counsel: Todd Kim argued the cause for petitioners.

Robert A. Parker argued the cause for the United States as amicus curiae.

Nathaniel P. Garrett argued the cause for respondents.

Judges: Thomas, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Breyer, Alito, Kagan, and Gorsuch, JJ., joined. Sotomayor, J., filed an opinion concurring in part and concurring in the judgment. Ginsburg, J., filed an opinion concurring in the judgment in part.

Opinion by: Thomas; Sotomayor; Ginsburg

Opinion

Justice **Thomas** delivered the opinion of the Court.

This case involves a civil suit against the District of Columbia and five of its police officers, brought by 16 individuals who were arrested for holding a raucous, late-night party in a house they did not have permission to enter. The United States Court of Appeals for the District of [***6] Columbia [**460] Circuit held that there was no probable cause to arrest the partygoers, and that the officers were not entitled to qualified immunity. We reverse on both grounds.

[*583] I

Around 1 a.m. on March 16, 2008, the District's Metropolitan Police Department received a complaint about loud music and illegal activities at a house in Northeast D. C. The caller, a former neighborhood commissioner, told police that the house had been vacant for several months. When officers arrived at the scene, several neighbors confirmed that the house should have been empty. The officers approached the house and, consistent with the complaint, heard loud music playing inside.

After the officers knocked on the front door, they saw a man look out the window and then run upstairs. One of the partygoers opened the door, and the officers entered. They immediately observed that the inside of the house "'was in disarray'" and looked like "'a vacant property.'" 841 F. Supp. 2d 20, 31 (DC 2012) (quoting Defs. Exh. A). The officers smelled marijuana and saw beer bottles and cups of liquor on the floor. In fact, the floor was so dirty that one of the partygoers

refused to sit on it while being questioned. Although the house had working electricity and [***7] plumbing, it had no furniture downstairs other than a few padded metal chairs. The only other signs of habitation were blinds on the windows, food in the refrigerator, and toiletries in the bathroom.

In the living room, the officers found a makeshift strip club. Several women were wearing only bras and thongs, with cash tucked into their garter belts. The women were giving lap dances while other partygoers watched. Most of the onlookers were holding cash and cups of alcohol. After seeing the uniformed officers, many partygoers scattered into other parts of the house.

The officers found more debauchery upstairs. A naked woman and several men were in the bedroom. A bare mattress—the only one in the house—was on the floor, along with some lit candles and multiple open condom wrappers. A used condom was on the windowsill. The officers found one partygoer hiding in an upstairs closet, and another who had shut himself in the bathroom and refused to come out.

The officers found a total of 21 people in the house. After interviewing all 21, the officers did not get a clear or consistent story. Many partygoers said they were there for a bachelor party, but no one could identify the bachelor. Each [***8] of the partygoers claimed that someone had invited them to the house, but no one could say who. Two of the women working the party said that a woman named "Peaches" or "Tasty" was renting the house and had given them permission to be there. One of the women explained that the previous owner had recently passed away, and Peaches had just started renting the house from the grandson who inherited it. But the house had no boxes or moving supplies. She did not know Peaches' real name. And Peaches was not there.

An officer asked the woman to call Peaches on her phone so he could talk to her. Peaches answered and explained that she had just left the [**461] party to go to the store. When the officer asked her to return, Peaches refused because she was afraid of being arrested. The sergeant supervising the investigation also spoke with Peaches. At first, Peaches claimed to be renting the house from the owner, who was fixing it up for her. She also said that she had given the attendees permission to have the party. When the sergeant again asked her who had given her permission to use the house, Peaches became evasive and hung up. The sergeant called her back, and she began yelling and insisting that [***9] she had permission before hanging up a second time. The officers eventually got [*584] Peaches on the phone again, and she admitted that she did not have permission to use the house.

The officers then contacted the owner. He told them that he had been trying to negotiate a lease with Peaches, but they had not reached an agreement. He confirmed that he had not given Peaches (or anyone else) permission to be in the house—let alone permission to use it for a bachelor party. At that point, the officers arrested the 21 partygoers for unlawful entry. See D. C. Code §22-3302 (2008). The police transported the partygoers to the police station, where the lieutenant decided to charge them with disorderly conduct. See §22-1321. The partygoers were released, and the charges were eventually dropped. [1]

II

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[1] In their merits brief, the partygoers attempt to dispute several of these facts. See Brief for Respondents 26-30. But the facts they now contest were presented in the petition for a writ of certiorari, and the partygoers did not contest them in their brief in opposition. Under this Court's Rule 15.2, the partygoers' failure to contest these factual assertions at the certiorari stage waived their right to do so at the merits stage. See *Carcieri* v. *Salazar*, 555 U. S. 379, 395-396, 129 S. Ct. 1058, 172 L. Ed. 2d 791 (2009).

Furthermore, although both parties moved for summary judgment, the undisputed facts here are sufficient to resolve both probable cause and qualified immunity. Our analysis thus would not change no matter which party is considered the moving party. Cf. *Scott* v. *Harris*, 550 U. S. 372, 378-379, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (explaining that, at summary judgment, courts must view the facts and draw reasonable inferences in favor of the nonmoving party).

Respondents, 16 of the 21 partygoers, sued the District and five of the arresting officers. They sued the officers for false arrest under the Fourth Amendment, Rev. Stat. §1979, 42 U. S. C. §1983, and under District law. They sued the District for false arrest and negligent supervision under District law. The partygoers' claims were all "predicated upon the allegation that [they] were arrested without probable cause." 841 F. Supp. 2d, at 32.

On cross-motions for summary judgment, the District [***10] Court awarded partial summary judgment to the partygoers. *Id.*, at 48-49. It concluded that the officers lacked probable cause to arrest the partygoers for unlawful entry. [2] *Id.*, at 32-33. The officers were told that Peaches had invited the partygoers to the house, the District Court reasoned, and nothing the officers learned in their investigation suggested the partygoers "'knew or should have known that [they were] [**462] entering against the [owner's] will.'" *Id.*, at 32. The District Court also concluded that the officers were not entitled to qualified immunity under §1983. [3] It noted that, under District case law, "probable cause to arrest for unlawful entry requires evidence that the alleged intruder knew or should have known, upon entry, that such entry was against the will of the owner." [*585] *Id.*, at 37. And in its view, the officers had no such evidence. *Id.*, at 32-33, 37-38.

With liability resolved, the case proceeded to trial on damages. The jury awarded the partygoers a total of $680,000 in compensatory damages. After the District Court awarded attorney's fees, the total award was nearly $1 million.

On appeal, a divided panel of the D. C. Circuit affirmed. On the question of probable cause, the panel majority made Peaches' invitation "central" [***11] to its determination that the officers lacked probable cause to arrest the partygoers for unlawful entry. 765 F. 3d 13, 21, 412 U.S. App. D.C. 246 (2014). The panel majority asserted that, "in the absence of any conflicting information, Peaches' invitation vitiates the necessary element of [the partygoers'] intent to enter against the will of the lawful owner." *Ibid.* And the panel majority determined that "there is simply no evidence in the record that [the partygoers] had any reason to think the invitation was invalid." *Ibid.*

On the question of qualified immunity, the panel majority determined that it was "perfectly clear" that a person with "a good purpose and bona fide belief of her right to enter" lacks the necessary intent for unlawful entry. *Id.*, at 27. In other words, the officers needed "some evidence" that the partygoers "knew or should have known they were entering against the will of the lawful owner." *Ibid.* And here, the panel majority asserted, the officers must "have known that uncontroverted evidence of an invitation to enter the premises would vitiate probable cause for unlawful entry." *Ibid.*

Judge Brown dissented. She concluded that summary judgment on the false-arrest claims was improper because, under the totality of [***12] the circumstances, a reasonable officer "could disbelieve [the partygoers'] claim of innocent entry" and infer that they knew or should have known that they did not have permission to be in the house. *Id.*, at 34. She also disagreed with the denial of qualified immunity, contending that a reasonable officer could have found probable cause to arrest in this "unusual factual scenario, not well represented in the controlling case law." *Id.*, at 36.

The D. C. Circuit denied rehearing en banc over the dissent of four judges. The dissenters focused on qualified immunity, contending that the panel

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[2] Because probable cause is an objective standard, an arrest is lawful if the officer had probable cause to arrest for any offense, not just the offense cited at the time of arrest or booking. See *Devenpeck* v. *Alford*, 543 U. S. 146, 153-155, 125 S. Ct. 588, 160 L. Ed. 2d 537, and n. 2 (2004). Because unlawful entry is the only offense that the District and its officers discuss in their briefs to this Court, we likewise limit our analysis to that offense.

[3] The District Court granted summary judgment against two of the officers, but denied summary judgment against the other three because there were triable issues regarding qualified immunity. See 841 F. Supp. 2d 20, 32-46 (DC 2012). The partygoers voluntarily dismissed their claims against those three officers. See 765 F. 3d 13, 17, 412 U.S. App. D.C. 246 (CADC 2014).

opinion "contravene[d] . . . emphatic Supreme Court directives" that "police officers may not be held liable for damages unless the officers were 'plainly incompetent' or 'knowingly violate[d]' clearly established law." 816 F. 3d 96, 102, 421 U.S. App. D.C. 391 (2016) (quoting *Carroll* v. *Carman*, 574 U. S. ___, ___, 135 S. Ct. 348, 350, 190 L. Ed. 2d 311, 314 (2014) (*per curiam*)). The panel majority— Judges [**463] Pillard and Edwards—responded in a joint concurrence. 816 F. 3d, at 96-101. They insisted that the panel opinion did not misapply the law of qualified immunity, and that their disagreement with the dissenters was a mere "case-specific assessment of the circumstantial evidence in the record." *Id.*, at 100.

We granted certiorari to resolve two questions: whether the officers had probable cause [***13] to arrest the partygoers, and whether the officers were entitled to qualified immunity. See 580 U. S. ___, 137 S. Ct. 826, 196 L. Ed. 2d 610 (2017). We address each question in turn.

III

[1] The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Because arrests are "seizures" of "persons," they must be reasonable under the circumstances. See [*586] *Payton* v. *New York*, 445 U. S. 573, 585, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). A warrantless arrest is reasonable if the officer has probable cause to believe that the suspect committed a crime in the officer's presence. *Atwater* v. *Lago Vista*, 532 U. S. 318, 354, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001).

[2] To determine whether an officer had probable cause for an arrest, "we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Maryland* v. *Pringle*, 540 U. S. 366, 371, 124 S. Ct. 795, 157 L. Ed. 2d 769 (2003) (quoting *Ornelas* v. *United States*, 517 U. S. 690, 696, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996)). Because probable cause "deals with probabilities and depends on the totality of the circumstances," 540 U. S., at 371, 124 S. Ct. 795, 157 L. Ed. 2d 769, it is "a fluid concept" that is "not readily, or even usefully, reduced to a neat set of legal rules," *Illinois* v. *Gates*, 462 U. S. 213, 232, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). It "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id.*, at 243-244, n. 13, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Probable cause "is not a high bar." *Kaley* v. *United States*, 571 U. S. ___, ___ , 571 U.S. 320, 134 S. Ct. 1090, 1103, 188 L. Ed. 2d 46, 62 (2014).

A

There is no dispute that the partygoers entered [***14] the house against the will of the owner. Nonetheless, the partygoers contend that the officers lacked probable cause to arrest them because the officers had no reason to believe that they "knew or should have known" their "entry was unwanted." *Ortberg* v. *United States*, 81 A. 3d 303, 308 (D. C. 2013). We disagree. Considering the totality of the circumstances, the officers made an "entirely reasonable inference" that the partygoers were knowingly taking advantage of a vacant house as a venue for their late-night party. *Pringle*, *supra*, at 372, 124 S. Ct. 795, 157 L. Ed. 2d 769.

Consider first the condition of the house. Multiple neighbors, including a former neighborhood official, informed [**464] the officers that the house had been vacant for several months. [4] The house had no furniture, except for a few padded metal chairs and a bare mattress. The rest of the house was empty, save for some fixtures and large appliances. The house had a few signs of inhabitance—working electricity and plumbing, blinds on the windows, toiletries in the bathroom, and food in the refrigerator. But those facts are not

[4] At oral argument, the partygoers argued that the house was not formally "vacant" under District law. Tr. of Oral Arg. 34. But a reasonable officer could infer that the complaining neighbors used the term "vacant" in the colloquial, not the legal, sense.

necessarily inconsistent with the house being unoccupied. The owner could have paid the utilities and kept the blinds while he looked for a new tenant, and the partygoers could have brought the food [***15] and toiletries. Although one woman told the officers that Peaches had recently moved in, the officers had reason to doubt that was true. There were no boxes or other moving supplies in the house; nor were there other possessions, such as clothes in the closet, suggesting someone lived there.

In addition to the condition of the house, consider the partygoers' conduct. The party was still going strong when the officers arrived after 1 a.m., with music so loud that it could be heard from outside. Upon entering the house, multiple officers smelled marijuana. [5] The partygoers left [*587] beer bottles and cups of liquor on the floor, and they left the floor so dirty that one of them refused to sit on it. The living room had been converted into a makeshift strip club. Strippers in bras and thongs, with cash stuffed in their garter belts, were giving lap dances. Upstairs, the officers found a group of men with a single, naked woman on a bare mattress—the only bed in the house—along with multiple open condom wrappers and a used condom.

Taken together, the condition of the house and the conduct of the partygoers allowed the officers to make several "'common-sense conclusions about human behavior.'" [***16] *Gates*, *supra*, at 231, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (quoting *United States* v. *Cortez*, 449 U. S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981)). Most homeowners do not live in near-barren houses. And most homeowners do not invite people over to use their living room as a strip club, to have sex in their bedroom, to smoke marijuana inside, and to leave their floors filthy. The officers could thus infer that the partygoers knew their party was not authorized.

The partygoers' reaction to the officers gave them further reason to believe that the partygoers knew they lacked permission to be in the house. Many scattered at the sight of the uniformed officers. Two hid themselves, one in a closet and the other in a bathroom. [3] "[U]nprovoked flight upon noticing the police," we have explained, "is certainly suggestive" of wrongdoing and can be treated as "suspicious behavior" that factors into [**465] the totality of the circumstances. *Illinois* v. *Wardlow*, 528 U. S. 119, 124-125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000). In fact, "deliberately furtive actions and flight at the approach of . . . law officers are *strong* indicia of *mens rea*." *Sibron* v. *New York*, 392 U. S. 40, 66, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968) (emphasis added). A reasonable officer could infer that the partygoers' scattering and hiding was an indication that they knew they were not supposed to be there.

The partygoers' answers to the officers' questions also suggested their guilty state of mind. When the officers asked who had [***17] given them permission to be there, the partygoers gave vague and implausible responses. They could not say who had invited them. Only two people claimed that Peaches had invited them, and they were working the party instead of attending it. If Peaches was the hostess, it was odd that none of the partygoers mentioned her name. Additionally, some of the partygoers claimed the event was a bachelor party, but no one could identify the bachelor. The officers could have disbelieved them, since people normally do not throw a bachelor party without a bachelor. Based on the vagueness and implausibility of the partygoers' stories, the officers could have reasonably inferred that they were lying and that their lies suggested a guilty mind. Cf. *Devenpeck* v. *Alford*, 543 U. S. 146, 149, 155-156, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004) (noting that the

[5] The panel majority dismissed this fact because the officers "did not see any evidence of drugs" and did "not attempt to justify [the] arrests" based on drug use. 765 F. 3d, at 23, n. 5. But a reasonable officer could infer, based on the smell, that marijuana had been used in the house. See *Johnson* v. *United States*, 333 U. S. 10, 13, 68 S. Ct. 367, 92 L. Ed. 436 (1948) (noting that "the odor" of narcotics can "be evidence of the most persuasive character"). And the officers could consider the drug use inside the house as evidence that the partygoers knew their presence was unwelcome.

suspect's "untruthful and evasive" answers to police questioning could support probable cause).

The panel majority relied heavily on the fact that Peaches said she had invited the partygoers to the house. But when the officers spoke with Peaches, she was nervous, agitated, and evasive. Cf. [*588] *Wardlow*, *supra*, at 124, 120 S. Ct. 673, 145 L. Ed. 2d 570 (explaining that [4] the police can take a suspect's "nervous, evasive behavior" into account). After initially insisting that she had permission [***18] to use the house, she ultimately confessed that this was a lie—a fact that the owner confirmed. Peaches' lying and evasive behavior gave the officers reason to discredit everything she had told them. For example, the officers could have inferred that Peaches lied to them when she said she had invited the others to the house, which was consistent with the fact that hardly anyone at the party knew her name. Or the officers could have inferred that Peaches told the partygoers (like she eventually told the police) that she was not actually renting the house, which was consistent with how the partygoers were treating it.

Viewing these circumstances as a whole, a reasonable officer could conclude that there was probable cause to believe the partygoers knew they did not have permission to be in the house.

B

In concluding otherwise, the panel majority engaged in an "excessively technical dissection" of the factors supporting probable cause. *Gates*, 462 U. S., at 234, 103 S. Ct. 2317, 76 L. Ed. 2d 527. Indeed, the panel majority failed to follow two basic and well-established principles of law.

First, the panel majority viewed each fact "in isolation, rather than as a factor in the totality of the circumstances." *Pringle*, 540 U. S., at 372, n. 2, 124 S. Ct. 795, 157 L. Ed. 2d 769. This was "mistaken in light of our [**466] precedents." [***19] *Ibid.* [5] The "totality of the circumstances" requires courts to consider "the whole picture." *Cortez*, *supra*, at 417, 101 S. Ct. 690, 66 L. Ed. 2d 621. Our precedents recognize that the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation. See *United States* v. *Arvizu*, 534 U. S. 266, 277-278, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002). Instead of considering the facts as a whole, the panel majority took them one by one. For example, it dismissed the fact that the partygoers "scattered or hid when the police entered the house" because that fact was "not sufficient *standing alone* to create probable cause." 765 F. 3d, at 23 (emphasis added). Similarly, it found "nothing in the record suggesting that the condition of the house, *on its own*, should have alerted the [partygoers] that they were unwelcome." *Ibid.* (emphasis added). The totality-of-the-circumstances test "precludes this sort of divide-and-conquer analysis." *Arvizu*, 534 U. S., at 274, 122 S. Ct. 744, 151 L. Ed. 2d 740.

Second, the panel majority mistakenly believed that it could dismiss outright any circumstances that were "susceptible of innocent explanation." *Id.*, at 277, 122 S. Ct. 744, 151 L. Ed. 2d 740. For example, the panel majority brushed aside the drinking and the lap dances as "consistent with" the partygoers' explanation that they were having a bachelor party. 765 F. 3d, at 23. And it similarly dismissed the condition of the house as "entirely [***20] consistent with" Peaches being a "new tenant." *Ibid.* But probable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts. As we have explained, [6] "the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *Gates*, 462 U. S., at 244, n. 13, 103 S. Ct. 2317, 76 L. Ed. 2d 527. Thus, the panel majority should have asked whether a reasonable officer could conclude—considering all of the surrounding circumstances, including the plausibility of the explanation itself—that there was a "substantial chance of criminal activity." *Ibid.*

[*589] The circumstances here certainly suggested criminal activity. As explained, the officers found a

group of people who claimed to be having a bachelor party with no bachelor, in a near-empty house, with strippers in the living room and sexual activity in the bedroom, and who fled at the first sign of police. The panel majority identified innocent explanations for most of these circumstances in isolation, but again, this kind of divide-and-conquer approach is improper. A factor viewed in isolation is often more "readily susceptible to an innocent explanation" than one viewed as part of [***21] a totality. *Arvizu*, *supra*, at 274, 122 S. Ct. 744, 151 L. Ed. 2d 740. And here, the totality of the circumstances gave the officers plenty of reasons to doubt the partygoers' protestations of innocence.

For all of these reasons, we reverse the D. C. Circuit's holding that the officers lacked probable cause to arrest. Accordingly, the District and its officers are entitled to summary judgment on all of the partygoers' claims. [6]

IV

Our conclusion that the officers had [**467] probable cause to arrest the partygoers is sufficient to resolve this case. But [7] where, as here, the Court of Appeals erred on both the merits of the constitutional claim and the question of qualified immunity, "we have discretion to correct its errors at each step." *Ashcroft v. al-Kidd*, 563 U. S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011); see, *e.g.*, *Plumhoff* v. *Rickard*, 572 U. S. ___, 572 U.S. 765, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014). We exercise that discretion here because the D. C. Circuit's analysis, if followed elsewhere, would "undermine the values qualified immunity seeks to promote." *al-Kidd*, *supra*, at 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149. [7]

A

[8] Under our precedents, officers are entitled to qualified immunity under §1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was "clearly established at the time." *Reichle* v. *Howards*, 566 U. S. 658, 664, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012). "Clearly established" means that, at the time of the officer's conduct, the law [***22] was "'sufficiently clear' that every 'reasonable official would understand that what he is doing'" is unlawful. *al-Kidd*, *supra*, at 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (quoting *Anderson* v. *Creighton*, 483 U. S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). In other words, existing law must have placed the constitutionality of the officer's conduct "beyond debate." *al-Kidd*, *supra*, at 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149. This demanding standard protects "all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U. S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).

[9] To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be "settled law," *Hunter* v. *Bryant*, 502 U. S. 224, 228, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (*per curiam*), which means it is dictated by "controlling authority" or "a robust 'consensus of cases [*590] of persuasive authority,'" *al-Kidd*, *supra*, at 741-742, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (quoting *Wilson* v. *Layne*, 526 U. S. 603, 617, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)). It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. See *Reichle*, 566 U. S., at 666, 132 S. Ct. 2088, 182 L. Ed. 2d 985. Otherwise, the rule is not one that "every reasonable official" would know. *Id.*, at 664, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (internal quotation marks omitted).

[6] The partygoers do not contest that the presence of probable cause defeats all of their claims.

[7] We continue to stress that lower courts "should think hard, and then think hard again," before addressing both qualified immunity and the merits of an underlying constitutional claim. *Camreta* v. *Greene*, 563 U. S. 692, 707, 131 S. Ct. 2020, 179 L. Ed. 2d 1118 (2011). We addressed the merits of probable cause here, however, because a decision on qualified immunity alone would not have resolved all of the claims in this case.

[10] The "clearly established" standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well [***23] defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier* v. *Katz*, 533 U. S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). This requires a high [**468] "degree of specificity." *Mullenix* v. *Luna*, 577 U. S. ___, ___, 136 S. Ct. 305, 309, 193 L. Ed. 2d 255, 260 (2015) (*per curiam*). We have repeatedly stressed that courts must not "define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff*, *supra*, at ___-___, 134 S. Ct. 2012, 2023, 188 L. Ed. 2d 1056, 1069) (internal quotation marks and citation omitted). A rule is too general if the unlawfulness of the officer's conduct "does not follow immediately from the conclusion that [the rule] was firmly established." *Anderson*, *supra*, at 641, 107 S. Ct. 3034, 97 L. Ed. 2d 523. In the context of a warrantless arrest, the rule must obviously resolve "whether 'the circumstances with which [the particular officer] was confronted . . . constitute[d] probable cause.'" *Mullenix*, *supra*, at ___, 136 S. Ct. 305, 309, 193 L. Ed. 2d 255, 260) (quoting *Anderson*, *supra*, at 640-641, 107 S. Ct. 3034, 97 L. Ed. 2d 523; some alterations in original).

[11] We have stressed that the "specificity" of the rule is "especially important in the Fourth Amendment context." *Mullenix*, *supra*, at ___, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255, 259). Probable cause "turn[s] on the assessment of probabilities in particular factual contexts" and cannot be "reduced to a neat set of legal rules." *Gates*, 462 U. S., at 232, 103 S. Ct. 2317, 76 L. Ed. 2d 527. It is "incapable of precise definition or quantification into percentages." *Pringle*, 540 U. S., at 371, 124 S. Ct. 795, 157 L. Ed. 2d 769. Given [***24] its imprecise nature, officers will often find it difficult to know how the general standard of probable cause applies in "the precise situation encountered." *Ziglar* v. *Abbasi*, 582 U. S. ___, ___, 137 S. Ct. 1843, 1866, 198 L. Ed. 2d 290, 319 (2017)). Thus, we have stressed the need to "identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment." *White* v. *Pauly*, 580 U. S. ___, ___, 137 S. Ct. 548, 552, 196 L. Ed. 2d 463, 468 (2017) (*per curiam*); *e.g.*, *Plumhoff*, *supra*, at ___, 134 S. Ct. 2012, 2023, 188 L. Ed. 2d 1056, 1069. While there does not have to be "a case directly on point," existing precedent must place the lawfulness of the particular arrest "beyond debate." *al-Kidd*, *supra*, at 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149, 1159. Of course, there can be the rare "obvious case," where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances. *Brosseau* v. *Haugen*, 543 U. S. 194, 199, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (*per curiam*). But "a body of relevant case law" is usually necessary to "'clearly establish' the answer" with respect to probable cause. *Ibid.*

Under these principles, we readily conclude that the officers here were entitled to qualified immunity. We start by defining "the circumstances with which [the officers] w[ere] confronted." [*591] *Anderson*, 483 U. S., at 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523, . The officers found a group of people in a house that the neighbors had identified as vacant, that appeared to be vacant, and that the partygoers were treating as vacant. The group scattered, [***25] and some hid, at the sight of law enforcement. Their explanations for being at the house were full of holes. The source of their claimed invitation admitted that she had no [**469] right to be in the house, and the owner confirmed that fact.

Even assuming the officers lacked actual probable cause to arrest the partygoers, the officers are entitled to qualified immunity because they "reasonably but mistakenly conclude[d] that probable cause [wa]s present." *Id.*, at 641, 107 S. Ct. 3034, 97 L. Ed. 2d 523. Tellingly, neither the panel majority nor the partygoers have identified a

single precedent—much less a controlling case or robust consensus of cases—finding a Fourth Amendment violation "under similar circumstances." *Pauly*, *supra*, at ___, 137 S. Ct. 548, 552, 196 L. Ed. 2d 463, 468). And it should go without saying that this is not an "obvious case" where "a body of relevant case law" is not needed. *Brosseau*, *supra*, at 199, 125 S. Ct. 596, 160 L. Ed. 2d 583. The officers were thus entitled to qualified immunity.

B

The panel majority did not follow this straightforward analysis. It instead reasoned that, under clearly established District law, a suspect's "good purpose and bona fide belief of her right to enter" vitiates probable cause to arrest her for unlawful entry. 765 F. 3d, at 26-27. The panel majority then concluded—in a two-sentence paragraph without any explanation—that the officers must [***26] have known that "uncontroverted evidence of an invitation to enter the premises would vitiate probable cause for unlawful entry." *Id.*, at 27. By treating the invitation as "uncontroverted evidence," the panel majority assumed that the officers could not infer the partygoers' intent from other circumstances. And by treating the invitation as if it automatically vitiated probable cause, the panel majority assumed that the officers could not disbelieve the partygoers' story.

The rule applied by the panel majority was not clearly established because it was not "settled law." *Hunter*, 502 U. S., at 228, 112 S. Ct. 534, 116 L. Ed. 2d 589. The panel majority relied on a single decision, *Smith* v. *United States*, 281 A. 2d 438 (D. C. 1971). [8] The defendant in *Smith*, who was found trespassing in a locked construction site near midnight, asserted that he was entitled to a jury instruction explaining that a bona fide belief of a right to enter is a complete defense to unlawful entry. *Id.*, at 439-440. The D. C. Court of Appeals affirmed the trial court's refusal to give the instruction because the defendant had not established a "reasonable basis" for his alleged bona fide belief. *Ibid.* *Smith* does not say anything about whether the officers here could infer from all the evidence that the partygoers knew that they were trespassing. [***27]

[*592] Nor would it have been clear to every reasonable officer that, in these circumstances, the partygoers' bona fide belief that they were invited to [**470] the house was "uncontroverted." The officers knew that the partygoers had entered the home against the will of the owner. And [12] District case law suggested that officers can infer a suspect's guilty state of mind based solely on his conduct. [9] In *Tillman* v. *Washington Metropolitan Area Transit Authority*, 695 A. 2d 94 (D. C. 1997), for example, the D. C. Court of Appeals held that officers had probable cause to believe the plaintiff knowingly entered the paid area of a subway station without paying. *Id.*, at 96. The court rejected the argument that "the officers had no reason to believe that [the suspect] was 'knowingly' in the paid area" because the officers "reasonably could have inferred from [the suspect's] undisputed conduct that he had the intent required." *Ibid.* The court emphasized that officers can rely on "the ordinary and reasonable inference that people know what they are doing when they act." *Ibid.* The court also noted that "it would be an unusual case where the circumstances, while undoubtedly proving an

[8] We have not yet decided what precedents—other than our own—qualify as controlling authority for purposes of qualified immunity. See, *e.g.*, *Reichle* v. *Howards*, 566 U. S. 658, 665-666, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012) (reserving the question whether court of appeals decisions can be "a dispositive source of clearly established law"). We express no view on that question here. Relatedly, our citation to and discussion of various lower court precedents should not be construed as agreeing or disagreeing with them, or endorsing a particular reading of them. See *City and County of San Francisco* v. *Sheehan*, 575 U. S. ___, ___, n. 4, 135 S. Ct. 1765, 191 L. Ed. 2d 856 (2015)). Instead, we address only how a reasonable official "could have interpreted" them. *Reichle*, *supra*, at 667, 132 S. Ct. 2088, 182 L. Ed. 2d 985.

[9] The officers cited many of these authorities in their opening brief to the Court of Appeals. See Brief for Appellants in No. 12-7127 (CADC), pp. 28-29. Yet the panel majority failed to mention any of them in its analysis of qualified immunity.

unlawful act, nonetheless demonstrated so clearly that the suspect lacked the required intent that [***28] the police would not even have probable cause for an arrest." *Ibid.* And the fact that a case is unusual, we have held, is "an important indication . . . that [the officer's] conduct did not violate a 'clearly established' right." *Pauly*, 580 U. S., at ___, 137 S. Ct. 548, 196 L. Ed. 2d 463.

Moreover, existing precedent would have given the officers reason to doubt that they had to accept the partygoers' assertion of a bona fide belief. [13] The D. C. Court of Appeals has held that officers are not required to take a suspect's innocent explanation at face value. See, *e.g.*, *Nichols* v. *Woodward & Lothrop, Inc.*, 322 A. 2d 283, 286 (1974) (holding that an officer was not "obliged to believe the explanation of a suspected shoplifter"). Similar precedent exists in the Federal Courts of Appeals, which have recognized that officers are free to disregard either all innocent explanations, [10] or at least innocent explanations that are inherently or circumstantially implausible. [11] These cases suggest that innocent explanations— even uncontradicted ones—do not have any automatic, probable-cause-vitiating effect.

[**471] [*593] For these reasons, a reasonable officer, looking at the entire legal landscape at the time of the arrests, could have interpreted the law as permitting the arrests here. There was no controlling case holding [***29] that a bona fide belief of a right to enter defeats probable cause, that officers cannot infer a suspect's guilty state of mind based on his conduct alone, or that officers must accept a suspect's innocent explanation at face value. Indeed, several precedents suggested the opposite. The officers were thus entitled to summary judgment based on qualified immunity.

***

The judgment of the D. C. Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Concur by: Sotomayor Ginsburg

Concur

Justice **Sotomayor**, concurring in part and concurring in the judgment.

I agree with the majority that the officers here are entitled to qualified immunity and, for that reason alone, I concur in the Court's judgment reversing the judgment of the Court of Appeals for the District of Columbia. But, I disagree with the majority's decision to reach the merits of the probable-cause question, which it does apparently only to ensure that, in addition to respondents' 42 U. S. C. §1983 claims, the Court's decision will resolve respondents' state-law claims of false arrest and negligent supervision. See *ante*, at ___, n. 7, 199 L. Ed. 2d, at 467. It is possible that our qualified-immunity decision alone will resolve those claims. [***30] See Reply Brief 20, n. 7. In light of the lack of a dispute on an important legal question and the heavily factbound nature of the

[10] See, *e.g.*, *Borgman* v. *Kedley*, 646 F. 3d 518, 524 (CA8 2011) ("[An officer] need not rely on an explanation given by the suspect"); *Cox* v. *Hainey*, 391 F. 3d 25, 32, n. 2 (CA1 2004) ("A reasonable police officer is not required to credit a suspect's story"); *Marx* v. *Gumbinner*, 905 F. 2d 1503, 1507, n. 6 (CA11 1990) ("[Officers a]re not required to forego arresting [a suspect] based on initially discovered facts showing probable cause simply because [the suspect] offered a different explanation"); *Criss* v. *Kent*, 867 F. 2d 259, 263 (CA6 1988) ("A policeman . . . is under no obligation to give any credence to a suspect's story . . . ").

[11] See *e.g.*, *Ramirez* v. *Buena Park*, 560 F. 3d 1012, 1024 (CA9 2009) (holding that "innocent explanations for [a suspect's] odd behavior cannot eliminate the suspicious facts" and that "law enforcement officers do not have to rule out the possibility of innocent behavior" (internal quotation marks omitted)); *United States* v. *Edwards*, 632 F. 3d 633, 640 (CA10 2001) (holding that probable cause existed where the suspect "offered only implausible, inconsistent explanations of how he came into possession of the money"); *Bradway* v. *Gonzales*, 26 F. 3d 313, 321 (CA2 1994) (holding that "[a] reasonable officer who found the [stolen items], and who heard [the suspect's] implausible explanation for possessing them, would have believed that probable cause existed").

probable-cause determination here, I do not think that the Court should have reached that issue. The lower courts are well equipped to handle the remaining state-law claims in the first instance.

Justice **Ginsburg**, concurring in the judgment in part.

This case, well described in the opinion of the Court of Appeals, [1] leads me to question whether this Court, in assessing probable cause, should continue to ignore why police in fact acted. See *ante*, at ___, n. 2, 199 L. Ed. 2d, at 461. No arrests of plaintiffs-respondents were made until Sergeant Suber so instructed. His instruction, when conveyed to the officers he superintended, was based on an error of law. Sergeant Suber believed that the absence of the premises owner's consent, an uncontested fact in this case, sufficed to justify arrest of the partygoers for unlawful entry. See App. 60 (Suber deposition) (officers had probable cause to arrest because "Peaches did not have the right, nor did the [party-goers] have the right[,] to be inside that location"). An essential element of unlawful entry in the District of Columbia is that [***31] the defendant "knew or should have known that his entry was unwanted." *Ortberg* v. *United States*, 81 A. 3d 303, 308 (D. C. 2013). But under Sergeant Suber's view of the law, what the [**472] arrestees knew or should have known was irrelevant. They could be arrested, as he comprehended the law, even if they believed their entry was invited by a lawful occupant.

Ultimately, plaintiffs-respondents were not booked for unlawful entry. Instead, they were charged at the police station with disorderly conduct. Yet no police officers at the site testified to having observed any activities warranting a disorderly conduct charge. Quite the opposite. The officers at the scene of the arrest [*594] uniformly testified that they had neither seen nor heard anything that would justify such a charge, and Sergeant Suber specifically advised his superiors that the charge was unwarranted. See 765 F. 3d 13, 18, 412 U.S. App. D.C. 246 (CADC 2014); App. 56, 62-63, 79, 84, 90, 103.

The Court's jurisprudence, I am concerned, sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection. A number of commentators have criticized the path we charted in *Whren* v. *United States*, 517 U. S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), and follow-on opinions, holding that "an arresting officer's state of mind . . . is irrelevant to the existence of probable cause," *Devenpeck* v. *Alford*, 543 U. S. 146, 153, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004). See, *e.g.*, *[***32]* 1 W. LaFave, Search and Seizure §1.4(f), p. 186 (5th ed. 2012) ("The apparent assumption of the Court in *Whren*, that no significant problem of police arbitrariness can exist as to actions taken with probable cause, blinks at reality."). I would leave open, for reexamination in a future case, whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry. Given the current state of the Court's precedent, however, I agree that the disposition gained by plaintiffs-respondents was not warranted by "settled law." The defendants-petitioners are therefore sheltered by qualified immunity.

References

U.S.C.S., Constitution, Amendment 4

5 Antieau on Local Government Law § 77.04 (Matthew Bender 2d ed.)

24 Moore's Federal Practice § 604.04 (Matthew Bender 3d ed.)

L Ed Digest, Arrest §§4, 5; Public Officers § 56

[1] The Court's account of the undisputed facts goes beyond those recited by the Court of Appeals. Compare *ante*, at ___ - ___, 199 L. Ed. 2d, at 460-461, with 765 F. 3d 13, 17-18, 412 U.S. App. D.C. 246 (CADC 2014).

L Ed Index, Arrest; Qualified Immunity

Supreme Court's views as to extent of prosecutorial immunity from liability for damages for alleged violations of civil rights. 172 L. Ed. 2d 905.

Supreme Court's views as to application or applicability of doctrine of qualified immunity in action under 42 U.S.C.S. § 1983 or in Bivens action, seeking damages for alleged civil rights violations. 116 L. Ed. 2d 965.

What constitutes probable cause for arrest--Supreme Court cases. 28 L. Ed. 2d 978.

Unconstitutional conduct [***33] by state or federal officer as affecting governmental immunity from suit in federal court--Supreme Court cases. 12 L. Ed. 2d 1110.

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White v. Pauly

Supreme Court of the United States

January 9, 2017, Decided

No. 16-67

Reporter

137 S. Ct. 548 *; 196 L. Ed. 2d 463 **; 2017 U.S. LEXIS 5 ***; 85 U.S.L.W. 4027; 26 Fla. L. Weekly Fed. S 409; 2017 WL 69170

RAY WHITE, et al., Petitioners v. DANIEL T. PAULY, as personal representative of the ESTATE OF SAMUEL PAULY, DECEASED, et al.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Prior History: [***1] ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Pauly v. White, 814 F.3d 1060, 2016 U.S. App. LEXIS 2184 (10th Cir. N.M., Feb. 9, 2016)

Judges: Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan.

Opinion

[**465] [*549] PER CURIAM.

This case addresses the situation of an officer who—having arrived late at an ongoing police action and having witnessed shots being fired by one of several individuals in a house surrounded by other officers—shoots and kills an armed occupant of the house without first giving a warning.

According to the District Court and the Court of Appeals, the record, when viewed in the light most favorable to respondents, shows the following. Respondent Daniel Pauly was involved in a road-rage incident on a highway near Santa Fe, New Mexico. 814 F.3d 1060, 1064-1065 (CA10 2016). It was in the evening, and it was raining. The two women involved called 911 to report Daniel as a "'drunk driver'" who was "'swerving all crazy.'" *Id.*, at 1065. The women then followed Daniel down the highway, close behind him and with their bright lights on. Daniel, feeling threatened, pulled his truck over at an off-ramp to confront them. After a brief, nonviolent encounter, Daniel drove a short distance to a secluded house where he lived with his brother, Samuel Pauly.

Sometime between 9 p.m. and 10 p.m., Officer [***2] Kevin Truesdale was dispatched to respond to the women's 911 call. Truesdale, arriving after Daniel had already left the scene, interviewed the two women at the off-ramp. The women told Truesdale that Daniel had been driving recklessly and gave his license plate number to Truesdale. The state police dispatcher identified the plate as being registered to the Pauly brothers' address.

After the women left, Officer Truesdale was joined at the off-ramp by Officers Ray White and Michael Mariscal. The three agreed there was insufficient probable cause to arrest Daniel. Still, the officers decided to speak with Daniel to (1) get his side of

the story, (2) "'make sure nothing else happened,'" and (3) find out if he was intoxicated. *Id.*, at 1065. The officers split up. White stayed at the off-ramp in case Daniel returned. Truesdale and Mariscal drove in separate patrol cars to the Pauly brothers' address, less than a half mile away. Record 215. Neither officer turned on his flashing lights.

When Officers Mariscal and Truesdale arrived at the address they had received from the dispatcher, they found two different houses, the first with no lights on inside and a second one behind it on a hill. *Id.*, at 217, 246. [**466] Lights were [***3] on in the second one. The officers parked their cars near the first house. They examined a vehicle parked near that house but did not find Daniel's truck. *Id.*, at 310.

Officers Mariscal and Truesdale noticed the lights on in the second house and approached it in a covert manner to maintain officer safety. Both used their flashlights in an intermittent manner. Truesdale alone turned on his flashlight once they got close to the house's front door. Upon reaching the house, the officers found Daniel's pickup truck and spotted two men moving around inside the residence. Truesdale and Mariscal radioed White, who left the off-ramp to join them.

At approximately 11 p.m., the Pauly brothers became aware of the officers' presence and yelled out "'Who are you?'" and "'What do you want?'" 814 F. 3d, at 1066. In response, Officers Mariscal and Truesdale laughed and responded: "'Hey, [*550] (expletive), we got you surrounded. Come out or we're coming in.'" *Ibid.* Truesdale shouted once: "'Open the door, State Police, open the door.'" *Ibid.* Mariscal also yelled: "'Open the door, open the door.'" *Ibid.*

The Pauly brothers heard someone yelling, "'We're coming in. We're coming in.'" *Ibid.* Neither Samuel nor Daniel heard the officers identify [***4] themselves as state police. Record 81-82. The brothers armed themselves, Samuel with a handgun and Daniel with a shotgun. One of the brothers yelled at the police officers that "'We have guns.'" 814 F. 3d, at 1066. The officers saw someone run to the back of the house, so Officer Truesdale positioned himself behind the house and shouted "'Open the door, come outside.'" *Ibid.*

Officer White had parked at the first house and was walking up to its front door when he heard shouting from the second house. He half-jogged, half-walked to the Paulys' house, arriving "just as one of the brothers said: 'We have guns.'" *Ibid.*; see also Civ. No. 12-1311 (D NM, Feb. 5, 2014), App. to Pet. for Cert. 75-78. When White heard that statement, he drew his gun and took cover behind a stone wall 50 feet from the front of the house. Officer Mariscal took cover behind a pickup truck.

Just "a few seconds" after the "We have guns" statement, Daniel stepped part way out of the back door and fired two shotgun blasts while screaming loudly. 814 F. 3d, at 1066-1067. A few seconds after those shots, Samuel opened the front window and pointed a handgun in Officer White's direction. Officer Mariscal fired immediately at Samuel but missed. "'Four to five seconds'" [***5] later, White shot and killed Samuel. *Id.*, at 1067.

The District Court denied the officers' motions for summary judgment, and the facts are viewed in the light most favorable to the Paulys. *Mullenix* v. *Luna*, 577 U. S. ___, ___, n.*, 136 S. Ct. 305; 193 L. Ed. 2d 255, 257 (2015) (*per curiam*) Because this case concerns the defense of qualified immunity, however, the Court considers only the facts that were knowable to the defendant officers. *Kingsley* v. *Hendrickson*, 576 U. S. ___, ___, 135 S. Ct. 2466; 192 L. Ed. 2d 416, 428 (2015).

Samuel's estate and Daniel filed suit against, *inter alia*, Officers [**467] Mariscal, Truesdale, and White. One of the claims was that the officers were liable under Rev. Stat. §1979, 42 U. S. C. §1983, for violating Samuel's Fourth Amendment right to be free from excessive force. All three officers moved for summary judgment on qualified immunity grounds. White in particular argued that the Pauly brothers could not show that White's use of force violated the Fourth Amendment and,

regardless, that Samuel's Fourth Amendment right to be free from deadly force under the circumstances of this case was not clearly established.

The District Court denied qualified immunity. A divided panel of the Court of Appeals for the Tenth Circuit affirmed. As to Officers Mariscal and Truesdale, the court held that "[a]ccepting as true plaintiffs' version of the facts, a reasonable person in the officers' position should have understood their conduct [***6] would cause Samuel and Daniel Pauly to defend their home and could result in the commission of deadly force against Samuel Pauly by Officer White." 814 F. 3d, at 1076. The panel majority analyzed Officer White's claim separately from the 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 brothers to 'Come out or we're coming in.'" *Ibid.* Despite the fact that "Officer White . . . arrived late on [*551] the scene and heard only 'We have guns' . . . before taking cover behind a stone wall," the majority held that a jury could have concluded that White's use of deadly force was not reasonable. *Id.*, at 1077, 1082. The majority also decided that this 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. The Court of Appeals' ruling relied on general statements from this Court's case law that (1) "the reasonableness of an officer's use of force depends, in part, on whether the officer was in danger at the precise moment that he used force" and (2) "if the suspect threatens the officer with [***7] a weapon[,] deadly force may be used if necessary to prevent escape, and if[,] where feasible, some warning has been given." *Id.*, at 1083 (citing, *inter alia*, *Tennessee* v. *Garner*, 471 U. S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), and *Graham* v. *Connor*, 490 U. S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989); emphasis deleted; internal quotation marks and alterations omitted). The court concluded that a reasonable officer in White's position would have known that, since the Paulys could not have shot him unless he moved from his position behind a stone wall, he could not have used deadly force without first warning Samuel Pauly to drop his weapon.

Judge Moritz dissented, contending that the "majority impermissibly second-guesses" Officer White's quick choice to use deadly force. 814 F. 3d, at 1084. Judge Moritz explained that the majority also erred by defining the clearly established law at too high a level of generality, in contravention of this Court's precedent.

The officers petitioned for rehearing en banc, which 6 of the 12 judges on the Court of Appeals voted to grant. In a dissent from denial of rehearing, Judge Hartz noted that he was "unaware of any clearly established law that suggests . . . that an officer . . . who faces an occupant pointing a firearm [**468] in his direction must refrain from firing his weapon but, rather, must identify himself [***8] and shout a warning while pinned down, kneeling behind a rock wall." 817 F. 3d 715, 718 (CA10 2016). Judge Hartz expressed his hope that "the Supreme Court can clarify the governing law." *Id.*, at 719.

The officers petitioned for certiorari. The petition is now granted, and the judgment is vacated: Officer White did not violate clearly established law on the record described by the Court of Appeals panel.

[1] Qualified immunity attaches when an official's conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix* v. *Luna*, 577 U. S., at ___-___, 136 S. Ct. 305; 193 L. Ed. 2d 255, 257). While this Court's case law "'do[es] 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.'" *Id.*, at ___, 136 S. Ct. 305; 193 L. Ed. 2d 255, 257. In other words, immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" *Ibid.*

In the last five years, this Court has issued a

number of opinions reversing federal courts in qualified immunity cases. See, *e.g., City and County of San Francisco* v. *Sheehan*, 575 U. S. ___, ___, n. 3, 135 S. Ct. 1765; 191 L. Ed. 2d 856, 866 (2015) (collecting cases). The Court has found this necessary both because qualified immunity is important to "'society as a whole,'" *ibid.*, and because as "'an immunity from suit,'" qualified immunity [***9] "'is effectively lost if a case is erroneously permitted to go to trial,'" [*552] *Pearson* v. *Callahan*, 555 U. S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

Today, it is again necessary to reiterate the longstanding principle that [2] "clearly established law" should not be defined "at a high level of generality." *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 742, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). As this Court explained decades ago, the clearly established law must be "particularized" to the facts of the case. *Anderson* v. *Creighton*, 483 U. S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.*, at 639, 107 S. Ct. 3034, 97 L. Ed. 2d 523.

The panel majority misunderstood the "clearly established" analysis: 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*, *Garner*, and their Court of Appeals progeny, which—as noted above—lay out excessive-force principles at only a general level. Of course, [3] "general statements of the law are not inherently incapable of giving fair and clear warning" to officers, *United States* v. *Lanier*, 520 U. S. 259, 271, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997), but "in the light of pre-existing law the unlawfulness must be apparent," *Anderson* v. *Creighton*, *supra*, at 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523. For that reason, we have held that *Garner* and *Graham* do not by themselves [***10] create clearly established law outside "an [**469] obvious case." *Brosseau* v. *Haugen*, 543 U. S. 194, 199, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (*per curiam*); see also *Plumhoff* v. *Rickard*, 572 U. S. ___, ___, 134 S. Ct. 2012; 188 L. Ed. 2d 1056, 1069 (2014) (emphasizing that *Garner* and *Graham* "are 'cast at a high level of generality'").

This is not a case where it is obvious that there was a violation of clearly established law under *Garner* and *Graham*. Of note, the majority did not conclude that 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 White's late arrival on the scene. 814 F. 3d, at 1077. This alone should have been an important indication to the majority that 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 White confronted here.

On the record described by the Court of Appeals, Officer White did not violate clearly established [***11] law. The Court notes, however, that respondents contend Officer White arrived on the scene only two minutes after Officers Truesdale and Mariscal and more than three minutes before Daniel's shots were fired. On the assumption that the conduct of Officers Truesdale and Mariscal did not adequately alert the Paulys that they were police officers, respondents suggest that a reasonable jury could infer that White witnessed the other officers' deficient performance and should have realized that corrective action was necessary before using deadly force. Brief in Opposition 11, 22, n. 5. This Court expresses no position on this potential alternative ground for affirmance, as it appears that neither the District Court nor the Court of Appeals panel addressed it.

The Court also expresses no opinion on the [*553] question whether this ground was properly preserved or whether—in light of this Court's holding today—Officers Truesdale and Mariscal are entitled to qualified immunity.

For the foregoing reasons, the petition for certiorari is granted; the judgment of the Court of Appeals is vacated; and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Concur by: Ginsburg

Concur

Justice [***12] **Ginsburg**, concurring.

I join the Court's opinion on the understanding that it does not foreclose the denial of summary judgment to Officers Truesdale and Mariscal. See 814 F. 3d 1060, 1068, 1073, 1074 (CA10 2016) (Court of Appeals emphasized, repeatedly, that fact disputes exist on question whether Truesdale and Mariscal "adequately identified themselves" as police officers before shouting "Come out or [**470] we're coming in" (internal quotation marks omitted)). Further, as to Officer White, the Court, as I comprehend its opinion, leaves open the propriety of denying summary judgment based on fact disputes over when Officer White arrived at the scene, what he may have witnessed, and whether he had adequate time to identify himself and order Samuel Pauly to drop his weapon before Officer White shot Pauly. Compare *id.*, at 1080, with *ante*, at 8. See also Civ. No. 12-1311 (D NM, Feb. 5, 2014), pp. 7, and n. 5, 9, App. to Pet. for Cert. 75-76, and n. 5, 77 (suggesting that Officer White may have been on the scene when Officers Truesdale and Mariscal threatened to invade the Pauly home).

References

U.S.C.S., Constitution, Amendment 4; 42 U.S.C.S. § 1983

Antieau on Local Government Law § 77.04 (Matthew Bender 2d ed.)

L Ed Digest, Civil Rights § 32; Public Officers § 56

L Ed Index, Qualified Immunity

Supreme Court's views [***13] as to extent of prosecutorial immunity from liability for damages for alleged violations of civil rights. 172 L. Ed. 2d 905.

Supreme Court's views as to application or applicability of doctrine of qualified immunity in action under 42 U.S.C.S. § 1983 or in Bivens action, seeking damages for alleged civil rights violations. 116 L. Ed. 2d 965.

Supreme Court's construction of Civil Rights Act of 1871 (42 U.S.C.S. § 1983) providing private right of action for violation of federal rights. 43 L. Ed. 2d 833.

Unconstitutional conduct by state or federal officer as affecting governmental immunity from suit in federal court--Supreme Court cases. 12 L. Ed. 2d 1110.

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Salazar-Limon v. City of Houston

Supreme Court of the United States

April 24, 2017, Decided

No. 16-515.

Reporter
137 S. Ct. 1277 *; 2017 U.S. LEXIS 2627 **; 197 L. Ed. 2d 751; 85 U.S.L.W. 3507; 2017 WL 1427676

Ricardo Salazar-Limon, Petitioner v. City of Houston, Texas, et al.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Prior History: [**1] ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Salazar-Limon v. City of Houston, 826 F.3d 272, 2016 U.S. App. LEXIS 10854 (5th Cir. Tex., 2016)

Judges: Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch.

Opinion

[*1277] Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Concur by: ALITO

Concur

Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

Justice Alito, with whom Justice Thomas joins, concurring in the denial of certiorari.

Every year the courts of appeals decide hundreds of cases in which they must determine whether thin evidence provided by a plaintiff is just enough to survive a motion for summary judgment or not quite enough. This is one such case. Officer Thompson stated in a deposition that he shot Salazar-Limon because he saw him turn toward him and reach for his waist in a movement consistent with reaching for a gun. Record, Doc. 39-2, pp. 29-30, 33. Remarkably, Salazar-Limon did not state in his deposition or in an affidavit that he did not reach for his waist, and on that ground the Court of Appeals held that respondents were entitled to summary judgment. 826 F. 3d 272, 278-279 (CA5 2016).

The dissent disagrees with that judgment. The dissent acknowledges that summary judgment would be proper if the record compelled the conclusion that Salazar-Limon reached for his waist, but [**2] the dissent believes that, if the case had gone to trial, a jury could have reasonably inferred that Salazar-Limon did not reach for his waist—even if Salazar-Limon never testified to that fact. The dissent's conclusion is surely debatable. But in any event, [*1278] this Court does not typically grant a petition for a writ of certiorari to review a factual question of this sort, see this

Court's Rule 10, and I therefore concur in the denial of review here.

I write to put our disposition of this petition in perspective. First, whether or not one agrees with the grant of summary judgment in favor of Officer Thompson, it is clear that the lower courts acted responsibly and attempted faithfully to apply the correct legal rule to what is at best a marginal set of facts.

Second, this Court applies uniform standards in determining whether to grant review in cases involving allegations that a law enforcement officer engaged in unconstitutional conduct. We may grant review if the lower court conspicuously failed to apply a governing legal rule. See this Court's Rule 10. The dissent cites five such cases in which we granted relief for law enforcement officers, and in all but one of those cases there was no published [**3] dissent. *White* v. *Pauly*, 580 U. S. ___, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017) (*per curiam*); *Mullenix* v. *Luna*, 577 U. S. ___, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (*per curiam*); *Taylor* v. *Barkes*, 575 U. S. ___, 135 S. Ct. 2042, 192 L. Ed. 2d 78 (2015) (*per curiam*); *Carroll* v. *Carman*, 574 U. S. ___, 135 S. Ct. 348, 190 L. Ed. 2d 311 (2014) (*per curiam*); *Stanton* v. *Sims*, 571 U. S. ___, 134 S. Ct. 3, 187 L. Ed. 2d 341 (2013) (*per curiam*). The dissent has not identified a single case in which we failed to grant a similar petition filed by an alleged victim of unconstitutional police conduct.

As noted, regardless of whether the petitioner is an officer or an alleged victim of police misconduct, we rarely grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case. See this Court's Rule 10. The case before us falls squarely in that category.

This is undeniably a tragic case, but as the dissent notes, *post*, at 8 (opinion of Sotomayor, J.), we have no way of determining what actually happened in Houston on the night when Salazar-Limon was shot. All that the lower courts and this Court can do is to apply the governing rules in a neutral fashion.

Dissent by: SOTOMAYOR

Dissent

Justice Sotomayor, with whom Justice Ginsburg joins, dissenting from the denial of certiorari.

Just after midnight on October 29, 2010, a Houston police officer shot petitioner Ricardo Salazar-Limon in the back. Salazar-Limon claims the officer shot him as he tried to walk away from a confrontation with the officer [**4] on an overpass. The officer, by contrast, claims that Salazar-Limon turned toward him and reached for his waistband—as if for a gun—before the officer fired a shot. The question whether the officer used excessive force in shooting Salazar-Limon thus turns in large part on which man is telling the truth. Our legal system entrusts this decision to a jury sitting as finder of fact, not a judge reviewing a paper record.

The courts below thought otherwise. The District Court credited the officer's version of events and granted summary judgment to respondents—the officer and the city. 97 F. Supp. 3d 898 (SD Tex. 2015). The Fifth Circuit affirmed. 826 F. 3d 272 (2016). But summary judgment is appropriate only where "there is no genuine dispute as to any material fact." Fed. Rule Civ. Proc. 56(a). The courts below failed to heed that mandate. Three Terms ago, we summarily reversed the Fifth Circuit in a case "reflect[ing] a clear misapprehension of summary judgment standards." *Tolan v. Cotton*, 572 U. S. ___, ___, 134 S. Ct. 1861, 1868, 188 L. Ed. 2d 895, 903 [*1279] (2014) (*per curiam*). This case reflects the same fundamental error. I respectfully dissent from the Court's failure to grant certiorari and reverse.

I

The encounter at issue here occurred around midnight on October 29, 2010, on the outskirts of Houston, Texas. Salazar-Limon, who had been drinking, was driving with [**5] three other men down Houston's Southwest Freeway. Houston Police Department Officer Chris Thompson was manning a speed gun on the freeway that night and spotted Salazar-Limon's truck weaving between lanes. He turned on his lights and sirens, and Salazar-Limon pulled over and stopped on the shoulder of an overpass. Thompson walked over to the window of Salazar-Limon's truck and asked for his driver's license and proof of insurance, which Salazar-Limon provided. Thompson checked Salazar-Limon's license and found no outstanding warrants.

When Thompson returned to the truck, the incident quickly escalated. Thompson asked Salazar-Limon to step out of the truck—apparently intending to conduct a blood alcohol test—and the two men began to walk together toward Thompson's patrol car. Although the men dispute the details of what happened next, they agree that Thompson tried to put Salazar-Limon in handcuffs; that Salazar-Limon resisted; and that a brief struggle ensued. At the end of the struggle, Salazar-Limon turned away and began to walk back to his truck, his back to Thompson. Thompson drew his firearm and told Salazar-Limon to stop walking.

What matters is what happened next, and here the [**6] men tell different stories. According to Salazar-Limon, Thompson shot him "immediately"—at most, within "seconds" of the oral command. Record, Doc. 39-1, p. 8. Salazar-Limon testified that when the bullet hit his back, he began to turn toward Thompson and then fell to the ground. *Ibid.* Thompson's version of the story differs. According to Thompson, when he told Salazar-Limon to stop walking, Salazar-Limon raised his hands toward his waistband—as if for a weapon—and turned toward him. *Id.*, Doc. 39-2, at 29. Thompson testified that he shot Salazar-Limon only "[o]nce he made the motion towards his waistband." *Ibid.* Salazar-Limon, in other words, claims that Thompson shot him in the back while he was walking away. Thompson claims that Salazar-Limon provoked the shot by turning toward him and reaching for what he thought was a gun.

Salazar-Limon survived the encounter but sustained crippling injuries. In 2011, he sued Thompson, the city of Houston, and various police officials, alleging violations of his constitutional rights. Respondents removed the case to federal court and moved for summary judgment, arguing that Thompson was protected by qualified immunity. [1] Respondents emphasized that, in [**7] their view, even viewed in the light most favorable to Salazar-Limon, the facts did not support an excessive-force claim:

> "Thompson was dealing with a suspect who physically resisted arres[t] while the two stood on a dimly lit overpass of a busy expressway; he was alone with Salazar-Limon and [three] other suspects, all of whom he had not searched; Salazar-Limon disobeyed Thompson's [*1280] orders to stop and proceeded to walk in the direction of his truck[,] which had not been searched either." *Id.*, Doc. 31, at 20.

Respondents did not cite Thompson's allegation that Salazar-Limon had turned and reached for his waistband, at least not in any part of their motion that relied only on undisputed facts; rather, they relied on the facts *preceding* the alleged turn and reach to argue that Thompson acted reasonably under the circumstances. See *id.*, at 13-14 (statement of undisputed facts).

The District Court granted summary judgment to

[1] The city also argued that Salazar-Limon had failed to plead a claim for supervisory liability against it under *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). The District Court granted summary judgment to the city, and although Salazar-Limon argued on appeal that it erred in doing so, he does not renew that contention here.

respondents, but on a different understanding of the alleged facts. In the District Court's view, "Thompson testified that Salazar[-Limon] stopped walking and start[ed] turning back toward Thompson, reaching toward his waistband," and Salazar-Limon "offered no controverting evidence." 97 F. Supp. 3d, at 906. As a result, [**8] the District Court found, "uncontroverted record evidence" showed that Salazar-Limon "disregarded repeated orders, walked away, then turned back toward Thom[p]son and reached for his waistband before Thompson fired." *Ibid.*; see also *ibid.* ("The undisputed summary judgment evidence showe[d] that . . . as [Salazar-Limon] walked away from Officer Thompson toward his own truck, he reached toward his waistband and began to turn back toward the officer"); *id.*, at 907 ("[T]he record shows that when Thompson saw Salazar[-Limon] turn toward him, he was reaching toward his waistband"); *id.*, at 909 ("Salazar[-Limon] has pointed to no summary judgment evidence contradicting Thompson's testimony that he shot because . . . Salazar[-Limon] reached for his waistband and turned toward him"). On this view of the facts, the District Court held, Thompson was entitled to qualified immunity. *Ibid.*

The Fifth Circuit affirmed. 826 F. 3d 272. It acknowledged Salazar-Limon's argument that the District Court erred in relying on disputed facts, including its findings that Salazar-Limon had turned and reached for his waistband before he was shot. *Id.*, at 278. But it explained that "only one [of these findings] need be addressed—whether Salazar[-Limon] reached for his [**9] waistband before being shot." *Ibid.* "[R]ecord evidence," the panel stated, "shows that Officer Thompson testified that . . . he saw Salazar[-Limon] reach for his waistband." *Ibid.* By contrast, it explained, Salazar-Limon "did not deny reaching for his waistband; nor has he submitted any other controverting evidence in this regard." *Id.*, at 278-279 (footnote omitted). To support its assertion, the panel cited only the District Court's finding that "'uncontroverted record evidence shows that Salazar[-Limon] . . . reached for his waistband before Thompson fired.'" *Id.*, at 278, n. 5 (quoting 97 F. Supp. 3d, at 906). Thus adopting the same view of the facts as the District Court had, the panel held that Thompson was shielded by qualified immunity.

II

This is not a case that should have been resolved on summary judgment. Summary judgment is appropriate only where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(a). A "judge's function" in evaluating a motion for summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); see also *First Nat. Bank of Ariz.* v. *Cities Service Co.*, 391 U. S. 253, 289, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968) (the question at summary judgment [*1281] is whether a jury should "resolve [**10] the parties' differing versions of the truth at trial"). In doing so, the court must "view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the . . . motion.'" *Scott* v. *Harris*, 550 U. S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) (quoting *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962) (*per curiam*)).

Applying that rule to this case is easy work. The question before the lower courts was whether the facts, taken in the light most favorable to Salazar-Limon, entitled Thompson to judgment on Salazar-Limon's excessive-force claim. *Saucier* v. *Katz*, 533 U. S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001); *Graham* v. *Connor*, 490 U. S. 386, 394, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). Although such cases generally require courts to wade through the "factbound morass of 'reasonableness,'" *Scott*, 550 U. S., at 383, 127 S. Ct. 1769, 167 L. Ed. 2d 686, here the question whether Thompson's use of force was reasonable turns in large part on exactly what Salazar-Limon did in the moments before Thompson shot him.

Indeed, the courts below needed to ask only one question: Did Salazar-Limon turn and reach for his waistband, or not? If he did, Thompson's use of force was reasonable. If he did not, a jury could justifiably decide that the use of force was excessive.

Given that this case turns in large part on what Salazar-Limon did just before he was shot, it should be obvious that the parties' competing accounts of the event preclude the entry of summary judgment for Thompson. Thompson [**11] attested in a deposition that he fired his gun only *after* he saw Salazar-Limon turn and "ma[k]e [a] motion towards his waistband area." Record, Doc. 39-2, at 29. Salazar-Limon, by contrast, attested that Thompson fired either "immediately" or "seconds" after telling Salazar-Limon to stop—and in any case *before* Salazar-Limon turned toward him. *Id.*, Doc. 39-1, at 7-8. These accounts flatly contradict each other. On the one, Salazar-Limon provoked the use of force by turning and raising his hands toward his waistband. On the other, Thompson shot without being provoked. It is not for a judge to resolve these "differing versions of the truth" on summary judgment, *First Nat. Bank*, 391 U. S., at 289, 88 S. Ct. 1575, 20 L. Ed. 2d 569; that question is for a jury to decide at trial.

The courts below reached the opposite conclusion only by disregarding basic principles of summary judgment. The District Court reasoned that Salazar-Limon "offered no controverting evidence" against Thompson's testimony that he turned and reached for his waistband before he was shot, 97 F. Supp. 3d, at 906, and the Fifth Circuit similarly reasoned that Salazar-Limon had not "submitted any other controverting evidence" regarding that fact, 826 F. 3d, at 279. This is plainly wrong. Salazar-Limon's own testimony "controverted" [**12] Thompson's claim that Salazar-Limon had turned and reached for his waistband. The sworn testimony of an eyewitness is competent summary judgment evidence. And Salazar-Limon's testimony "controverted" Thompson's; indeed, the two contradict one another in every material way. Salazar-Limon needed no other evidence to defeat summary judgment.

Respondents defend the judgment below on the ground that Salazar-Limon "had the opportunity to directly contradict Officer Thompson's testimony," but did not do so. Brief in Opposition 16. Justice Alito advances the same argument. *Ante*, at 1 (concurring opinion). They argue that Salazar-Limon never explicitly stated, "I did not reach for my waistband," and that his failure to do so permitted the [*1282] courts below to grant summary judgment to Thompson. But this inference is questionable at best: Salazar-Limon had no need to introduce such an explicit statement, given respondents' concession that the events immediately preceding the gunshot (including the alleged waistband reach) were subject to dispute. See Record, Doc. 31, at 13-14. And even if the inference respondents suggest was a reasonable one, it would be improper at the summary judgment stage. At [**13] that stage, all "reasonable inferences should be drawn in favor of the nonmoving party"—here, Salazar-Limon. *Tolan*, 572 U. S., at ___ , 134 S. Ct. 1861, 1868, 188 L. Ed. 2d 895, 903. The most natural inference to be drawn from Salazar-Limon's testimony was that he neither turned nor reached for his waistband before he was shot—especially as no gun was ever recovered. See *Cruz* v. *Anaheim*, 765 F. 3d 1076, 1079 (CA9 2014) ("In this case, there's circumstantial evidence that could give a reasonable jury pause. Most obvious is the fact that [the victim] didn't have a gun on him, so why would he have reached for his waistband?"). [2]

[2] Some commentators have observed the increasing frequency of incidents in which unarmed men allegedly reach for empty waistbands when facing armed officers. See Faturechi, Deputies' Shooting of Unarmed Suspects Rise, L. A. Times, Sept. 23, 2011, pp. A1, AA7 (reporting that nearly half of the individuals shot by Los Angeles police after allegedly reaching for their waistbands turned out to be unarmed); Balko, When Unarmed Men Reach for Their Waistbands, Washington Post, Aug. 29, 2014, https://www.washingtonpost.com/news/the-watch/wp/2014/08/29/when-unarmed-men-reach-for-their-waistbands/ (as last visited Apr. 11, 2017) (collecting cases). That these cases are increasingly

Respondents' argument to the contrary "reflects a clear misapprehension of summary judgment standards." *Tolan*, 572 U. S., at ___, 134 S. Ct. 1861, 1868, 188 L. Ed. 2d 895, 903 .

This is not a difficult case. When a police officer claims that the victim of the use of force took some act that would have justified that force, and the victim claims he did not, summary judgment is improper. The Fifth Circuit's decision should be reversed.

***

Only Thompson and Salazar-Limon know what happened on that overpass on October 29, 2010. It is possible that Salazar-Limon did something that Thompson reasonably found threatening; it is also possible that Thompson shot an unarmed man in the back without justification. What is clear is that our legal system does not [**14] entrust the resolution of this dispute to a judge faced with competing affidavits. The evenhanded administration of justice does not permit such a shortcut.

Our failure to correct the error made by the courts below leaves in place a judgment that accepts the word of one party over the word of another. It also continues a disturbing trend regarding the use of this Court's resources. We have not hesitated to summarily reverse courts for wrongly denying officers the protection of qualified immunity in cases involving the use of force. See, *e.g.*, *White* v. *Pauly*, 580 U. S. ___, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017) (*per curiam*); *Mullenix* v. *Luna*, 577 U. S. ___, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (*per curiam*); *Taylor* v. *Barkes*, 575 U. S. ___, 135 S. Ct. 2042, 192 L. Ed. 2d 78 (2015) (*per curiam*); *Carroll* v. *Carman*, 574 U. S. ___ , 135 S. Ct. 348, 190 L. Ed. 2d 311 (2014) (*per curiam*); *Stanton* v. *Sims*, 571 U. S. ___, 134 S. Ct. 3, 187 L. Ed. 2d 341 (2013) (*per curiam*). But we rarely intervene where courts [*1283] wrongly afford officers the benefit of qualified immunity in these same cases. The erroneous grant of summary judgment in qualified-immunity cases imposes no less harm on "'society as a whole,'" *City and County of San Francisco* v. *Sheehan*, 575 U. S. ___, ___, n. 3, 135 S. Ct. 1765, 1774, 191 L. Ed. 2d 856, 866 (2015) (quoting *Harlow* v. *Fitzgerald*, 457 U. S. 800, 814, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)), than does the erroneous denial of summary judgment in such cases. We took one step toward addressing this asymmetry in *Tolan*. 572 U. S., at ___, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (slip op., at 11). We take one step back today.

I respectfully dissent.

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common makes it even more important for lower courts—confronted with such inconsistencies—to let the jury exercise its role as the arbiter of credibility disputes.

City & Cnty. of San Francisco v. Sheehan

Supreme Court of the United States

March 23, 2015, Argued; May 18, 2015, Decided

No. 13-1412

Reporter

135 S. Ct. 1765 *; 191 L. Ed. 2d 856 **; 2015 U.S. LEXIS 3200 ***; 575 U.S. 600; 83 U.S.L.W. 4303; 25 Fla. L. Weekly Fed. S 254

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, et al., Petitioners v. TERESA SHEEHAN

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: On remand at Sheehan v. City & Cnty. of San Francisco, 2015 U.S. App. LEXIS 12096 (9th Cir., July 14, 2015)

Prior History: [***1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Sheehan v. City & County of San Francisco, 743 F.3d 1211, 2014 U.S. App. LEXIS 3321 (9th Cir. Cal., 2014)

Disposition: Certiorari dismissed in part; 743 F. 3d 1211, reversed in part and remanded.

Syllabus

[**860] [*1767] Respondent Sheehan lived in a group home for individuals with mental illness. After Sheehan began acting erratically and threatened to kill her social worker, the City and County of San Francisco (San Francisco) dispatched police officers Reynolds and Holder to help escort Sheehan to a facility for temporary evaluation and treatment. When the officers first entered Sheehan's room, she grabbed a knife and [*1768] threatened to kill them. They retreated and closed the door. Concerned about what Sheehan might do behind the closed door, and without considering if they could accommodate her disability, the officers reentered her room. Sheehan, knife in hand, again confronted them. After pepper spray proved ineffective, the officers shot Sheehan multiple times. Sheehan later sued petitioner San Francisco for, among other things, violating Title II of the Americans with Disabilities Act of 1990 (ADA) by arresting her without accommodating her disability. See 42 U. S. C. §12132. She also sued petitioners Reynolds and Holder in their personal capacities under 42 U. S. C. §1983, claiming that they [***2] violated her Fourth Amendment rights. The District Court granted summary judgment because it concluded that officers making an arrest are not required to determine whether their actions would comply with the ADA before protecting themselves and others, and also that Reynolds and Holder did not violate the Constitution. Vacating in part, the Ninth Circuit held that the ADA applied and that a jury must decide whether San Francisco

should have accommodated Sheehan. The court also held that Reynolds and Holder are not entitled to qualified immunity because it is 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.

Held:

1. The question whether §12132 "requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody," Pet. for Cert. i, is dismissed as improvidently granted. Certiorari was granted on the understanding that San Francisco would argue that Title II of the ADA does not apply when an officer faces an armed and dangerous individual. Instead, San Francisco [***3] merely argues that Sheehan was not "qualified" for an accommodation, §12132, because she "pose[d] a direct threat to the health [**861] or safety of others," which threat could not "be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services," 28 CFR §§35.139(a), 35.104. This argument was not passed on by the court below. The decision to dismiss this question as improvidently granted, moreover, is reinforced by the parties' failure to address the related question whether a public entity can be vicariously liable for damages under Title II for an arrest made by its police officers. Pp. ___ - ___, 191 L. Ed. 2d, at 865-867.

2. Reynolds and Holder are entitled to qualified immunity from liability for the injuries suffered by Sheehan. Public officials are immune from suit under 42 U. S. C. §1983 unless they have "violated a statutory or constitutional right that was ' " 'clearly established' " ' at the time of the challenged conduct," *Plumhoff* v. *Rickard*, 572 U.S. 765, 778, 134 S. Ct. 2012, 188 L. Ed. 2d 1056, 1069 , an exacting standard that "gives government officials breathing room to make reasonable but mistaken judgments," *Ashcroft v. al-Kidd*, 563 U.S. 731, 743, 131 S. Ct. 2074, 179 L. Ed. 2d 1149, 1160. The officers did not violate the Fourth Amendment when they opened Sheehan's door the first time, and there is no doubt that they could have opened her door the second time without [***4] violating her rights had Sheehan not been disabled. Their use of force was also reasonable. The only question therefore is whether they violated the Fourth Amendment when they decided to reopen Sheehan's door rather than attempt to accommodate her disability. Because any such Fourth Amendment right, even assuming it exists, was not clearly established, Reynolds and [*1769] Holder are entitled to qualified immunity. Likewise, an alleged failure on the part of the officers to follow their training does not itself negate qualified immunity where it would otherwise be warranted. Pp. ___ - ___, 191 L. Ed. 2d, at 867-872.

Certiorari dismissed in part; 743 F. 3d 1211, reversed in part and remanded.

Counsel: Christine Van Aken argued the cause for petitioners.

Ian H. Gershengorn argued the cause for petitioners as amicus curiae, by special leave of court.

Leonard Feldman argued the cause for respondent.

Judges: Alito, J., delivered the opinion of the Court, in which ROBERTS, C. J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ., joined. Scalia, J., filed an opinion concurring in part and dissenting in part, in which Kagan, J., joined, *post*, ___. Breyer, J., took no part in the consideration or decision of the case.

Opinion by: Alito

Opinion

JUSTICE **Alito** delivered the opinion of the Court.

We granted certiorari to consider two questions relating to the manner in which San Francisco police officers arrested a woman who was suffering from a mental illness and had become violent. After reviewing the parties' submissions, [***5] we dismiss the first question as improvidently granted. We decide the second question and hold that the officers are entitled to qualified immunity because they did not violate any clearly established Fourth Amendment rights.

I

Petitioners are the City and County of San Francisco, California (San Francisco), and two police officers, Sergeant Kimberly Reynolds and Officer Kathrine Holder. Respondent is Teresa Sheehan, a woman who suffers [**862] from a schizoaffective disorder. [1] Because this case arises in a summary judgment posture, we view the facts in the light most favorable to Sheehan, the nonmoving party. See, *e.g.*, *Plumhoff* v. *Rickard*, 572 U.S. 765, 768-769, 134 S. Ct. 2012, 188 L. Ed. 2d 1056, 1062 (2014).

In August 2008, Sheehan lived in a group home for people dealing with mental illness. Although she shared common areas of the building with others, she had a private room. On August 7, Heath Hodge, a social worker who supervised the counseling staff in the building, attempted to visit Sheehan to conduct a welfare check. Hodge was concerned because Sheehan had stopped taking her medication, no longer spoke with her psychiatrist, and reportedly was no longer changing her clothes or eating. See 743 F. 3d 1211, 1218 (CA9 2014); App. 23-24.

Hodge knocked on Sheehan's door but received no answer. He then used a key to enter her [***6] room and found Sheehan on her bed. Initially, she would not respond [*1770] to questions. But she then sprang up, reportedly yelling, "Get out of here! You don't have a warrant! I have a knife, and I'll kill you if I have to." Hodge left without seeing whether she actually had a knife, and Sheehan slammed the door shut behind him. See 743 F. 3d, at 1218.

Sheehan, Hodge realized, required "some sort of intervention," App. 96, but he also knew that he would need help. Hodge took steps to clear the building of other people and completed an application to have Sheehan detained for temporary evaluation and treatment. See Cal. Welf. & Inst. Code Ann. §5150 (West 2015 Cum. Supp.) (authorizing temporary detention of someone who "as a result of a mental health disorder, is a danger to others, or to himself or herself, or gravely disabled"). On that application, Hodge checked off boxes indicating that Sheehan was a "threat to others" and "gravely disabled," but he did not mark that she was a danger to herself. 743 F. 3d, at 1218. He telephoned the police and asked for help to take Sheehan to a secure facility.

Officer Holder responded to police dispatch and headed toward the group home. When she arrived, Holder reviewed the temporary-detention application and spoke with [***7] Hodge. Holder then sought assistance from Sergeant Reynolds, a more experienced officer. After Reynolds arrived and was brought up to speed, Hodge spoke with a nurse at the psychiatric emergency services unit at San Francisco General Hospital who said that the hospital would be able to admit Sheehan.

Accompanied by Hodge, the officers went to Sheehan's room, knocked on her door, announced who they were, and told Sheehan that "we want to help you." App. 36. When Sheehan did not answer, the officers used Hodge's key to enter the room. Sheehan reacted violently. She grabbed a kitchen

knife with an approximately 5-inch blade and began approaching the officers, yelling something along the lines of "I am going to kill you. I don't need help. Get out." *Ibid.* See also *id.*, at 284 ("[Q.] Did you tell them I'll kill you if you don't get out of here? A. Yes"). The officers—who did not have their weapons drawn—"retreated and Sheehan closed the door, leaving Sheehan in her room and the officers and Hodge in the hallway." 743 F. 3d, at 1219. The officers called for backup and sent Hodge downstairs to let in reinforcements when they arrived.

[**863] The officers were concerned that the door to Sheehan's room was closed. They worried that [***8] Sheehan, out of their sight, might gather more weapons—Reynolds had already observed other knives in her room, see App. 228—or even try to flee through the back window, *id.*, at 227. Because Sheehan's room was on the second floor, she likely would have needed a ladder to escape. Fire escapes, however, are common in San Francisco, and the officers did not know whether Sheehan's room had such an escape. (Neither officer asked Hodge about a fire escape, but if they had, it seems he "probably" would have said there was one, *id.*, at 117). With the door closed, all that Reynolds and Holder knew for sure was that Sheehan was unstable, she had just threatened to kill three people, and she had a weapon. [1]

[*1771] Reynolds and Holder had to make a decision. They could wait for backup—indeed, they already heard sirens. Or they could quickly reenter the room and try to subdue Sheehan before more time elapsed. Because Reynolds believed that the situation "required [their] immediate attention," *id.*, at 235, the officers chose reentry. In making that decision, they did not pause to consider whether Sheehan's disability should be accommodated. See 743 F. 3d, at 1219. The officers obviously knew that Sheehan was unwell, but in Reynolds' words, that was "a secondary issue" given that they were "faced with a violent woman who had already threatened to kill her social worker" and "two uniformed police officers." App. 235.

The officers ultimately decided that Holder—the larger officer—should push the door open while Reynolds used pepper spray on Sheehan. With pistols drawn, the officers moved in. When Sheehan, knife in hand, saw them, she again yelled for [***10] them to leave. She may also have again said that she was going to kill them. Sheehan is "not sure" if she threatened death a second time, *id.*, at 284, but "concedes that it was her intent to resist arrest and to use the knife," 743 F. 3d, at 1220. In any event, Reynolds began pepper-spraying Sheehan in the face, but Sheehan would not drop the knife. When Sheehan was only a few feet away, Holder shot her twice, but she did not collapse. Reynolds then fired multiple shots. [2] After Sheehan finally fell, a third officer (who had just arrived) kicked the knife out of her hand. Sheehan survived.

Some time later, San Francisco prosecuted Sheehan for assault with a deadly weapon, assault on a peace officer with a deadly weapon, and making criminal threats. The jury acquitted Sheehan of making threats but was unable to reach a verdict on the assault counts, and prosecutors decided not to retry her.

[**864] Sheehan then brought suit, alleging, among other things, that San Francisco violated the

[1] The officers also may have feared that another person was with Sheehan. Reynolds testified that the officers had not been "able to do a complete assessment of the entire room." App. 38. Sheehan, by contrast, testified during a deposition that the officers "could see . . . that no one else was in the room." *Id.*, at 279. Before the Ninth Circuit, Sheehan conceded that some of her deposition testimony "smacks of irrationality that begs the question whether any of it is credible." Brief for Appellant in No. 11-16401 (CA9), p. 41; [***9] see also Reply Brief in No. 11-16401, p. 17 (explaining that "the inherent inconsistencies in her testimony cast suspicion over all of it"). We need not decide whether there is a genuine dispute of fact here because the officers' other, independent concerns make this point immaterial.

[2] There is a dispute regarding whether Sheehan was on the ground for the last shot. This dispute is not material: "Even if Sheehan was on the ground, she was certainly not subdued." 743 F. 3d 1211, 1230 (CA9 2014).

Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U. S. C. §12101 *et seq.*, by subduing [***11] her in a manner that did not reasonably accommodate her disability. She also sued Reynolds and Holder in their personal capacities under Rev. Stat. §1979, 42 U. S. C. §1983, for violating her Fourth Amendment rights. In support of her claims, she offered testimony from a former deputy police chief, Lou Reiter, who contended that Reynolds and Holder fell short of their training by not using practices designed to minimize the risk of violence when dealing with the mentally ill.

The District Court granted summary judgment for petitioners. Relying on *Hainze* v. *Richards*, 207 F. 3d 795 (CA5 2000), the court held that officers making an arrest are not required "to first determine whether their actions would comply with the ADA before protecting themselves and others." App. to Pet. for Cert. 80. The court also held that the officers did not violate the Fourth Amendment. The court wrote that the officers "had no way of knowing whether [Sheehan] might escape through a back window or fire escape, whether she might hurt herself, or whether there was anyone else in her room whom she might hurt." *Id.*, at 71. In addition, the court observed that Holder [*1772] did not begin shooting until it was necessary for her to do so in order "to protect herself" and that "Reynolds used deadly force only after she found that [***12] pepper spray was not enough force to contain the situation." *Id.*, at 75, 76-77.

On appeal, the Ninth Circuit vacated in part. Relevant here, the panel held that because the ADA covers public "services, programs, or activities," §12132, the ADA's accommodation requirement should be read "to encompass 'anything a public entity does,'" 743 F. 3d, at 1232. The Ninth Circuit agreed "that exigent circumstances inform the reasonableness analysis under the ADA," *ibid.*, but concluded that it was for a jury to decide whether San Francisco should have accommodated Sheehan by, for instance, "respect[ing] her comfort zone, engag[ing] in non-threatening communications and us[ing] the passage of time to defuse the situation rather than precipitating a deadly confrontation." *id.*, at 1233.

As to Reynolds and Holder, the panel held that their initial entry into Sheehan's room was lawful and that, after the officers opened the door for the second time, they reasonably used their firearms when the pepper spray failed to stop Sheehan's advance. Nonetheless, the panel also held that a jury could find that the officers "provoked" Sheehan by needlessly forcing that second confrontation. *Id.*, at 1216, 1229. The panel further found that it was clearly established that an officer cannot "forcibly enter the home [***13] of an armed, mentally ill subject who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry." *Id.*, at 1229. Dissenting in part, Judge Graber would have held that the officers were entitled to qualified immunity.

San Francisco and the officers petitioned for a writ of certiorari and asked us to review two questions. We granted the petition. 574 U.S. 1021, 135 S. Ct. 702, 190 L. Ed. 2d 434 (2014).

II

[2] Title II of the ADA commands [**865] that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U. S. C. §12132. The first question on which we granted review asks whether this provision "requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody." Pet. for Cert. i. When we granted review, we understood this question to embody what appears to be the thrust of the argument that San Francisco made in the Ninth Circuit, namely that "'Title II *does not apply* to an officer's on-the-street responses to reported disturbances [***14] or other similar incidents,

whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life.'" Brief for Appellees in No. 11-16401 (CA9), p. 36 (quoting *Hainze*, *supra*, at 801; emphasis added); see also Brief for Appellees in No. 11-16401, at 37 (similar).

As San Francisco explained in its reply brief at the certiorari stage, resolving its "question presented" "does not require a fact-intensive 'reasonable accommodation' inquiry," since "the only question for this Court to resolve is whether any accommodation of an armed and violent individual is reasonable or required under Title II of the ADA." Reply to Brief in Opposition 3.

Having persuaded us to grant certiorari, San Francisco chose to rely on a different argument than what it pressed below. In [*1773] its brief in this Court, San Francisco focuses on the statutory phrase "qualified individual," §12132, and a regulation declaring that Title II "does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety [***15] of others." 28 CFR §35.139(a) (2014). Another regulation defines a "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services." §35.104. Putting these authorities together, San Francisco argues that "a person who poses a direct threat or significant risk to the safety of others is not qualified for accommodations under the ADA," Brief for Petitioners 17. Contending that Sheehan clearly posed a "direct threat," San Francisco concludes that she was therefore not "qualified" for an accommodation.

Though, to be sure, this "qualified" argument does appear in San Francisco's certiorari petition, San Francisco never hinted at it in the Ninth Circuit. [3] The Court does not ordinarily decide questions that were not passed on below. More than that, San Francisco's new argument effectively concedes that the relevant provision of the ADA, 42 U. S. C. §12132, *may* "requir[e] law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody." Pet. for Cert. i. This is so because there may be circumstances in which any "significant [***16] risk" presented by "an armed, violent, and mentally ill suspect" can be "eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services."

[**866] The argument that San Francisco now advances is predicated on the proposition that the ADA governs the manner in which a qualified individual with a disability is arrested. [4] The relevant provision provides that a public entity may not "exclud[e]" a qualified individual with a disability from "participat[ing] in," and may not "den[y]" that individual the "benefits of[,] the services, programs, or activities of a public entity." §12132. This language would apply to an arrest if an arrest is an "activity" in which the arrestee "participat[es]" or from which the arrestee may "benefi[t]."

This same provision also commands that "no qualified individual with a disability shall be . . . subjected to discrimination by any [public] entity." *Ibid.* This part of the statute would apply to an arrest if the failure to arrest an individual with a mental disability in a manner that reasonably accommodates that disability constitutes "discrimination." *Ibid.*

Whether the statutory language quoted above applies to arrests is an important question that would benefit from briefing [***17] and an adversary presentation. But San Francisco, the United States as *amicus curiae*, and Sheehan all argue (or at least accept) that §12132 applies to arrests. No one argues the contrary view. As a result, we do not think that it would be prudent to decide the question in this case.

Our decision not to decide whether the ADA

applies to arrests is reinforced by the parties' failure to address a related question: whether a public entity can be liable for damages under Title II for an arrest made by its police officers. [5] Only public entities are subject to Title II, see, *e.g.*, *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 208, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998), and the parties agree that such an entity can be held vicariously liable for money damages for the purposeful or deliberately indifferent [*1774] conduct of its employees. see Tr. of Oral Arg. 10-12, 22. But we have never decided whether that is correct, and we decline to do so here, in the absence of adversarial briefing.

[6] Because certiorari jurisdiction exists to clarify the law, its exercise "is not a matter of right, but of judicial discretion." This Court's Rule 10. Exercising that discretion, we dismiss the first question presented as improvidently granted. See, *e.g.*, *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 360, n. 1, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001) (partial dismissal); *Parker* v. *Dugger*, 498 U.S. 308, 323, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991) (same).

III

The second question presented is whether [***18] Reynolds and Holder can be held personally liable for the injuries that Sheehan suffered. We conclude they are entitled to qualified immunity. [3]

[8] Public officials are immune from suit under 42 U. S. C. §1983 unless they have "violated a statutory or [**867] constitutional right that was clearly established at the time of the challenged conduct." *Plumhoff*, 572 U.S., at 778, 134 S. Ct. 2012, 188 L. Ed. 2d 1056, 1069 (internal quotation marks omitted). An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it," *ibid.*, meaning that "existing precedent . . . placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149, 1159 (2011)). This exacting standard "gives government officials breathing room to make reasonable but mistaken judgments" by "protect[ing] all but the plainly incompetent or those who knowingly violate the law." *Id.*, at 743, 131 S. Ct. 2074, 179 L. Ed. 2d 1149, 1160.

In this case, although we disagree with the Ninth Circuit's ultimate conclusion on the question of qualified immunity, we agree with its analysis in many respects. For instance, there is no doubt that the officers did not violate any federal right when they opened Sheehan's door the first time. See 743 F. 3d, at 1216, 1223. Reynolds and Holder knocked on the door, announced that they were police officers, and informed Sheehan that [***20] they wanted to help her. When Sheehan did not come to the door, they entered her room. This was not unconstitutional. [9] "[L]aw enforcement [*1775] officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City* v. *Stuart*, 547 U. S. 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006). See also *Kentucky* v. *King*, 563 U.S. 452, 460, 131 S. Ct.

[3] Not satisfied with dismissing question 1, which concerns *San Francisco's* liability, our dissenting colleagues would further punish San Francisco by dismissing question 2 as well. See *post*, at ___, 191 L. Ed. 2d, at 872 (opinion of Scalia, J.) (arguing that deciding the second question would "reward" San Francisco and "spar[e it] the significant expense of defending the suit, and satisfying any judgment, against the individual petitioners"). But question 2 concerns the *liability of the individual officers.* Whatever contractual obligations San Francisco may (or may not) have to represent and indemnify the officers are not our concern. At a minimum, these officers have a personal interest in the correctness of the judgment below, which holds that they may have violated the Constitution. Moreover, when we granted the petition, we determined that both questions independently merited review. [7] Because of the importance of qualified immunity "to society as a whole," *Harlow* v. *Fitzgerald*, 457 U. S. 800, 814, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982), the Court often corrects lower courts when they wrongly subject individual officers to liability. See, [***19] *e.g.*, *Carroll* v. *Carman*, 574 U.S. 13, 135 S. Ct. 348, 190 L. Ed. 2d 311 (2014) (*per curiam*);*Wood* v. *Moss*, 572 U.S. 744, 134 S. Ct. 2056, 188 L. Ed. 2d 1039 (2014); *Plumhoff* v. *Rickard*, 572 U.S. 765, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014); *Stanton* v. *Sims*, 571 U.S. 3 , 134 S. Ct. 3, 187 L. Ed. 2d 341 (2013) (*per curiam*); *Reichle* v. *Howards*, 566 U.S. 658, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012).

1849, 179 L. Ed. 2d 865, 875 (2011).

Nor is there any doubt that had Sheehan not been disabled, the officers could have opened her door the second time without violating any constitutional rights. For one thing, [10] "because the two entries were part of a single, continuous search or seizure, the officers [were] not required to justify the continuing emergency with respect to the second entry." 743 F. 3d, at 1224 (following *Michigan* v. *Tyler*, 436 U. S. 499, 511, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978)). In addition, Reynolds and Holder knew that Sheehan had a weapon and had threatened to use it to kill three people. They also knew that delay could make the situation more dangerous. [11] The Fourth Amendment standard is reasonableness, and it is reasonable for police to move quickly if delay "would gravely endanger their lives or the lives of others." *Warden, Md. Penitentiary* v. *Hayden*, 387 U. S. 294, 298-299, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967). This is true even when, judged with the benefit of hindsight, the officers may have made "some mistakes." *Heien* v. [**868] *North Carolina*, 574 U.S. 54, 61, 135 S. Ct. 530, 190 L. Ed. 2d 475, 482 (2014). The Constitution is not blind to "the fact that police officers are often forced to make split-second [***21] judgments." *Plumhoff, supra*, at 775, 134 S. Ct. 2012, 188 L. Ed. 2d 1056, 1066.

We also agree with the Ninth Circuit that after the officers opened Sheehan's door the second time, their use of force was reasonable. Reynolds tried to subdue Sheehan with pepper spray, but Sheehan kept coming at the officers until she was "only a few feet from a cornered Officer Holder." 743 F. 3d, at 1229. At this point, the use of potentially deadly force was justified. See *Scott* v. *Harris*, 550 U. S. 372, 384, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). Nothing in the Fourth Amendment barred Reynolds and Holder from protecting themselves, even though it meant firing multiple rounds. See *Plumhoff, supra*, at 777, 134 S. Ct. 2012, 188 L. Ed. 2d 1056, 1068.

The real question, then, is 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. [12] 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, 172 L. Ed. 2d 565. Rather, we simply decide whether [***22] the officers' failure to accommodate Sheehan's illness violated clearly established law. It did not.

To begin, nothing in our cases suggests the constitutional rule applied by the Ninth Circuit. The Ninth Circuit focused on *Graham* v. *Connor*, 490 U. S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), but [13] *Graham* holds only that the "'objective reasonableness'" test applies to excessive-force claims under the Fourth Amendment. See *id.*, at 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443. That is far too general a proposition to control this case. [14] "We have repeatedly [*1776] told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." *al-Kidd, supra*, at 742, 131 S. Ct. 2074, 179 L. Ed. 2d 1149, 1160 (citation omitted); cf. *Lopez* v. *Smith*, 574 U.S. 1, 6, 135 S. Ct. 1, 190 L. Ed. 2d 1, 5 (2014) (*per curiam*). Qualified immunity is no immunity at all if "clearly established" law can simply be defined as the right to be free from unreasonable searches and seizures.

Even 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, 104 L. Ed. 2d 443, and responding to the perilous situation Reynolds and Holder confronted. *Graham [***23]* is a nonstarter.

Moving beyond *Graham*, the Ninth Circuit also turned to two of its own [**869] cases. But even if "a controlling circuit precedent could constitute clearly established federal law in these circumstances," *Carroll* v. *Carman*, 574 U.S. 13, 17, 135 S. Ct. 348, 190 L. Ed. 2d 311, 314 (2014) (*per curiam*), it does not do so here.

The Ninth Circuit first pointed to *Deorle* v. *Rutherford*, 272 F. 3d 1272 (CA9 2001), but from the very first paragraph of that opinion we learn that *Deorle* involved an officer's use of a beanbag gun to subdue "an emotionally disturbed" person who "was unarmed, had not attacked or even touched anyone, had generally obeyed the instructions given him by various police officers, and had not committed any serious offense." *Id.*, at 1275. The officer there, moreover, "observed Deorle at close proximity for about five to ten minutes before shooting him" in the face. See*id.*, at 1281. Whatever the merits of the decision in *Deorle*, the differences between that case and the case before us leap from the page. Unlike Deorle, Sheehan was dangerous, recalcitrant, lawbreaking, and out of sight.

The Ninth Circuit also leaned on *Alexander* v. *City and County of San Francisco*, 29 F. 3d 1355 (CA9 1994), another case involving mental illness. There, officials from San Francisco attempted to enter Henry Quade's home "for the primary purpose of arresting him" even though they lacked an arrest [***24] warrant. *Id.*, at 1361. Quade, in response, fired a handgun; police officers "shot back, and Quade died from gunshot wounds shortly thereafter." *Id.*, at 1358. The panel concluded that a jury should decide whether the officers used excessive force. The court reasoned that the officers provoked the confrontation because there were no "exigent circumstances" excusing their entrance. *Id.*, at 1361.

*Alexander*too is a poor fit. As Judge Graber observed below in her dissent, the Ninth Circuit has long read *Alexander* narrowly. See 743 F. 3d, at 1235 (opinion concurring in part and dissenting in part) (citing *Billington* v. *Smith*, 292 F. 3d 1177 (CA9 2002)). Under Ninth Circuit law, [4] an entry that otherwise complies [*1777] with the Fourth Amendment is not rendered unreasonable because it provokes a violent reaction. See *id.*, at 1189-1190. 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, [15] 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." *Id.*, at 1190. Courts must not judge officers with '"the 20/20 vision [***25] of hindsight.'" *Ibid.* (quoting *Graham*, *supra*, at 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443).

When *Graham*, *Deorle*, and *Alexander* are viewed together, the central error in the Ninth Circuit's reasoning is apparent. The panel majority concluded [**870] that these three cases "would have placed any reasonable, competent officer on notice that it is unreasonable to forcibly enter the home of an armed, mentally ill suspect who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry." 743 F. 3d, at 1229. But even assuming that is true, *no precedent clearly*

[4] Our citation to Ninth Circuit cases should not be read to suggest our agreement (or, for that matter, disagreement) with them. The Ninth Circuit's "provocation" rule, for instance, has been sharply questioned elsewhere. See *Livermore* v. *Lubelan*, 476 F. 3d 397, 406-407 (CA6 2007); see also, *e.g.*, *Hector* v. *Watt*, 235 F. 3d 154, 160 (CA3 2001) ("[I]f the officers' use of force was reasonable given the plaintiff's acts, then despite the illegal entry, the plaintiff's own conduct would be an intervening cause"). Whatever their merits, all that matters for our qualified immunity analysis is that they do not clearly establish any right that the officers violated.

established that there was not "an objective need for immediate entry" here. No matter how carefully a reasonable [***26] 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 779, 572 U.S. 765, 134 S. Ct. 2012, 188 L. Ed. 2d 1056, 1069.

Nor does it matter for purposes of qualified immunity that Sheehan's expert, Reiter, testified that the officers did not follow their training. According to Reiter, San Francisco trains its officers when dealing with the mentally ill to "ensure that sufficient resources are brought to the scene," "contain the subject" and "respect" the suspect's "comfort zone," "use time to their advantage," and "employ non-threatening verbal communication and open-ended questions to facilitate the subject's participation in communication." Brief for Respondent 7. Likewise, San Francisco's policy is "'to use hostage negotiators'" when dealing with "'a suspect [who] resists arrest by barricading himself.'" *Id.*, at 8 (quoting San Francisco Police Department General Order 8.02, §II(B) (Aug. 3, 1994), online at http://www.sf-police.org (as visited May 14, 2015, and available in Clerk [***27] of Court's case file)).

[16] Even 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 "avoi[d] 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." *Billington*, *supra*, at 1189. Cf. *Saucier* v. *Katz*, 533 U. S. 194, 216, n. 6, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) (Ginsburg, J., concurring in judgment) ("'[I]n close cases, a jury does not automatically get to second-guess these life and death decisions, even though a plaintiff has an expert and a plausible claim that the situation could better have been handled differently'" (quoting [*1778] *Roy* v. *Inhabitants of Lewiston*, 42 F. 3d 691, 695 (CA1 1994))). Considering the specific situation confronting Reynolds and Holder, they had sufficient reason to believe that their conduct was justified.

Finally, to the extent that [17] a "robust 'consensus of cases of persuasive authority'" could itself clearly establish the federal right respondent alleges, *al-Kidd*, 563 U.S., at 742, 131 S. Ct. 2074, 179 L. Ed. 2d 1149, 1159, no such consensus exists here. If anything, the [***28] opposite may be true. See, *e.g., Bates* v. *Chesterfield County*, 216 F. 3d 367, 372 (CA4 2000) ("Knowledge of a person's disability simply cannot foreclose officers from protecting themselves, the disabled person, and [**871] the general public"); *Sanders* v. *Minneapolis*, 474 F. 3d 523, 527 (CA8 2007) (following *Bates*, *supra*); *Menuel* v. *Atlanta*, 25 F. 3d 990 (CA11 1994) (upholding use of deadly force to try to apprehend a mentally ill man who had a knife and was hiding behind a door).

In sum, we hold that qualified immunity applies because these officers had no "'fair and clear warning' of what the Constitution requires.'" *al-Kidd*, *supra*, at 746, 563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149, 1162 (Kennedy, J., concurring). Because the qualified immunity analysis is straightforward, we need not decide whether the Constitution was violated by the officers' failure to accommodate Sheehan's illness.

***

For these reasons, the first question presented is dismissed as improvidently granted. On the second question, we reverse the judgment of the Ninth Circuit. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE Breyer took no part in the consideration or decision of this case.

Concur by: Scalia(In Part)

Dissent by: Scalia(In Part)

Dissent

JUSTICE **Scalia**, with whom JUSTICE **Kagan** joins, concurring in part and dissenting in part.

The first question presented (QP) in the petition for certiorari was "Whether Title II [***29] of the Americans with Disabilities Act [(ADA)] requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody." Pet. for Cert. i. The petition assured us (quite accurately), and devoted a section of its argument to the point, that "The Circuits Are In Conflict On This Question." *Id.*, at 18. And petitioners faulted the Ninth Circuit for "holding that the ADA's reasonable accommodation requirement applies to officers facing violent circumstances," a conclusion that was "in direct conflict with the categorical prohibition on such claims adopted by the Fifth and Sixth Circuits." *Ibid.* Petitioners had expressly advocated for the Fifth and Sixth Circuits' position in the Court of Appeals. See Appellees' Answering Brief in No. 11-16401 (CA9), pp. 35-37 ("[T]he ADA does not apply to police officers' responses to violent individuals who happen to be mentally ill, where officers have not yet brought the violent situation under control").

Imagine our surprise, then, when the petitioners' principal brief, reply brief, and oral argument had nary a word to say about that subject. Instead, petitioners bluntly announced [***30] in their principal brief that they "do not assert that the actions of individual police officers [in arresting violent and armed disabled persons] are never subject to scrutiny under Title II," and proclaimed that "[t]he only ADA issue here is *what* Title II requires of individual officers who are facing an armed and dangerous suspect." Brief for Petitioners 34 (emphasis added). In other words, the issue is not (as the petition had asserted) [*1779] *whether* Title II applies to arrests of violent, mentally ill individuals, but rather *how* it applies under the circumstances of this case, where the plaintiff threatened officers with a weapon. We were thus deprived of the opportunity to consider, and settle, a [**872] controverted question of law that has divided the Circuits, and were invited instead to decide an ADA question that has relevance only if we assume the Ninth Circuit correctly resolved the antecedent, unargued question on which we granted certiorari. The Court is correct to dismiss the first QP as improvidently granted.

Why, one might ask, would a petitioner take a position on a Circuit split that it had no intention of arguing, or at least was so little keen to argue that it cast the argument aside [***31] uninvited? The answer is simple. Petitioners included that issue to induce us to grant certiorari. As the Court rightly observes, there are numerous reasons why we would not have agreed to hear petitioners' first QP if their petition for certiorari presented it in the same form that it was argued on the merits. See *ante*, at ___ - ___, 191 L. Ed. 2d, at 864-866. But it is also true that there was little chance that we would have taken this case to decide only the second, fact-bound QP—that is, whether the individual petitioners are en-titled to qualified immunity on respondent's Fourth Amendment claim.

This Court's Rule 10, entitled "Considerations Governing Review on Certiorari," says that certiorari will be granted "only for compelling reasons," which include the existence of conflicting decisions on issues of law among federal courts of

appeals, among state courts of last resort, or between federal courts of appeals and state courts of last resort. The Rule concludes: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The second QP implicates, at most, the latter. It is unlikely that we would have granted certiorari [***32] on that question alone.

But (and here is what lies beneath the present case) when we do grant certiorari on a question for which there is a "compelling reason" for our review, we often also grant certiorari on attendant questions that are not independently "certworthy," but that are sufficiently connected to the ultimate disposition of the case that the efficient administration of justice supports their consideration. In other words, by promising argument on the Circuit conflict that their first question presented, petitioners got us to grant certiorari not only on the first question but also on the second.

I would not reward such bait-and-switch tactics by proceeding to decide the independently "uncertworthy" second question. And make no mistake about it: Today's judgment is a reward. It gives the individual petitioners all that they seek, and spares San Francisco the significant expense of defending the suit, and satisfying any judgment, against the individual petitioners. [*] I would not encourage future litigants to seek review premised on arguments they never plan to press, secure in the knowledge that once they find a toehold on this Court's docket, we will consider whatever workaday [***33] arguments they choose to present in their merits briefs.

There is no injustice in my vote to dismiss both questions as improvidently [**873] granted. To be sure, *ex post*—after the [*1780] Court has improvidently decided the uncertworthy question—it appears that refusal to reverse the judgment below would have left a wrong unrighted. *Ex ante*, how-ever—before we considered and deliberated upon the second QP but after petitioners' principal brief made clear that they would not address the Circuit conflict presented by the first QP—we had no more assurance that this question was decided incorrectly than we do for the thousands of other uncertworthy questions we refuse to hear each Term. *Many* of them have undoubtedly been decided wrongly, but we are not, and for well over a century have not been, a court of error correction. The fair course—the just course—is to treat this now-nakedly [***34] uncertworthy question the way we treat all others: by declining to decide it. In fact, there is in this case an even greater reason to decline: to avoid being snookered, and to deter future snookering.

Because I agree with the Court that "certiorari jurisdiction exists to clarify the *law*," *ante*, at ___, 191 L. Ed. 2d, at 866 (emphasis added), I would dismiss both questions presented as improvidently granted.

References

U.S.C.S., Constitution, Amendment 4; 42 U.S.C.S. § 1983

5 Antieau on Local Government Law § 77.04 (Matthew Bender)

27 Moore's Federal Practice § 641.51 (Matthew Bender)

L Ed Digest, Public Officers § 56; Search and Seizure § 25.2

L Ed Index, Arrest; Qualified Immunity; Search and Seizure

[*] * San Francisco will still be subject to liability under the ADA if the trial court determines that the facts demanded accommodation. The Court of Appeals vacated the District Court's judgment that the ADA was inapplicable to police arrests of violent and armed disabled persons, and remanded for the accommodation determination.

When does local government or local governmental agency become liable, under 42 U.S.C.S. § 1983, for alleged violation of civil rights--Supreme Court cases. 178 L. Ed. 2d 905.

Supreme Court's view as to what constitutes reasonable accommodation or modification, for purposes of Americans with Disabilities Act of 1990, as amended (ADA) (42 U.S.C.S. § 12101 et seq.). 152 L. Ed. 2d 1141.

When will Supreme Court dismiss writ of certiorari as improvidently granted. 126 L. Ed. 2d 745.

Supreme Court's views as to application or applicability of doctrine of qualified immunity in action under 42 U.S.C.S. § 1983, or in Bivens action, seeking damages for alleged civil rights violations. 116 L. Ed. 2d 965.

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Circuit Court Cases

Doe v. Jackson Local Sch. Dist. Bd. of Educ.

United States Court of Appeals for the Sixth Circuit

October 23, 2019, Argued; April 1, 2020, Decided; April 1, 2020, Filed

File Name: 20a0105p.06

No. 19-3019

Reporter

2020 U.S. App. LEXIS 10238 *; 2020 FED App. 0105P (6th Cir.) **

JANE DOE and JOHN DOE, Individually and as the natural parents and next of kin of Minor Doe, Plaintiffs-Appellants, v. JACKSON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, TAMARA NEFF, MICHELLE KRIEG, JIMMIE SINGLETON, SUSANNE WALTMAN, and HARLEY NEFTZER, Defendants-Appellees.

Prior History: [*1] Appeal from the United States District Court for the Northern District of Ohio at Akron. No. 5:17-cv-01931—Sara E. Lioi, District Judge.

Doe v. Jackson Local Sch. Dist. Bd. of Educ., 2018 U.S. Dist. LEXIS 211131 (N.D. Ohio, Dec. 14, 2018)

Counsel: ARGUED: Laura L. Mills, MILLS, MILLS, FIELY & LUCAS, LLC, Canton, Ohio, for Appellants.

Sherrie C. Massey, PETERS KALAIL & MARKAKIS CO., LPA, Cleveland, Ohio, for Appellees.

ON BRIEF: Laura L. Mills, MILLS, MILLS, FIELY & LUCAS, LLC, Canton, Ohio, for Appellants.

Sherrie C. Massey, David S. Hirt, PETERS KALAIL & MARKAKIS CO., LPA, Cleveland, Ohio, for Appellees.

Judges: Before: GUY, BUSH, and MURPHY, Circuit Judges.

Opinion by: MURPHY

Opinion

[**2] MURPHY, Circuit Judge. Like other cases involving the "state-created-danger" theory of substantive due process, this case comes to us with tragic facts: a fifth grader sexually assaulted a kindergartener. *Cf. McQueen v. Beecher Cmty. Sch.*, 433 F.3d 460, 462 (6th Cir. 2006); *Schroder v. City of Fort Thomas*, 412 F.3d 724, 725 (6th Cir. 2005). The fifth-grade student, C.T., lit a match during the bus ride home from an Ohio elementary school. In response, school administrators moved him to the front of the bus. While seated in the front, he sexually assaulted the kindergarten student, Minor Doe, as they rode home from school over several weeks. C.T. was expelled and is not a defendant. Instead, Minor Doe's parents brought a state-created-danger claim against the Jackson [*2] Local School District Board of Education and five school employees. The district court granted summary judgment to these defendants, holding

that no reasonable jury could find that they knowingly exposed Minor Doe to the risk of sexual assault. We must agree, and respectfully reaffirm that the Constitution does not empower federal judges to remedy every situation we find "heart-wrenching." *Schroder*, 412 F.3d at 731.

I

In the fall of 2015, Jimmie Singleton began driving the bus that C.T. and Minor Doe rode to and from their elementary school. The bus driver that Singleton replaced had handled this route for years, but retired at the end of the prior school year. Soon after this transition, school administrators fielded some parent complaints about Singleton's ability to prevent student misconduct compared to the previous bus driver. Harley Neftzer, the school's director of transportation, spoke with Singleton about the complaints and did not hear further concerns from parents for the rest of the school year.

At the start of the 2016-2017 school year, Singleton created a seating chart for the students on his bus. The school district encouraged drivers to assign younger students to the front of the bus and older [*3] students to the back. Minor Doe was entering kindergarten and C.T. was entering the fifth grade. So Singleton assigned C.T. to a seat in the back with the older [**3] children, while Minor Doe sat in the front row directly behind the driver's seat. Another kindergartener sat next to Minor Doe in the mornings on the way to school. But Minor Doe sat alone in the afternoons because her seatmate did not ride the bus home.

On September 15, 2016, a student told his teacher that C.T. had lit a match on the bus the day before. The teacher relayed this concern to the dean of students, Michelle Krieg. Krieg and a guidance counselor, Tamara Neff, investigated the allegation. Students told them that C.T. had lit matches during the afternoon bus ride and had lit matches and burned cardboard while waiting at the bus stop the prior morning. A camera on the bus recorded C.T. lighting a match and throwing it out the window over another student's head. A search of the school grounds turned up matches in a bathroom trashcan. Making matters worse, C.T. had tried to prevent fellow students from telling school administrators about his conduct. One student had immediately attempted to report C.T. to Singleton, [*4] but C.T. had blocked her path to the bus driver. And C.T. had promised not to bother another student for the rest of the year if the student did not tell anyone about the matches.

Krieg and Neff summarized the findings of their investigation for the school's principal, Susanne Waltman. Waltman interviewed C.T. He was initially dishonest about what he had done. When Waltman confronted him with the bus video, C.T. confessed.

Waltman disciplined C.T. She found that he had violated several codes of conduct. His violations included: "failing to tell the truth"; engaging in "[b]ehavior which causes or reasonably could cause physical harm to students or adults"; and "[p]ossession of or igniting of" a device "which produces an explosion, smoke, fire, gas, or odor." She placed C.T. in "alternative day assignment" for a day and a half. She suspended him from riding the bus for a week or so. And she required him to sit in the front row of the bus across from the driver for the rest of the school year. Waltman wanted C.T. in that seat because it would be "easier [for the bus driver] to see" him, and "if he lit a match, the driver could smell it."

Waltman also crafted a "Safety Plan" for C.T. For [*5] the indefinite future, a school employee would meet C.T. at the bus each morning and escort him to the school office, where school officials would check his backpack. Someone would then escort C.T. to class. C.T. could [**4] not go into the hallway or restrooms unless escorted by an adult. He could only play on the playground blacktop near the adult monitors. And he would have assigned seats in gym class, in music class, in the library, and in the cafeteria. Waltman explained that she wanted C.T. "to be close to an adult at all

times" because C.T. had been "dishonest" when asked about the matches.

Before this incident, school administrators had been involved with C.T. one prior time. Teachers had developed a "Success Plan" for C.T. soon after he enrolled in the middle of his third-grade year. According to Neff, the guidance counselor, C.T. had struggled with "being truthful, being respectful of other people's property, and following directions the first time they were given." He, for example, "would take someone's glue sticks" and deny doing so. As part of the plan Neff checked in with C.T. about ten times in all. By the end of C.T.'s third-grade year, she recalled that the Success Plan [*6] "kind of dwindled off." By C.T.'s fifth-grade year, his teacher described him as "a little bit chatty, talkative, but really kind of typical of a fifth grade boy."

Singleton, the bus driver, learned that C.T.'s new seat assignment would be in the bus's front-right seat. Waltman claims that she explained to Singleton that C.T. "had lit matches on the bus and he was coming to the front because he was not truthful." Singleton, however, recalls hearing about the matches and seat restriction from Neftzer, the director of transportation. No one told Singleton about C.T.'s building restrictions.

C.T. shared his new front-row seat with a kindergarten boy. C.T.'s parents say they asked that he sit alone, but Singleton was not advised of such a request. When making this assignment, Waltman did not consider which students were assigned to the front of the bus. C.T.'s new seat was across the aisle from Minor Doe's. Her seat, directly behind Singleton, was "the worst seat on the bus" in terms of his visibility.

At some point after C.T. returned to the bus, he moved out of his assigned seat and into Minor Doe's seat. Singleton denied knowing that C.T. had moved across the aisle because, he said, he [*7] keeps his "focus on driving the bus." Singleton also denied telling C.T. that he could sit with Minor Doe, but video footage shows at least one instance where Singleton appears to have [**5] motioned C.T. to sit next to Minor Doe. Principal Waltman did not follow up with Singleton to ensure that he was enforcing C.T.'s new seat assignment.

At dinner on the night of Friday, November 11, Minor Doe told her parents that C.T. had done "something really gross" on the bus ride home. She then described how C.T. had forced her to engage in sexual acts several times. Minor Doe's parents immediately notified the police and emailed Principal Waltman. Waltman informed her superiors and arranged to meet with Minor Doe's parents Monday morning. Before the meeting, Waltman and Neftzer reviewed the bus's video footage and confirmed that C.T. had sexually assaulted Minor Doe. During the ensuing investigation, they learned that C.T. had taken steps to hide the assaults. C.T. told the kindergarten boy who shared his assigned seat to look out the window while the assaults occurred. And he positioned his backpack so that Singleton, the bus driver, could not see the assaults.

On Monday morning, Waltman suspended [*8] C.T. before he came to school. C.T. never returned to the school, was eventually expelled, and later pleaded guilty to gross sexual imposition. The school cooperated with the police, who concluded that Singleton had not known of the assaults.

Minor Doe and her parents sued the School Board and five school employees: Singleton (the bus driver), Waltman (the principal), Neff (the guidance counselor), Neftzer (the director of transportation), and Krieg (the dean of students). The Does alleged, among other claims, that the employees violated the Due Process Clause's implied "substantive" component by failing to prevent C.T.'s sexual assault of Minor Doe. *Doe v. Jackson Local Sch. Dist. Bd. of Educ.*, 2018 U.S. Dist. LEXIS 211131, 2018 WL 6590615, at *7 (N.D. Ohio Dec. 14, 2018). The district court granted summary judgment to the defendants, concluding that this claim failed because the Does could not show that the defendants had "acted with the 'requisite

culpability to establish a substantive due process violation[.]'" 2018 U.S. Dist. LEXIS 211131, [WL] at *9 (citation omitted).

Even assuming a constitutional violation, the court alternatively concluded, the Does still could not recover damages from the School Board or the school employees. It held that the Does could not obtain damages from the Board because they did not show that C.T.'s assault arose [**6] from a Board [*9] policy or custom, as required for municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). *Doe*, 2018 U.S. Dist. LEXIS 211131, 2018 WL 6590615, at *11. And it held that the Does could not seek damages from the employees because they would be entitled to qualified immunity even if they had violated due process. The Does identified no "clearly established" caselaw that would have constitutionally compelled the employees to do more under the circumstances. 2018 U.S. Dist. LEXIS 211131, [WL] at *17.

II

The Does challenge only the district court's holding that the school employees did not act with deliberate indifference; they nowhere challenge (or even acknowledge) the district court's alternative holdings that *Monell* and qualified immunity would bar relief against the Board and the school employees even if they had violated due process. Yet "[a] ruling by us that the [Does] have shown a constitutional violation, unaccompanied by a ruling with respect to any municipal policy [or qualified immunity], would not suffice to alter the judgment." *Hardrick v. City of Detroit*, 876 F.3d 238, 244 (6th Cir. 2017). That fact might suggest we could affirm on these unchallenged grounds alone. *See id.* at 243-44; *White Oak Prop. Dev., LLC v. Washington Township*, 606 F.3d 842, 854 (6th Cir. 2010). Oddly, however, the school defendants also did not raise these *Monell* and qualified-immunity bases for affirmance. Given the parties' briefing decisions, we exercise our discretion not to "address [*10] the municipal-policy and qualified-immunity issues . . . because both theories share an initial premise—the violation of a federally protected right—that has not been satisfied." *Schroder v. City of Fort Thomas*, 412 F.3d 724, 727 (6th Cir. 2005); *see Hardrick*, 876 F.3d at 244.

A

State actors who commit sexual assaults "deprive" their victims of their "liberty" interest in bodily integrity within the meaning of the Due Process Clause. *See Doe v. Claiborne County*, 103 F.3d 495, 506 (6th Cir. 1996). Here, however, a private student (not a state actor) deprived Minor Doe of this liberty interest. The Does' allegations against the state actors thus stem from their failure to protect Minor Doe from C.T.'s abuse. Yet this "failure-to-protect" claim faces immediate textual and precedential problems. The clause's text provides: "[N]or shall any State [**7] deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This plain language, which restricts deprivations *by the state*, imposes "a limitation on the State's power to act, not . . . a guarantee of certain minimal levels of safety and security." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).

DeShaney adopted this plain-text reading. It held that social workers did not violate due process when they negligently failed to prevent a father from abusing his son, Joshua DeShaney. *Id.* at 203. According to the Court, the Due Process Clause's text and history showed that [*11] the clause did not compel states to protect their residents from a private party's violence. *Id.* at 195-96. The clause instead allowed the states to decide democratically whether to hold public actors accountable for failing to protect residents. *Id.* at 196, 202-03. To reach this result, the Court distinguished Joshua DeShaney from individuals (such as prisoners) who are in state custody and whom a state has a constitutional duty to protect. *See id.* at 198-200. Yet the abuse that Joshua suffered occurred when he was in the custody of his father, not the

government. *Id.* at 201.

Both text and precedent thus could be read to foreclose the Does' claim that school officials violated due process by failing to prevent C.T.'s abuse. After all, we have repeatedly held that students in schools are not in state "custody" within the meaning of *DeShaney*. *Stiles ex rel. D.S. v. Grainger County*, 819 F.3d 834, 854 (6th Cir. 2016). We have, however, carved out an exception to *DeShaney*'s rule that a state has no constitutional duty to protect individuals who are not in its custody. When rejecting the due-process claim, *DeShaney* described the case's facts as follows: "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more [*12] vulnerable to them." 489 U.S. at 201. We have used this sentence to adopt a "state-created-danger theory" of substantive due process, and have gradually molded that theory into a three-part test. *See Estate of Romain v. City of Grosse Pointe Farms*, 935 F.3d 485, 491-92 (6th Cir. 2019). An official must initially take an "affirmative act . . . that either create[s] or increase[s] the risk that the plaintiff [will] be exposed to private acts of violence." *Schroder*, 412 F.3d at 728. Next, this risk of private harm must rise to the level of a "special danger" to a specific victim that exceeds the general risk of harm the public faces from the private actor. *Jones v. Reynolds*, 438 F.3d 685, 696 (6th Cir. 2006). Last, when exacerbating this risk of harm, the [**8] official must act with a sufficiently culpable mental state. *McQueen v. Beecher Cmty. Sch.*, 433 F.3d 460, 469 (6th Cir. 2006).

We can resolve this case on the third "culpability" element alone. Our decisions have described this element in different ways. Sometimes we have said that a public official either "must have known or clearly should have known that [the official's] actions specifically endangered an individual." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998); *see Engler v. Arnold*, 862 F.3d 571, 575 (6th Cir. 2017). Other times we have said that a public official must have "acted with the requisite culpability to establish a substantive due process violation[.]" *Ewolski v. City of Brunswick*, 287 F.3d 492, 510 (6th Cir. 2002).

Which test applies? The latter one more accurately articulates current law. A should-have-known [*13] framework comes close to "suggest[ing] a classic negligence formulation." *Estate of Romain*, 935 F.3d at 493-95 (Murphy, J., concurring). But a public official's negligence cannot prove a substantive-due-process violation even where the official directly inflicts the injury. *See County of Sacramento v. Lewis*, 523 U.S. 833, 848-49, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998); *Daniels v. Williams*, 474 U.S. 327, 332-33, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). And our recent decisions using the should-have-known test have their roots in *Kallstrom*, a case predating the Supreme Court's *Lewis* decision. *E.g.*, *Cartwright v. City of Marine City*, 336 F.3d 487, 493 (6th Cir. 2003). Since *Lewis*, we have recognized that the culpability standard that applies to state actors who indirectly allow a private party to inflict harm should not be lower than the culpability standard that applies to state actors who directly inflict that harm themselves. *See Ewolski*, 287 F.3d at 510.

This answer leads to another question: What is "the requisite culpability to establish a substantive due process violation"? *Id.* The Supreme Court has told us that the Constitution sets a high bar for this sort of constitutional tort. That is so because this claim relies on due process's implied substantive component and so requires courts to make subjective judgments with little grounding in constitutional text or history. Here, as elsewhere, the Court has "been reluctant to expand the concept of substantive due process because [*14] guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992). The Court has added a federalism concern to this subjectivity concern. It has long resisted turning due process into a "font of tort law." *Paul v. Davis*,

424 U.S. 693, 701, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). [**9] Nowhere does the Constitution "purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels*, 474 U.S. at 332. The Constitution instead leaves those rules of the behavioral road for the states themselves to regulate. *Id.*

For these reasons, the Supreme Court has held that an executive actor's conduct violates the Due Process Clause only if it is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lewis*, 523 U.S. at 847 n.8. These colorful descriptors may be "more than a little 'open-ended.'" *Browder v. City of Albuquerque*, 787 F.3d 1076, 1079 (10th Cir. 2015) (Gorsuch, J.) (citation omitted). But they at least, "as Judge Friendly put it, 'poin[t] the way'": only extreme misconduct will violate the clause. *Lewis*, 523 U.S. at 847 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)). To offer clearer guidance, the Court has placed this shocks-the-conscience test within tort law's traditional "spectrum of culpability." *Id.* at 848. On one end, negligent conduct will never shock society's conscience. *Daniels*, 474 U.S. at 328. On the other, conduct [*15] unjustifiably "intended to injure" is the "most likely to rise to the conscience-shocking level." *Lewis*, 523 U.S. at 849. The Court has reserved a case-by-case approach for public actors who cause harm with a state of mind falling in between these extremes—such as actors who are deliberately indifferent to the risk of a private party's harm. *Id.* It has said that deliberate indifference can at times support liability if a public official injures (or fails to protect) someone that the government has taken into custody. *See Farmer v. Brennan*, 511 U.S. 825, 835-38, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). But it has added that an actual intent to injure is required when public actors must make hasty decisions, such as during a high-speed chase or a prison riot. *Lewis*, 523 U.S. at 852-53.

Our court has imported this deliberate-indifference standard into the state-created-danger context, at least when officials have "the opportunity for reflection and unhurried judgments.'" *Bukowski v. City of Akron*, 326 F.3d 702, 710 (6th Cir. 2003) (quoting *Ewolski*, 287 F.3d at 511 n.5); *cf. Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 542 F.3d 529, 539-40 (6th Cir. 2008). The standard has two parts. An official must "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Ewolski*, 287 F.3d at 513 (quoting *Farmer*, 511 U.S. at 837). "Having drawn the inference," the [**10] official next must "act or fail to act in a manner demonstrating 'reckless or callous indifference' [*16] toward the individual's rights." *Id.* (citation omitted). Given the call for caution in this area, *Collins*, 503 U.S. at 125, our cases set demanding rules for both parts of this standard.

Start with the first part: To "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists," *Ewolski*, 287 F.3d at 513 (citation omitted), a public official must know of more than a *general* risk of harm. The official must know of the *specific* risk that later develops. In *McQueen*, for example, a first-grade student ("John Smith") fatally shot another student ("Jane Doe") when the children's teacher, Alicia Judd, left them unsupervised. 433 F.3d at 463. Before this shooting, Smith had been "involved in several incidents where he attacked other students, sometimes beating them up and other times stabbing them with a pencil." *Id.* at 462. Doe's mother sued Judd and alleged that she "knew that Smith might violently assault another student" and ignored that risk by leaving him unsupervised. *Id.* at 469. But Judd's knowledge of Smith's "sometimes violent behavior" was not enough to prove that she knew that Smith posed a risk of gun violence. *Id.* (citation omitted). Judd had no notice that Smith "would escalate from hitting with fists, feet, and pencils" [*17] to shooting with guns. *Id.* at 470; *see also Range v. Douglas*, 763 F.3d 573, 591 (6th Cir. 2014).

Turn to the second part: To act with "reckless or callous indifference," *Ewolski*, 287 F.3d at 513 (citation omitted), a public official must do more than be aware of "a substantial risk of serious harm," *Hunt*, 542 F.3d at 543. The official's response to that harm must also be "conscience shocking." *Schroder*, 412 F.3d at 731. And if the official chooses a response motivated by a "legitimate governmental purpose," this element will generally be absent. *Hunt*, 542 F.3d at 542. *Schroder* best proves that point. In that case, city officials knew that a street's speed limit risked deadly accidents because residents repeatedly warned them of that risk and asked for a lower speed limit. 412 F.3d at 726. After a speeding car tragically killed a 10-year-old boy, his parents sued those officials under the state-created-danger theory. *Id.* We rejected their claim. While the officials may have "exhibited deliberate indifference to the[] warnings," that indifference alone did not suffice. *Id.* at 729. "It is in the very nature of deliberative bodies to choose between and among competing policy options," we said, and "a substantive due process violation does not arise whenever the government's choice prompts a known risk to [**11] come to pass." *Id.* The official's choice of a speed limit [*18] simply did not establish the required "'callous disregard' or 'conscience shocking' element." *Id.* at 731.

B

Measured against these standards, the Does have not created a genuine dispute of material fact over the culpability element of our state-created-danger test. *See McQueen*, 433 F.3d at 463. Before explaining why, we must begin with a high-level point about the cause of action in 42 U.S.C. § 1983. The Does barely distinguish among the Board and the five school employees, making broad-bush statements against "Defendants-Appellees" collectively. That will not do. "[V]icarious liability is inapplicable to . . . § 1983 suits," so a plaintiff must plead and prove "that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *McQueen*, 433 F.3d at 470. The Does thus must show that each employee knew of a risk that C.T. would sexually assault Minor Doe and responded to that risk in a way that society would find "conscience shocking." But they have little to say about the knowledge or conduct of several defendants. Take Michelle Krieg, the dean of students. She gathered the facts as part of the school's match-lighting investigation. But she "was not involved in . . . the development of" the Safety Plan or "the [*19] decision to assign [C.T.] to sit in the front of the bus." How could Krieg face liability given her tangential connection to the harm? The Does do not say. They instead focus on the actions of Susanne Waltman (the principal) and Jimmie Singleton (the bus driver). Yet the Does fail to establish either part of our deliberate-indifference standard for any school employee.

1. *Knowledge of the Risk*. We agree with the district court that "nothing about C.T.'s school record . . . could have put the [school employees] on notice that [C.T.] posed a risk of sexually assaulting" Minor Doe. *Doe*, 2018 U.S. Dist. LEXIS 211131, 2018 WL 6590615, at *10. Consider the facts they knew: C.T. had lit a match on the bus and threw it out the window, and had lit matches and burned cardboard at the bus stop. These actions showed that, when left unsupervised, C.T. might engage in risky behavior that could put fellow students in harm's way. School employees also knew that C.T. had prevented students from reporting his conduct, and had been dishonest when confronted by school officials. All told, then, they knew that C.T.'s poor judgment, bullying tendencies, and [**12] dishonesty had the potential to endanger students. Yet nothing about the "kind and degree of risk" from [*20] this reckless match-lighting incident suggested that C.T. also posed a risk of intentional sexual assault. *Range*, 763 F.3d at 591.

In that respect, this case is easier than *McQueen*. There, the school official actually knew of the shooter's history of intentional violence against

other students. As noted, "in the months leading up to the shooting, [he had been] involved in several incidents where he attacked other students, sometimes beating them up and other times stabbing them with a pencil." 433 F.3d at 462. Yet these prior assaults did not put his teacher on notice that he would resort to gun violence. *Id.* at 469-70. Here, the school officials had no knowledge of C.T. ever attacking students. If a history of physical violence cannot establish subjective awareness of a risk of gun violence, it follows that C.T.'s lighting of a match—better categorized as reckless—cannot establish subjective awareness of a risk of sexual violence.

Nor would any other conduct have given the school employees the required notice. C.T.'s third-grade "Success Plan," for example, had nothing to do with school violence, let alone sexual assault. Simply put, C.T.'s theft of glue sticks would not warn the employees that C.T. might sexually assault students. [*21] It is likewise insufficient that the Does' expert witness opined that sexually abusive youth also frequently have behavioral problems.

2. *Response to the Risk.* The school employees' responses to the risk also do not show the "callous disregard" or "conscience shocking" behavior that our state-created-danger cases require. *See Schroder*, 412 F.3d at 731. They did not ignore a risk that C.T. would harm his fellow students. Far from it. Soon after the dean of students got word of the match-lighting claims, the school employees quickly investigated the incident. And Principal Waltman designed a Safety Plan tailored to C.T.'s misconduct. That plan would, for the most part, put C.T. "close to an adult at all times," which would reduce the opportunities for the type of reckless behavior that C.T. had undertaken on the bus and at the bus stop.

To be sure, Waltman's choice to move C.T. to the front of the bus put him closer to Minor Doe. But Waltman did not make this seating change for some "arbitrary" reason designed to increase the risks of harm to Minor Doe. *Hunt*, 542 F.3d at 543. Waltman was instead [**13] "motivated by a countervailing, legitimate governmental purpose." *Id.* at 542. She moved C.T. to his front-row seat across from Minor Doe because it [*22] would be "easier [for the bus driver] to see" him, and because "if he lit a match, the bus driver could smell it." As she put it: "You can't smell a match when you're in the front and the children are in the back." She chose a course of action based on the known risk before her (match lighting), not based on an unknown risk that had yet to come to pass (sexual assault).

When choosing C.T.'s discipline, Principal Waltman also faced the "tradeoffs" we have said generally do not establish conscience-shocking behavior. *Id.* Waltman chose a discipline that, it's safe to say, regularly occurs in schools across this country: If a child misbehaves on a bus, the child gets moved to the front of the bus. *Cf. Moore v. Chilton Cty. Bd. of Educ.*, 1 F. Supp. 3d 1281, 1290 n.4 (M.D. Ala. 2014). On the other hand, tougher sanctions faced countervailing concerns. Sure, Waltman could have sought to expel C.T. or barred him from the bus. But these harsher sanctions likely would have risked an administrative or judicial retort that the punishment did not fit the crime. *Cf. Cisek v. Nordonia Hillsc Bd. of Educ.*, 2011-Ohio-1042, 2011 WL 806518, at *4 (Ohio Ct. App. 2011); *see Goss v. Lopez*, 419 U.S. 565, 573-75, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975). Our state-created-danger cases have sought to avoid this type of "Catch 22." *Hunt*, 542 F.3d at 542.

As will often be the case in retrospect, Waltman and Singleton also could have done more when implementing this discipline. Singleton [*23] could have ensured that C.T. stayed in his assigned seat. And Waltman could have followed up with Singleton about the discipline. At most, however, the failure to take these additional precautions suggests negligence, which falls well short of establishing the required "callous disregard for the safety" of Minor Doe. *Ewolski*, 287 F.3d at 514. And even these specific choices came with

tradeoffs of their own. The more time Singleton spent monitoring for student misconduct, the less time he spent watching the road. It is not callously indifferent to prioritize his "focus on driving the bus" for the safety of all. And, as Waltman explained, "there are so many moving parts in a school building during a day" that "following up with every single on-the-spot decision is not even humanly possible." In short, "the practicalities of day-to-day governance require officials to make difficult allocation choices and tradeoffs," and "it is generally not for the courts to compel affirmative steps in one area at the expense of another in weighing competing policy options." [**14] *Schroder*, 412 F.3d at 730. No school employees in this case acted in a way that could be characterized as "conscience shocking." *Id.* at 731.

C

The Does make a factual point and a legal point [*24] in response. Factually, they identify the "extensive" Safety Plan as smoking-gun evidence that the school employees knew that C.T. posed a serious risk of harm. Yet nothing in the Safety Plan suggests, as our cases require, that the employees perceived the *specific* risk that materialized—the risk that C.T. would sexually assault another student. *McQueen*, 433 F.3d at 469-70. To the contrary, Waltman was preoccupied with C.T.'s specific infraction—lighting matches and lying about it—when designing the Safety Plan. C.T. was not moved to the front of the bus for fear he might violently attack older students in the back. He was moved to the front because he might light a match. Up front (unlike in the back), the driver would be better able to smell any flame and take the proper recourse.

Regardless, the Does' use of this Safety Plan to impose liability on the school employees flips the deliberate-indifference standard on its head. That approach would impose liability on officials who vigorously respond to risks of harm (because this response evinces their knowledge), while giving a free pass to officials who do nothing in response (because this omission evinces their lack of knowledge). So "imposing liability . . [*25] . for acting in this manner would dissuade [school employees] from responding expeditiously" to future risks. *Tanner v. County of Lenawee*, 452 F.3d 472, 479 (6th Cir. 2006). That is why, in addition to a known risk of harm, our deliberate-indifference standard has a second part—a requirement that the response to the harm be "conscience shocking." *Schroder*, 412 F.3d at 731. The extensive nature of the Safety Plan all but confirms that the defendants' response in this case was anything but.

Legally, the Does challenge the district court's conclusion that the school employees could be liable only if they knew of the risk of the specific type of harm—here, sexual assault. It is a strange rule, they say, that would absolve the school employees of liability for C.T.'s sexual assault of Minor Doe, but subject them to liability if C.T. had burned her instead. They argue it should be enough that the employees knew of a general risk of harm from C.T. Both precedent [**15] and logic rebut this claim. As a matter of precedent, our cases foreclose the general-risk-of-harm standard that the Does request. *See McQueen*, 433 F.3d at 469-70. Under their rule, *McQueen* would have been wrongly decided. The teacher in that case undoubtedly knew that the student posed a general risk of harm from his prior history of beating [*26] up children and stabbing them with pencils. *Id.* at 462. But we rejected liability for his later gun violence nonetheless. *Id.*

As a matter of logic, our cases focus on the kind of *risk* known to the state actors because that will inform the kind of *response* the Constitution requires. Here, for example, because C.T. imposed a risk of lighting matches, the school employees developed a plan that would discourage him from bringing matches on the bus. Their measures included not just moving him to the front of the bus, but also letting him know that they would be checking his backpack every morning for contraband. It is not at all clear that these preventive measures would have subjected the

school employees to constitutional liability even if C.T. had burned Minor Doe. And no matter the result on those hypothetical facts, the Constitution simply does not require a school to treat an 11-year-old as a violent sexual predator based on a history of lying, bullying, or playing with matches. This is not a negligence claim, but one sounding in a rare species of one of the narrowest doctrines of constitutional law. *See Estate of Romain*, 935 F.3d at 492. While C.T.'s sexual assault of Minor Doe undoubtedly shocks the conscience, the school [*27] employees' responses to C.T.'s earlier actions do not. And it is their conduct that is at issue here.

* * *

One final point bears repeating. Nothing in the federal Constitution prevents the states, through their democratically elected representatives, from enacting laws that require school officials to meet heightened standards of care in protecting their students. *Cf. Jones*, 438 F.3d at 699. Ohio, for example, does not extend tort immunity to municipal officials who act in a "reckless manner[.]" *Doe*, 2018 U.S. Dist. LEXIS 211131, 2018 WL 6590615, at *17 (quoting Ohio Rev. Code § 2744.03(A)(6)(b)). Although the Does brought state tort claims in the district court, 2018 U.S. Dist. LEXIS 211131, [WL] at *17-18, they abandoned those claims in favor of a constitutional claim on appeal. Yet the federal Constitution supplements traditional state tort liabilities only in rare circumstances involving what the Supreme Court has described as truly "egregious" and "outrageous" conduct. *Lewis*, [**16] 523 U.S. at 847 n.8. Because the conduct of the school employees in this case does not meet that high bar, we must affirm.

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Fijalkowski v. Wheeler

United States Court of Appeals for the Fourth Circuit

November 13, 2019, Argued; March 9, 2020, Decided

No. 19-1262

Reporter
2020 U.S. App. LEXIS 7243 *; __ Fed. Appx. __; 2020 WL 1130641

MATEUSZ FIJALKOWSKI, Plaintiff - Appellant, v. M. WHEELER; S. ADCOCK; S. BLAKELY; R. BRONTE-TINKEW; C. CLARK; J. GRANDE; R. JAKOWICZ; L. LABARCA; L. MCNAUGHT; W. MULHERN; M. ZESK, Defendants - Appellees, and AMERICAN POOL INC.; SEAN BROOKS, Defendants.WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS; THE RUTHERFORD INSTITUTE, Amici Supporting Appellant.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [*1] Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. (1:18-cv-00492-TSE-MSN). T. S. Ellis, III, Senior District Judge.

Mateusz Fijalkowski v. Wheeler, 361 F. Supp. 3d 577, 2019 U.S. Dist. LEXIS 23202 (E.D. Va., Feb. 12, 2019)

Disposition: AFFIRMED.

Counsel: ARGUED: Victor M. Glasberg, VICTOR M. GLASBERG & ASSOCIATES, Alexandria, Virginia, for Appellant.

Kimberly Pace Baucom, FAIRFAX COUNTY ATTORNEY'S OFFICE, Fairfax, Virginia, for Appellees.

ON BRIEF: Bernadette E. Valdellon, VICTOR M. GLASBERG & ASSOCIATES, Alexandria, Virginia, for Appellant.

Karen Gibbons, Elizabeth Teare, FAIRFAX COUNTY ATTORNEY'S OFFICE, Fairfax, Virginia, for Appellees.

Jonathan Smith, Hannah Lieberman, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS & URBAN AFFAIRS, Washington, D.C.; Carter G. Phillips, Mark P. Guerrera, David E. Kronenberg, Justin A. Benson, Joshua Moore, SIDLEY AUSTIN LLP, Washington, D.C. for Amicus Washington Lawyers' Committee for Civil Rights and Urban Affairs.

John W. Whitehead, Douglas R. McKusick, THE RUTHERFORD INSTITUTE, Charlottesville, Virginia, for Amicus The Rutherford Institute.

Judges: Before MOTZ, DIAZ, and HARRIS, Circuit Judges.

Opinion by: DIAZ

Opinion

DIAZ, Circuit Judge:

Mateusz Fijalkowski brought this action under 42 U.S.C. § 1983 and state law, arguing, as relevant here, that Fairfax County, Virginia police [*2] officers violated his Fourteenth Amendment substantive due process rights when they delayed—for up to two-and-a-half minutes—a lifeguard from rescuing him from drowning in a swimming pool. He also alleges that the officers were grossly negligent under Virginia law when they delayed his rescue and otherwise failed to assist him. The district court dismissed these claims, concluding that the officers were entitled to qualified immunity on the substantive due process claim and that Fijalkowski failed to state a gross negligence claim. For the reasons that follow, we affirm.

I.

On May 23, 2016, twenty-three-year-old Mateusz Fijalkowski arrived in the United States from his home country, Poland, to work for the summer.[1] Three days later, Fijalkowski began working as a pool attendant at Riverside Apartments in Fairfax County, Virginia. He was trained to clean the pool, check the pH level of the water, and arrange the deck chairs. He wasn't trained to perform lifeguarding duties, and he didn't know how to swim.

On May 30, 2016, Fijalkowski began acting irrationally at work. He argued with guests over the colored wristbands required to enter the pool area, and he grabbed a young woman by the arm and ripped off [*3] her wristband. He also began talking to himself in Polish and walking around the pool without purpose, appearing distressed.

A lifeguard on duty that day, Sean Brooks, called the police, and Fairfax County police officers arrived shortly thereafter. Brooks told the officers about Fijalkowski's behavior and that he appeared to be experiencing a mental health crisis. Brooks also told them that Fijalkowski couldn't swim. The complaint further alleges that the officers "were aware that [Fijalkowski] was a supposed lifeguard who did not know how to swim and who was experiencing a serious mental health breakdown, making himself a potential risk of harm to himself and others at the pool." J.A. 12.

The officers attempted to communicate with Fijalkowski, but he blew his whistle and continually moved away from them. The officers directed all pool patrons to leave and locked the fence that surrounded the pool. Only Fijalkowski, Brooks, and the officers remained inside the fenced-in pool area. The officers called a Polish-speaking officer and Fijalkowski's Polish roommate to the pool to attempt to communicate with him. One of the officers was trained in crisis intervention, but he and the others [*4] were unable to communicate with Fijalkowski, who didn't acknowledge them.

Fijalkowski continued to act erratically. He paced around the pool and talked to himself. He threw his cell phone into the deep end of the pool and walked in to recover it, submerging himself in the process. He soon emerged from the pool, but he then threw his cell phone into the deep end a second time. Again, he walked into the pool to recover it, submerged himself, and then emerged. He also climbed into a lifeguard tower and shouted and blew his whistle. The officers continued to attempt to communicate with him, but he didn't respond.

Fijalkowski then went to the ladder at the shallow end of the pool and stood calmly and silently for

[1] Because this case comes to us on appeal from the grant of a motion to dismiss, we accept the facts alleged in the complaint as true and draw all reasonable inferences in Fijalkowski's favor. *See Hamilton v. Pallozzi*, 848 F.3d 614, 620 (4th Cir. 2017).

about one minute.[2] He entered the pool again, going to the deep end and submerging himself. Brooks and the officers stood around the pool and watched him. After some period of time, Fijalkowski grabbed onto the pool's drain cover and struggled not to surface. He vomited, and after about a minute and twenty-two seconds, he released the air retained in his lungs. Eventually, he stopped moving. Brooks and the officers continued to watch him, though they knew that he was at risk of drowning [*5] after he had been submerged for thirty seconds and had released the air from his lungs.

At some point, Brooks told the officers that he needed to rescue Fijalkowski. Brooks was able and equipped to do so, but the officers ordered Brooks not to enter the pool. After Fijalkowski had been submerged for approximately two-and-a-half minutes, Brooks again told the officers that he needed to rescue him, and (this time) the officers allowed him to do so. Brooks dove into the pool and brought Fijalkowski to the surface. Several of the officers jumped in to help remove him from the water.

Once Fijalkowski was out of the pool, the officers performed lifesaving measures. Emergency medical technicians arrived and used a ladder to climb over the locked pool fence to reach Fijalkowski. They found that he wasn't breathing and didn't have a pulse. They applied an automatic external defibrillator to his chest. This revived him, and he was transported to the hospital.

Fijalkowski remained in the hospital's heart and vascular unit for just over a week. He was then transferred to the psychiatric unit, where he was diagnosed with bipolar disorder and psychosis. He was discharged from the hospital six days [*6] later and returned to Poland.

Fijalkowski filed suit against the officers, Brooks, and Brooks's employer, seeking damages under 42 U.S.C. § 1983 and state law. As relevant here, Fijalkowski alleges that the officers violated his Fourteenth Amendment substantive due process rights when they delayed Brooks's rescue efforts and that they were grossly negligent under Virginia law when they delayed his rescue and otherwise failed to assist him.[3] The defendants moved to dismiss the complaint, and the district court granted the motion, concluding, in relevant part, that the officers were entitled to qualified immunity and that Fijalkowski failed to state a claim of gross negligence. This appeal followed.

II.

We first consider the district court's dismissal of Fijalkowski's substantive due process claim on the ground that the officers were entitled to qualified immunity. "We review a qualified immunity-based motion to dismiss de novo." *Tobey v. Jones*, 706 F.3d 379, 385 (4th Cir. 2013).

A.

Qualified immunity shields state officials from civil liability under § 1983 "unless their actions violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pinder v. Johnson*, 54 F.3d 1169, 1173 (4th Cir. 1995) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). "Determining whether a state officer is entitled to qualified immunity is a [*7] two-step inquiry." *Bailey v. Kennedy*, 349 F.3d 731, 739 (4th Cir. 2003). First, we consider "whether a constitutional right would have been violated on the facts alleged." *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 200, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)). Second, "assuming that the violation of the right is established," we "consider whether the right

[2] At this time, a bystander began videotaping the incident. The contents of the video are incorporated into the complaint by reference, so we consider them here. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011).

[3] Fijalkowski also alleges that the officers violated his substantive due process rights when they failed to prevent him from entering the pool. The district court dismissed this allegation for failure to state a claim. The court also dismissed Fijalkowski's claims against Brooks and Brooks's employer. Fijalkowski does not appeal these rulings.

was clearly established at the time such that it would be clear to an objectively reasonable officer that his conduct violated that right." *Id.* (quoting *Brown v. Gilmore*, 278 F.3d 362, 367 (4th Cir. 2002)). We may consider the steps in either order. *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

To determine whether a right was clearly established, we consider whether controlling authority, or a "robust consensus of persuasive authority," *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 544 (4th Cir. 2017) (internal quotation marks omitted), would have given the officers "'fair warning that their conduct,' under the circumstances, 'was wrongful,'" *Williams v. Strickland*, 917 F.3d 763, 769 (4th Cir. 2019) (internal quotation marks omitted) (quoting *Williamson v. Stirling*, 912 F.3d 154, 187 (4th Cir. 2018)). We must define the right allegedly violated "at a high level of particularity." *Braun v. Maynard*, 652 F.3d 557, 562 (4th Cir. 2011) (quoting *Campbell v. Galloway*, 483 F.3d 258, 271 (4th Cir. 2007)).

Although this standard "do[es] not require a case directly on point, . . . existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011). However, "when 'the defendants' conduct is so patently violative of [a] constitutional right that reasonable officials would know without guidance from the [*8] courts' that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established." *Clem v. Corbeau*, 284 F.3d 543, 553 (4th Cir. 2002) (quoting *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994)).[4]

B.

Fijalkowski contends that the officers violated his substantive due process rights when they ordered Brooks not to enter the pool to rescue him. Fijalkowski relies on the state-created danger doctrine, which holds that state actors are liable under the Due Process Clause when they "created or increased the risk of private danger, and did so directly through affirmative acts, not merely through inaction or omission." *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015). We decline to resolve whether the officers' conduct constitutes a substantive due process violation under the state-created danger doctrine. Rather, we agree with the district court that even if it does, the officers are entitled to qualified immunity because it was not clearly established at the time of the incident that delaying by up to two-and-a-half minutes[5] the rescue of a drowning person who may have posed a danger to others violated that person's substantive due process rights.

The parties have identified no controlling authority placing the constitutionality of the officers' conduct beyond debate, and we agree that there [*9] is none. But this doesn't end our inquiry; a "robust consensus of persuasive authority" may also clearly establish the right allegedly violated. *Booker*, 855 F.3d at 544 (internal quotation marks omitted). Fijalkowski offers no such robust consensus. The officers, for their part, point to three cases from our sister circuits addressing alleged substantive due process violations by officers who prevented the rescue of drowning persons. The officers contend that together, these cases fail to provide a consensus, let alone a robust consensus, that would have given them fair warning that their conduct violated Fijalkowski's substantive due process rights. We agree.[6]

[4] To emphasize the point, Fijalkowski directs us to our recent decision in *Ray v. Roane*, 948 F.3d 222 (4th Cir. 2020). We agree with *Ray* that "directly on-point, binding authority" is not required where "the right was clearly established based on general constitutional principles," *id.* at 229 (quoting *Booker*, 855 F.3d at 543), and we apply that principle here.

[5] It is not clear from the complaint or the video when Brooks first sought to rescue Fijalkowski. If Brooks did so immediately after Fijalkowski entered the water, the officers would have delayed his rescue for a maximum of two-and-a-half minutes.

[6] The officers also highlight three other cases addressing alleged substantive due process violations by officers who interacted with

The first of the factually similar cases is *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990). In *Ross*, a twelve-year-old boy fell into a lake and sank. *Id.* at 1424. Within ten minutes, two lifeguards, two firefighters, and one police officer arrived on the scene to conduct a rescue. *Id.* In addition, two nearby civilians with a boat and scuba diving equipment offered to assist in the rescue. *Id.* Despite these resources, a county deputy sheriff ordered all rescue efforts to stop because, under a county policy, only divers from the city fire department were authorized to rescue someone drowning in the lake. *Id.* at 1424-25. [*10] When the civilians offered to attempt the rescue at their own risk, the deputy sheriff threatened to arrest them and positioned his boat to prevent them from entering the water. *Id.* at 1425. Authorized city divers did not arrive until the boy had been underwater for thirty minutes. *Id.* They pulled him from the water, but he later died. *Id.*

Addressing the deputy sheriff's conduct, the Seventh Circuit stated that "a citizen in peril for his life ha[s] a constitutional right that prevent[s] a police officer from cutting off private avenues of lifesaving rescue without providing an alternative." *Id.* at 1432. The court also held that the right was clearly established at the time of the incident. *Id.* The court so held because "a fundamental tenet of [its] constitutional jurisprudence" is that "the state cannot arbitrarily assert its power so as to cut short a person's life." *Id.* at 1433. Applying that principle to the record facts, the court concluded that a reasonable officer in the deputy sheriff's position would have known that he could not arbitrarily use his authority to prevent private rescue efforts. *Id.* The court explained that "[t]here was simply no rational reason for [the deputy sheriff] to prefer 'authorized' [*11] but equally competent rescuers located away from the scene." *Id.*

The next factually similar case is *Andrews v. Wilkins*, 934 F.2d 1267, 290 U.S. App. D.C. 95 (D.C. Cir. 1991), *abrogation on other grounds recognized by Atchinson v. District of Columbia*, 73 F.3d 418, 421, 315 U.S. App. D.C. 318 (D.C. Cir. 1996). There, Andrews jumped into the Washington Channel as a police officer attempted to arrest him. *Id.* at 1269. Andrews swam across part of the Channel but then turned back towards the shore and began to tire. *Id.* The officer attempted to throw a life ring to Andrews, but it didn't reach him. *Id.* Officers then saw a private boat approaching, and they hailed the boat to assist in rescuing Andrews. *Id.* After reaching Andrews, the boat owner told the officers that she needed to enter the water to rescue him and that she had been trained to do so. *Id.* However, the officers directed her not to enter the water, stating that Andrews was an escaped prisoner and could be dangerous. *Id.* Approximately thirty minutes later, official rescuers arrived and pulled Andrews from the water. *Id.* He was later pronounced dead. *Id.*

The D.C. Circuit recognized that *Ross* "held that police action deliberately or recklessly interfering with ongoing private rescue efforts may establish a constitutional tort." *Id.* at 1270. However, the D.C. Circuit found the facts in *Andrews* "much less troubling [*12] than those in *Ross*." *Id.* at 1271. Among other things, the court noted that the officers in *Andrews* "were concerned with Andrews's bizarre behavior." *Id.* In addition, the court concluded that even if the officers violated Andrews's substantive due process rights when they interfered with the private rescue effort, the right was not clearly established "in a particularized sense." *Id.* (alterations adopted) (quoting *Brogsdale v. Barry*, 926 F.2d 1184, 1191, 288 U.S. App. D.C. 311 (D.C. Cir. 1991)). It explained:

> While it should have been clear to the police that they could not "arbitrarily assert their power so as to cut short a person's life," it certainly could not have been clear to them that they were required to refrain from taking any action when a private citizen, drawn into a police rescue operation, was about to expose

suicidal persons. Appellees' Br. at 24-26. Because these cases neither found violations nor involved the delay of rescue efforts without providing an alternative, we agree with the officers that the cases would not have given them fair warning that their conduct here was unlawful.

> herself to substantial danger, of which she was not completely aware.

Id. (internal citation omitted and alteration adopted) (quoting *Ross*, 910 F.2d at 1433). The final factually similar case is *Beck v. Haik*, No. 99-1050, 2000 U.S. App. LEXIS 26768, 2000 WL 1597942 (6th Cir. Oct. 17, 2000) (unpublished). In *Beck*, a man jumped or fell from a bridge into a river. 2000 U.S. App. LEXIS 26768, [WL] at *1. City police officers and the city's director of public safety arrived a few minutes later. *Id.* In addition, members of a group of trained civilian divers heard a report of the incident and went to the scene to [*13] assist in the rescue. *Id.* The volunteer divers told the public safety director that they were prepared to attempt a rescue. *Id.* However, the public safety director instructed them not to enter the water because, pursuant to a joint city and county policy, only the county dive team was authorized to conduct underwater rescues. *Id.* The county dive team arrived thirty-five minutes after the volunteer divers had offered to attempt a rescue. 2000 U.S. App. LEXIS 26768, [WL] at *2. They pulled the man from the water and attempted to resuscitate him, but he later died. *Id.*

The Sixth Circuit agreed with *Ross* that "official action preventing rescue attempts by a volunteer civilian diver can be arbitrary in a constitutional sense if a state-sponsored alternative is not available when it counts." 910 F.2d 1422, [WL] at *4. The court stated that *Ross* "pointed to" the conclusion that the public safety director's conduct was unconstitutional, but it held that even if it was, he was entitled to qualified immunity because no Supreme Court or Sixth Circuit precedent clearly established that the Sixth Circuit would follow Ross. 910 F.2d 1422, [WL] at *7.

We agree with the officers that these cases do not amount to a robust consensus of persuasive authority that would have given them fair warning [*14] that their conduct violated Fijalkowski's substantive due process rights. Only *Ross* expressly held that an officer violated a drowning person's substantive due process rights by preventing private rescue efforts without providing an alternative. *Beck* merely suggested that the public safety director did so. One case is not a robust consensus of persuasive authority.

Moreover, the facts in *Ross* and *Beck* are distinct from those here in two key respects. First, the officer in *Ross* and the public safety director in *Beck* prevented the private rescue efforts for approximately thirty and thirty-five minutes, respectively. Second, neither the officer in *Ross* nor the public safety director in *Beck* had reason to believe that the drowning persons posed a danger to others. These cases would not have given the officers here fair warning that delaying Fijalkowski's rescue for up to two-and-a-half minutes, knowing that he may pose a danger to others, violated his substantive due process rights.

The circumstances here are closer to those in *Andrews*. There, the officers were concerned with Andrews's bizarre behavior, and, although the private rescuer said she had rescue training, they believed that he [*15] posed a danger to her. And there, the court suggested that the officers' conduct did not rise to the level of that found unconstitutional in *Ross*.[7] Accordingly, *Ross*, *Beck*, and *Andrews* would not have given the officers fair warning that delaying Fijalkowski's rescue under the circumstances here violated his substantive due process rights.

But this doesn't end our inquiry. Fijalkowski insists that the officers' conduct so patently violated the fundamental principle that "the state cannot arbitrarily assert its power so as to cut short a person's life," *Ross*, 910 F.2d at 1433, that objectively reasonable officers would have known their conduct was unconstitutional even without

[7] The officers in *Andrews* were also concerned that the private rescuer didn't know of the danger Andrews may have posed, while here, Brooks knew of Fijalkowski's erratic behavior, mental state, and inability to swim. But, given the similarities that remain, we don't think this difference would have given the officers fair warning that their conduct was unconstitutional.

closely analogous case law. We cannot agree.

Looking to the facts alleged in the complaint, we cannot say that the officers' conduct amounted to a patently arbitrary assertion of power. True, the complaint alleges that the officers knew that Fijalkowski was at risk of drowning after being submerged for thirty seconds and that Brooks was able and equipped to rescue him. But the complaint also alleges that the officers were aware that Fijalkowski's inability to swim and his mental state made him a risk of danger to others. And, they [*16] had seen him enter and exit the pool twice before on his own. Unlike in *Ross*, where "[t]here was simply no rational reason" for the officer to prevent the rescue efforts, *id.*, here there were such reasons. And ultimately, the officers allowed Brooks to rescue Fijalkowski after (at most) two-and-a-half minutes, far less than the amount of time that had elapsed in *Ross*, *Beck*, and *Andrews*.

Accordingly, the complaint doesn't allege conduct that amounts to a patently arbitrary assertion of power to cut short Fijalkowski's life. And this is so, even as we are mindful that at the motion to dismiss stage, we may not draw inferences against Fijalkowski. We are also mindful that the rationale for the officers' conduct isn't alleged in the complaint, and we don't make any inferences about that rationale here. We only conclude that on its face, the complaint alleges facts belying the contention that the officers' conduct was a patently arbitrary assertion of power.

We therefore affirm the district court's dismissal on qualified immunity grounds of Fijalkowski's substantive due process claim.

III.

We next consider the district court's dismissal of Fijalkowski's gross negligence claim. "We review de [*17] novo the grant of a motion to dismiss for failure to state a claim." *Bonds v. Leavitt*, 629 F.3d 369, 385 (4th Cir. 2011).

A.

Under Virginia law, gross negligence is "a degree of negligence showing indifference to another and an utter disregard of prudence that amounts to a complete neglect of the safety of such other person." *Elliott v. Carter*, 292 Va. 618, 791 S.E.2d 730, 732 (Va. 2016) (quoting *Cowan v. Hospice Support Care, Inc.*, 268 Va. 482, 603 S.E.2d 916, 918 (Va. 2004)). "Because 'the standard for gross negligence in Virginia is one of indifference, not inadequacy,' a claim for gross negligence must fail as a matter of law when the evidence shows that the defendants exercised some degree of care." *Id.* (alterations adopted) (quoting *Kuykendall v. Young Life*, 261 F. App'x 480, 491 (4th Cir. 2008) (unpublished) (per curiam)). Ordinarily, the question of whether gross negligence has been established is a matter for the jury. *Id.* However, when no reasonable juror could find that gross negligence has been established, the court must dismiss the claim. *Id.*

B.

On appeal, Fijalkowski draws our attention to the officers' conduct after he submerged himself for the third time and argues that this conduct amounts to gross negligence under Virginia law.

We disagree and conclude that the facts alleged in the complaint show that the officers exercised some degree of care during that time.[8] In particular, the officers came to the deep end of the pool [*18] and monitored Fijalkowski, they eventually permitted Brooks to rescue him, and they also assisted in the rescue. Even if they waited too long to do so, we agree with the district court that the claim is one of inadequacy, not indifference.

Accordingly, we affirm the district court's dismissal of Fijalkowski's gross negligence claim.

IV.

For the reasons given, the district court's dismissal

[8] As a result, we need not address the officers' arguments that Fijalkowski can't recover damages because he committed the common law crime of attempted suicide and that they aren't liable because they didn't owe Fijalkowski a special duty.

of Fijalkowski's complaint is

AFFIRMED.

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Corbitt v. Vickers

United States Court of Appeals for the Eleventh Circuit

July 10, 2019, Decided

No. 17-15566

Reporter

929 F.3d 1304 *; 2019 U.S. App. LEXIS 20447 **; 27 Fla. L. Weekly Fed. C 2166; 2019 WL 3000798

AMY CORBITT, Individually and as Parent and Natural Guardian of SDC, a Minor, Plaintiff-Appellee, versus MICHAEL VICKERS, Defendant-Appellant.

Subsequent History: Petition for certiorari filed at, 11/22/2019

Prior History: [**1] Appeal from the United States District Court for the Southern District of Georgia. D.C. Docket No. 5:16-cv-00051-LGW-RSB.

Corbitt v. Wooten, 2017 U.S. Dist. LEXIS 199826 (S.D. Ga., Dec. 5, 2017)

Disposition: REVERSED and REMANDED.

Counsel: For AMY CORBITT, Individually and as Parent and Natural Guardian of SDC, a Minor, JERRY RICH, Individually, ELIZABETH BOWEN, as Parent and Natural Guardian of AMB, a Minor, Plaintiffs - Appellees: Ashleigh Ruth Madison, Southeast Law, LLC, Savannah, GA; Ben B. Mills Jr., Mills & Larkey, PC, Fitzgerald, GA.

For TONYA JOHNSON, as Parent and Natural Guardian of ERA, a Minor, DAMION STEWART, Individually and as Parent and Natural Guardian of JDS, a Minor, and as Parent and Natural Guardian of MS, a Minor, Plaintiffs - Appellees: Ben B. Mills Jr., Mills & Larkey, PC, Fitzgerald, GA.

For Michael Vickers, Defendant - Appellant: Richard K. Strickland, Emily Rose Hancock, Sean Kenneth Scally, Brown Readdick Bumgartner Carter Strickland & Watkins, LLP, Brunswick, GA.

Judges: Before WILSON, BRANCH, and ANDERSON, Circuit Judges. WILSON, Circuit Judge, dissenting.

Opinion by: ANDERSON

Opinion

[*1307] ANDERSON, Circuit Judge:

In this case involving an alleged use of excessive force, Defendant-Appellant Michael Vickers ("Vickers") asks this Court to reverse the district court's denial of his motion [**2] to dismiss on grounds that he is entitled to qualified immunity. In addition to hearing from the parties at oral argument, we have carefully reviewed the briefs, the record, and the relevant case law. Because Vickers's actions did not violate any clearly

established rights, we conclude that he is entitled to qualified immunity and that the district court should have granted his motion to dismiss.

[*1308] **I. BACKGROUND**

A. Factual Background.

This case is before us in the posture of an appeal from the district court's denial of Vickers's Fed. R. Civ. P. 12(b)(6) motion to dismiss. We set forth below the relevant allegations of the plaintiffs'[1] complaint. At all times relevant to this appeal, Vickers was a deputy sheriff in Coffee County, Georgia. On July 10, 2014, Vickers and other officers "participated in an operation to apprehend a criminal suspect, Christopher Barnett, whom [plaintiffs] ha[d] never met." The operation spilled over onto Plaintiff-Appellee Amy Corbitt's ("Corbitt") property after Barnett "wandered into the area."

At the time of the incident, one adult (Damion Stewart) and six minor children—including Corbitt's ten-year-old child SDC and two other children under the age of three—were outside in Corbitt's [**3] yard. Corbitt and two other minors were inside. At some point after Vickers and the other officers entered Corbitt's yard, the officers "demanded all persons in the area, including the children, to get down on the ground." An officer handcuffed Stewart and placed a gun at his back. The children were outnumbered by the officers, and plaintiffs alleged at least four of the children (including SDC) "remained seized by deadly firearms."

Then, "while the children were lying on the ground obeying [Vickers's] orders . . . without necessity or any immediate threat or cause, [Vickers] discharged his firearm at the family pet named 'Bruce' twice." The first shot missed, and Bruce (a dog) temporarily retreated under Corbitt's home. No other efforts were made to restrain or subdue the dog, and no one appeared threatened by him. Eight or ten seconds after Vickers fired the first shot, the dog reappeared and was "approaching his owners," when Vickers fired a second shot at the dog. This shot also missed the dog, but the bullet struck SDC in the back of his right knee. At the time of the shot, SDC was "readily viewable" and resting "approximately eighteen inches from . . . Vickers, lying on the ground, [**4] face down, pursuant to the orders of [Vickers]." Barnett (the fleeing suspect) "was visibly unarmed and readily compliant" with officers. According to the complaint, "[a]t no time did SDC, or any other children . . . present any threat or danger to provoke . . . Vickers to fire two shots." Importantly, the parties do not dispute that Vickers intended to shoot the dog and not SDC.

Medical imaging confirmed a serious gunshot wound to SDC's right knee. Bullet fragments remained in the wound for an extended period of time after the shooting. SDC suffered severe pain and mental trauma. He received ongoing care from an orthopedic surgeon.

B. Procedural Background.

Corbitt, individually and as SDC's parent and guardian, brought a civil action against Vickers in his individual capacity pursuant to 42 U.S.C. § 1983. The complaint alleged deprivations of the right to be free from excessive force as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution. Corbitt asked the district court to award special and compensatory damages totaling $2,000,000, together with unspecified punitive damages.

In response, Vickers filed a motion to dismiss pursuant to Rule 12(b)(6). He asserted that he was entitled to qualified immunity because case law had not staked out a [**5] "bright line" indicating that

[1] Four other plaintiffs collectively sought $2,000,000 in damages (plus punitive damages), but their claims have been withdrawn or resolved and are not at issue in this appeal.

the act of firing at the dog and unintentionally [*1309] shooting SDC was unlawful. In support of this contention, Vickers pointed to the unpublished decision of this Court in Speight v. Griggs, 620 F. App'x 806 (11th Cir. 2015), which observed that "[i]n this circuit, there is no clearly established right to be free from the accidental application of force during arrest, even if that force is deadly." Id. at 809.

The district court found that Vickers was not entitled to qualified immunity and denied his motion to dismiss. See generally Corbitt v. Wooten, No. 5:16-cv-51, 2017 U.S. Dist. LEXIS 199826, 2017 WL 6028640 (S.D. Ga. Dec. 5, 2017). The district court highlighted several allegations from Corbitt's complaint, including that no officer was required to discharge a gun; that no one tried to restrain the dog; and that SDC was only eighteen inches from Vickers when Vickers fired at the dog. 2017 U.S. Dist. LEXIS 199826, [WL] at *1. The district court then found that SDC was seized even before Vickers fired a shot. 2017 U.S. Dist. LEXIS 199826, [WL] at *4.

Next, the district court reasoned that this case involves an "accidental shooting" and not an "accidental firing" because, even if Vickers did not intend to shoot SDC, he did intend to fire his gun at the dog. 2017 U.S. Dist. LEXIS 199826, [WL] at *4 & n.4. It then relied on "a reasonable inference from the allegations in the [c]omplaint, drawn in [Corbitt's] [**6] favor . . . that Vickers fired his weapon at the animal in order to keep control of SDC . . . [and] continue [his] seizure." 2017 U.S. Dist. LEXIS 199826, [WL] at *4. In other words, the district court thought "a jury could find that Vickers intended to shoot the animal in order to maintain his control of the situation and keep [SDC] from escaping." Id.

The district court then considered whether Vickers was entitled to qualified immunity. It noted this Court's general statement in Thornton v. City of Macon that "[i]t is clearly established that the use of excessive force in carrying out an arrest constitutes a violation of the Fourth Amendment." 2017 U.S. Dist. LEXIS 199826, [WL] at *5 (citing Thornton v. City of Macon, 132 F.3d 1395, 1400 (11th Cir. 1998)). Relying on this statement, the district court then concluded that "Vickers is not entitled to qualified immunity if he used excessive force in firing his weapon." Id.

In determining whether Vickers used excessive force, the district court remarked that in some cases "no factually particularized, preexisting case law [is] necessary for it to be very obvious to every objectively reasonable officer facing [the defendant's] situation that [his] conduct . . . violated [the plaintiff's] right to be free of the excessive use of force." 2017 U.S. Dist. LEXIS 199826, [WL] at *6 (alterations in original) (quoting Vinyard v. Wilson, 311 F.3d 1340, 1355 (11th Cir. 2002)). It then emphasized that [**7] "[t]he touchstone for reasonableness in animal shooting cases is typically officer safety," before concluding that Vickers may have acted unreasonably because the complaint alleged he fired his gun "without necessity or any immediate threat or cause" and that "no allegations suggest that Vickers was unsafe in any way or that Bruce [the dog] exhibited any signs of aggression." Id. (citations and alterations omitted). The district court acknowledged that the record could develop differently following discovery—at which time Vickers might raise the defense of qualified immunity again—but it ultimately concluded that "[a]t this stage, the complaint makes sufficient allegations to proceed." 2017 U.S. Dist. LEXIS 199826, [WL] at *7. Vickers appealed to this Court, and we now consider whether the district court erred when it denied Vickers's motion to dismiss on grounds that he was not then entitled to qualified immunity.[2]

[2] To the extent it turns on a question of law, a denial of qualified immunity at the motion to dismiss stage is an immediately appealable interlocutory order. Behrens v. Pelletier, 516 U.S. 299, 308, 116 S. Ct. 834, 839-40, 133 L. Ed. 2d 773 (1996). This is true even if the district court "reserved ruling on a defendant's claim to immunity" until a later stage of the litigation because the "immunity is a right not to be subjected to litigation beyond the point at which immunity is asserted." Howe v. City of Enterprise, 861 F.3d 1300,

C. Arguments on Appeal.

On appeal, Vickers argues the district court erred in denying his motion to dismiss. [*1310] He contends there is only a single act at issue in this case: the firing of his gun with the intent to strike a dog. He notes the lack of any cases finding similar conduct to be unlawful, and emphasizes Supreme [**8] Court precedent providing that a Fourth Amendment seizure occurs "only when there is a governmental termination of freedom of movement through means intentionally applied." See Brower v. Cty. of Inyo, 489 U.S. 593, 597, 109 S. Ct. 1378, 1381, 103 L. Ed. 2d 628 (1989).

Vickers also argues that this Court's published decision in Vaughan v. Cox[3] and our unpublished decisions in Speight[4] and Cooper v. Rutherford[5] compel the conclusion that there is no clearly established right to be free from the accidental application of force. He takes issue with the district court's attempt to "fit the facts of this case into the framework of Vaughan" because, to Vickers, there is no plausible way to conclude from the pleadings that his goal in shooting at the dog was to continue SDC's "lawful temporary detention incidental to the arrest of Barnett." He also argues the circuit split[6] on the question of whether the Fourth Amendment is ever violated by the accidental discharge of a weapon is by itself enough to show the law at issue here is not clearly established, before pointing to two district court decisions[7] from other jurisdictions that found no constitutional violation on facts somewhat similar to those presented here.

In response, Corbitt agrees with the district [**9] court that SDC was seized throughout the entire incident (even before Vickers fired his gun at the dog). She argues that Vickers's act of firing his gun at the dog violated SDC's Fourth Amendment rights. She then argues this Court should apply the objective reasonableness test from Graham v. Connor[8] and find that Vickers [*1311] acted unreasonably. She contends it is clearly established that the use of excessive force in carrying out an arrest violates the Fourth Amendment, and that Vickers used excessive force because the complaint clearly indicates that it was not necessary to use any force at all.

II. ANALYSIS

A. Qualified Immunity in Motion to Dismiss Posture.

Although "the defense of qualified immunity is typically addressed at the summary judgment stage of a case, it may be . . . raised and considered on a motion to dismiss." St. George v. Pinellas Cty., 285 F.3d 1334, 1337 (11th Cir. 2002). Generally speaking, it is proper to grant a motion to dismiss on qualified immunity grounds when the "complaint fails to allege the violation of a clearly

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1302 (11th Cir. 2017). Indeed, the "driving force behind creation of qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials [will] be resolved prior to discovery." Pearson v. Callahan, 555 U.S. 223, 232-33, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009) (alteration in original) (internal quotation marks omitted) (quoting Anderson v. Creighton, 483 U.S. 635, 640 n.2, 107 S. Ct. 3034, 3039 n.2, 97 L. Ed. 2d 523 (1987)).

[3] 343 F.3d 1323 (11th Cir. 2003). See also discussion infra, Part II.C.

[4] 620 F. App'x 806.

[5] 503 F. App'x 672 (11th Cir. 2012).

[6] Compare Dodd v. City of Norwich, 827 F.2d 1, 7 (2d Cir. 1987) (refusing to apply reasonableness standard to accidental shooting), with Pleasant v. Zamieski, 895 F.2d 272, 276-77 (6th Cir. 1990) (examining reasonableness even though shooting was accidental). In addition to the cases cited by Vickers, compare Schultz v. Braga, 455 F.3d 470, 479-483 (4th Cir. 2006) (focusing primarily on officer's lack on intent to shoot bystander in rejecting Fourth Amendment claim), with Roach v. City of Fredericktown, 882 F.2d 294, 296-97 (8th Cir. 1989) (rejecting Fourth Amendment excessive force claim brought by passengers of oncoming car injured as a result of high speed police chase but only after determining that officer's use of high speed chase was reasonable under the circumstances).

[7] Brandon v. Vill. of Maywood, 157 F. Supp. 2d 917, 924-25 (N.D. Ill. 2001); Dahm v. City of Miamisburg, No. C-3-95-207, 1997 U.S. Dist. LEXIS 23766, 1997 WL 1764770, at *9 (S.D. Ohio 1997).

[8] 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

established constitutional right." Id.; see also Quiller v. Barclays Am./Credit, Inc., 727 F.2d 1067, 1069 (11th Cir. 1984), aff'd en banc 764 F.2d 1400 (11th Cir. 1985). This is a question of law that is reviewed "de novo, accepting the facts alleged in the complaint as true and drawing all reasonable inferences in the plaintiff's favor." St. George, 285 F.3d at 1337. When [**10] reviewing the denial of a qualified immunity defense asserted in a motion to dismiss, appellate review is "limited to the four corners of the complaint." Id. "Once an officer has raised the defense of qualified immunity, the burden of persuasion on that issue is on the plaintiff." Id.

B. Qualified Immunity Law.

The qualified immunity defense 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."[9] Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). The immunity balances two important public interests: "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223, 231, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009). This allows officials to work without fear of liability, protecting "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271 (1986).

To overcome a qualified immunity defense, the plaintiff must make two showings. See Griffin Indus., Inc. v. Irvin, 496 F.3d 1189, 1199-1200 (11th Cir. 2007). First, she "must establish that the defendant violated a constitutional right." Id. Second, she must show the violated [**11] right was "clearly established." Id. Although the lower federal courts were once required to consider the first prong before the second, they are now "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." Pearson, 555 U.S. at 236, 129 S. Ct. at 818.

For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987). This is because "officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases," and [*1312] an "official's awareness of the existence of an abstract right . . . does not equate to knowledge that his conduct infringes the right." Coffin v. Brandau, 642 F.3d 999, 1015 (11th Cir. 2011) (alteration in original) (citations omitted). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of the pre-existing law the unlawfulness must be apparent." Anderson, 483 U.S. at 640, 107 S. Ct. at 3039; see also Hope v. Pelzer, 536 U.S. 730, 736, 739, 122 S. Ct. 2508, 2513, 2515, 153 L. Ed. 2d 666 (2002) (rejecting this Court's earlier requirement that "federal law by which the government [**12] official's conduct should be evaluated must be preexisting, obvious and mandatory" and not based on "abstractions" but instead only by "materially similar" cases as too rigid a gloss on qualified immunity law). Indeed, the "'salient question' . . . is whether the state of the law gave the defendants 'fair warning' that their alleged conduct was unconstitutional." Vaughan v. Cox, 343 F.3d 1323, 1332 (11th Cir. 2003) (quoting Hope, 536 U.S. at 741, 122 S. Ct. at 2516).

"Because identifying factually similar cases may be

[9] There is no question in this case that Vickers was acting in his discretionary capacity as a deputy sheriff when the challenged shooting occurred.

difficult in the excessive force context," Lee v. Ferraro, 284 F.3d 1188, 1198-99 (11th Cir. 2002), we may find fair warning in the law without also finding a factually identical case. In fact, this Court has since Hope identified three different ways a plaintiff can show that the state of the law gives officials fair warning of a clearly established right. First, she can still "show that a materially similar case has already been decided." Mercado v. City of Orlando, 407 F.3d 1152, 1159 (11th Cir. 2005). "This category consists of cases where judicial precedents are tied to particularized facts." Loftus v. Clark-Moore, 690 F.3d 1200, 1204 (11th Cir. 2012). In determining whether a right is clearly established under this prong, this Court looks to "judicial decisions of the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the relevant state." Griffin Indus., 496 F.3d at 1199 & n.6. Second, she can "also [**13] show that a broader, clearly established principle should control the novel facts" of a particular situation. Mercado, 407 F.3d at 1159 (citing Hope, 536 U.S. at 741, 122 S. Ct. at 2516). "[T]he principle must be established with obvious clarity by the case law so that every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted." Loftus, 690 F.3d at 1205 (alteration in original). Put another way, "in the light of pre-existing law the unlawfulness must be apparent." Id. Third, she could show that her case "fits within the exception of conduct which so obviously violates [the] constitution that prior case law is unnecessary." Mercado, 407 F.3d at 1159. Under this final test, the qualified immunity defense can be successfully overcome in an excessive force case "only if the standards set forth in Graham and our own case law inevitably lead every reasonable officer in [the defendant's] position to conclude the force was unlawful." Lee, 284 F.3d at 1199 (alteration in original) (citation and internal quotation marks omitted). Notwithstanding the availability of these three independent showings, this Court has observed on several occasions that "if case law, in factual terms, has not staked out a bright line, qualified immunity [**14] almost always protects the defendant." See, e.g., Oliver v. Fiorino, 586 F.3d 898, 907 (11th Cir. 2009) (quoting Priester v. City of Riviera Beach, 208 F.3d 919, 926 (11th Cir. 2000)).

C. The Constitutional Right Allegedly Infringed.

With these basic qualified immunity principles in mind, our § 1983 [*1313] "analysis begins by identifying the specific constitutional right allegedly infringed." Graham v. Connor, 490 U.S. 386, 394, 109 S. Ct. 1865, 1870, 104 L. Ed. 2d 443 (1989). Two decisions provide relevant guidance in this regard. First, the Supreme Court in Graham held that the Fourth Amendment governs "a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of his person." Id. at 388, 109 S. Ct. at 1868-69. Second, "the Fourteenth Amendment guards against the use of excessive force against arrestees and pretrial detainees." J W ex rel. Tammy Williams v. Birmingham Bd. of Educ., 904 F.3d 1248, 1259 (11th Cir. 2018). Consequently, it is a threshold question whether SDC was "seized" at any point during his encounter with Vickers. If SDC was already seized when Vickers fired at the dog, or if the act of shooting SDC by itself constituted a seizure, then this case is properly analyzed under Fourth Amendment standards. If SDC was not already seized, and if the act of shooting SDC by itself does not constitute a seizure, then Fourteenth Amendment standards must be applied.

What makes this case more difficult than many excessive force cases is that SDC's role in the incident does not fit neatly into any of [**15] the usual analytical categories. SDC was not the intended target of an active arrest or investigatory stop (in which case the Fourth Amendment clearly would apply), nor was he an arrestee or pretrial detainee (in which case the Fourteenth Amendment clearly would apply). Rather, SDC was a ten-year-

old child who happened to be playing in his own yard when it became an arrest scene by virtue of circumstances beyond his control. SDC is best described as an innocent bystander.

Reasonably construing the allegations in the complaint in Corbitt's favor, Vickers ordered SDC and the other children to the ground and held them there at gunpoint. An adult in the yard with SDC and the other children was placed in handcuffs. Other armed officers were present, and Vickers eventually discharged his weapon twice. The second shot accidentally hit SDC. We conclude that SDC was already "seized" when Vickers fired at the dog because "in view of all of the circumstances surrounding the incident, a reasonable person[10] would have believed that he was not free to leave." See United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980). And even though the complaint does not allege Vickers applied any physical force against SDC until Vickers's second shot struck his knee, there was without question an initial [**16] "show of authority" to which SDC clearly yielded when he lay face down on the ground pursuant to Vickers's orders. Cf. California v. Hodari D., 499 U.S. 621, 626-29, 111 S. Ct. 1547, 1550-52, 113 L. Ed. 2d 690 (1991) (finding that fleeing suspect was not seized until he was tackled because he did not yield to initial pursuit by officers).

SDC's status as an innocent bystander is not inconsistent with our conclusion that he was seized by Vickers before any shots were fired. In making this observation, we are mindful "that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology," and that "[i]t must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Michigan v. Summers, 452 U.S. 692, 696 n.5, 101 S. Ct. 2587, 2591 n.5, 69 L. Ed. 2d 340 (1981) (quoting Terry v. Ohio, [*1314] 392 U.S. 1, 16, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889 (1968)).

This general principle applies with equal force in cases involving innocent bystanders located at the scene of an active arrest. In a case involving the execution of an anticipatory search warrant, this Court concluded that "officers were authorized to exercise 'unquestioned command of the situation' by placing all the occupants of the Premises on the ground for several minutes while securing the home and ensuring there was no danger to the [**17] officers or the public." Croom v. Balkwill, 645 F.3d 1240, 1253 (11th Cir. 2011) (quoting Muehler v. Mena, 544 U.S. 93, 99, 125 S. Ct. 1465, 1470, 161 L. Ed. 2d 299 (2005)). This was true even with respect to an innocent bystander (the homeowner's mother Patsy Croom) who was not involved in any of the criminal activity in which her son was allegedly participating. After observing that Croom "was seized in the non-curtilage front yard," the Court also noted that the "officers' authority to detain Croom flowed not from the warrant, but rather from the Reasonableness Clause of the Fourth Amendment." Id. at 1248-49 (emphasis added). It then expressly found that there was no Fourth Amendment violation because the officers had used only de minimis force in "pushing Croom to the ground from her squatting position and holding her there with a foot (or knee) in the back for up to ten minutes." Id. at 1252-53.

We note that at least two other circuits have recognized that even innocent bystanders who are temporarily detained have been subjected to a seizure for purposes of the Fourth Amendment. See Bletz v. Gribble, 641 F.3d 743, 755 (6th Cir. 2011) (noting that "even absent particularized reasonable suspicion, innocent bystanders may be temporarily detained where necessary to secure the scene of a valid search or arrest and ensure the safety of officers and others" and concluding that a reasonable jury could find that hour-long detention

[10] Cf. Doe v. Heck, 327 F.3d 492, 510 (7th Cir. 2003) (finding seizure where "no reasonable child would have believed that he was free to leave"); Jones v. Hunt, 410 F.3d 1221, 1226 (10th Cir. 2005) (viewing case "through the eyes of a reasonable sixteen-year-old").

of innocent bystander following a deadly [**18] shooting violated the Fourth Amendment); United States v. Maddox, 388 F.3d 1356, 1362-63, 1367 (10th Cir. 2004) (applying Fourth Amendment reasonableness standard in concluding that officers may temporarily seize bystanders in area immediately adjoining arrest scene when seizure is justified by safety concerns and the scope of the seizure is reasonable under the circumstances); Thompson v. City of Lawrence, 58 F.3d 1511, 1517 (10th Cir. 1995) (balancing innocent bystander's Fourth Amendment rights against "governmental interest in securing the area around [the target of an arrest operation] and protecting officers from potential danger" in finding temporary detention was lawful). For purposes of this appeal, we find these cases persuasive to the extent they demonstrate that an innocent bystander who is not suspected of any wrongdoing may be seized—in some cases reasonably and in other cases potentially unreasonably—within the meaning of the Fourth Amendment.

Given our conclusion that SDC was already seized when Vickers fired at the dog, we proceed by exercising our discretion to address only the qualified immunity issue as it relates to Corbitt's claim that Vickers's second shot at the dog violated SDC's clearly established Fourth Amendment rights.[11]

[*1315] **D. Were Clearly Established Fourth Amendment Rights Violated?**

The Fourth Amendment provides a "right of the people to be secure in their persons . . . against unreasonable . . . [**19] seizures." U.S. Const. amend. IV. The amendment "encompasses the right to be free from excessive force during the course of a criminal apprehension." Oliver, 586 F.3d at 905. To establish a Fourth Amendment claim for excessive force, a plaintiff "must allege (1) that a seizure occurred and (2) that the force used to effect the seizure was unreasonable." Troupe v. Sarasota Cty., 419 F.3d 1160, 1166 (11th Cir. 2005).

As noted above, at the time Vickers fired at the dog, SDC just happened to be playing in his own yard when, for reasons beyond his control, his yard became the scene of an arrest operation. Although we have held that SDC was already seized at the time of the shot, SDC is best described as an innocent bystander. And although the commands of the officers that SDC and the other children lie face down on the ground were actions directed at SDC and the other children, Corbitt does not claim that those actions violated SDC's Fourth Amendment rights; rather, she claims that the action of Vickers firing at the dog and accidentally hitting SDC violated the Fourth Amendment. We hold that Vickers's action of intentionally firing at the dog and unintentionally shooting SDC did not violate any clearly established Fourth Amendment rights.

First, we note that Corbitt failed to present us with any materially similar case from the United States Supreme Court, [**20] this Court, or the Supreme Court of Georgia that would have given Vickers fair warning that his particular conduct violated the Fourth Amendment. Corbitt admitted as much during the hearing on Vickers's motion to dismiss before the district court. Moreover, neither the district court's order nor our own research has revealed any such case. Thus, the only way Corbitt can successfully overcome Vickers's assertion of qualified immunity is to show either that "a broader, clearly established principle should control the novel facts" of this case as a matter of obvious clarity, or that Vickers's conduct "so obviously violates [the] constitution that prior case law is unnecessary." Mercado, 407 F.3d at 1159. As our

[11] Corbitt's complaint also set forth a Fourteenth Amendment claim for relief. She declined to withdraw that claim during the motion hearing before the district court, but the district court did not expressly reach the Fourteenth Amendment issue in its decision below. Although Corbitt briefed the Fourteenth Amendment issue before this Court (her arguments are not fully developed), there is no need for us to reach the issue given our conclusion that SDC was already seized—thus implicating the Fourth Amendment—when Vickers shot at the dog. See Graham, 490 U.S. at 388, 109 S. Ct. at 1868-69.

cases suggest, it is very difficult to demonstrate either.

The district court found that Vickers was not entitled to qualified immunity at the motion to dismiss stage because (1) this Court had previously stated that "[i]t is clearly established that the use of excessive force in carrying out an arrest constitutes a violation of the Fourth Amendment," Corbitt, 2017 U.S. Dist. LEXIS 199826, 2017 WL 6028640 at *5 (quoting Thornton, 132 F.3d at 1400), and (2) Vickers acted unreasonably and used excessive force in firing his weapon because there was no reasonable threat of harm, id. at *6. This line of reasoning is an application of [**21] the second qualified immunity test that asks whether a broader, clearly established principle should, as a matter of obvious clarity, control the novel facts of a case. In so reasoning, we think the district court placed too much emphasis on this Court's statement in Thornton. For starters, we have expressly said otherwise in other qualified immunity cases. See, e.g., Mercado, 407 F.3d at 1159 ("[T]he principle that officers may not use excessive force to apprehend a suspect is too broad a concept to give officers notice of unacceptable conduct."); Post v. City of Ft. Lauderdale, 7 F.3d 1552, 1557 (11th Cir. 1993) ("The line between lawful and unlawful conduct is often vague. [The] 'clearly established' standard demands that a [*1316] bright line be crossed. The line is not found in abstractions—to act reasonably, to act with probable cause, and so on—but in studying how these abstractions have been applied in concrete circumstances."), as modified 14 F.3d 583 (11th Cir. 1994).

More important, perhaps, are two recent Supreme Court cases reminding courts that the qualified immunity analysis requires a clearly established right to be defined with specificity. In White v. Pauly, the Supreme Court—with palpable frustration—reiterated "the longstanding principle that clearly established law should not be defined [**22] at a high level of generality." ___ U.S. ___, ___, 137 S. Ct. 548, 552, 196 L. Ed. 2d 463 (2017) (per curiam) (internal quotation marks omitted) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742, 131 S. Ct. 2074, 2084, 179 L. Ed. 2d 1149 (2011)). Instead, "the clearly established law must be 'particularized' to the facts of the case." Id. (quoting Anderson, 483 U.S. at 640, 107 S. Ct. at 3039). The Supreme Court ultimately vacated a decision authored by a divided Tenth Circuit panel, faulting it for "fail[ing] to identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment . . . [and for] rel[ying] on Graham, Garner, and their Court of Appeals progeny, which . . . lay out excessive-force principles at only a general level." Id. at __, 137 S. Ct. at 550-52. Although the Supreme Court acknowledged that "general statements of the law are not inherently incapable of giving fair and clear warning[,]" it also emphasized that "Garner and Graham do not by themselves create clearly established law outside 'an obvious case.'" Id. (first quoting United States v. Lanier, 520 U.S. 259, 271, 117 S. Ct. 1219, 1227, 137 L. Ed. 2d 432 (1997); then quoting Brosseau v. Haugen, 543 U.S. 194, 199, 125 S. Ct. 596, 599, 160 L. Ed. 2d 583 (2004)).

Just this year, the Supreme Court explained in another excessive force case:

> Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation [**23] the officer confronts. Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue . . . .
>
> [I]t does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer cannot be said to

> have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.

City of Escondido v. Emmons, ___ U.S. ___, ___, 139 S. Ct. 500, 202 L. Ed. 2d 455, 2019 WL 113027, at *2-3 (2019) (per curiam) (alterations in original) (quoting Kisela v. Hughes, _ U.S. _, 138 S. Ct. 1148, 1153, 200 L. Ed. 2d 449 (2018) (per curiam)).

In light of these basic principles, we conclude that the district court erred in relying on the general proposition that it is clearly established that the use of excessive force is unconstitutional. The unique facts of this case bear this out. Not only was SDC not the intended target of the arrest operation, he also was not the intended target of Vickers's gunshot. Both of these facts take this case outside "a run-of-the-mill [**24] Fourth Amendment violation." White, ___ U.S. at ___, 137 S. Ct. at 552. In other words, we are not dealing with "an obvious case," and no principles emerge from our decisions that speak with "obvious clarity" to the unique and unfortunate [*1317] circumstances that befell SDC. Indeed, we are unable to identify any settled Fourth Amendment principle making it obviously clear that volitional conduct which is not intended to harm an already-seized person gives rise to a Fourth Amendment violation.

Narrower principles do emerge from our excessive force cases. See, e.g., Vinyard, 311 F.3d at 1348 (finding use of pepper spray on mildly intoxicated and profane misdemeanant constituted "force that was plainly excessive, wholly unnecessary, and, indeed, grossly disproportionate under Graham"); Oliver, 586 F.3d at 907-08 (denying qualified immunity where repeated use of Taser on non-threatening subject was "grossly disproportionate to any threat posed" and "any reasonable officer would have recognized that his actions were unlawful"). However, unlike the present facts these cases—along with those cited by our dissenting colleague in support of an almost identical proposition—all involve conduct that was intentional as to the injured plaintiff.

Unlike any prior cases that could clearly establish the law for this case, at the time Vickers fired [**25] at the dog, SDC was not the intended target of an arrest or investigatory stop. Nor was he the intended target of Vickers's shot; rather, he was accidentally hit when Vickers fired at the dog. The Supreme Court's decision in Brower indicates that a Fourth Amendment violation depends upon intentional action on the part of the officer. The Brower decision provides:

> Violation of the Fourth Amendment requires an intentional acquisition of physical control. A seizure occurs even when an unintended person or thing is the object of the detention or taking, but the detention or taking itself must be willful. This is implicit in the word "seizure," which can hardly be applied to an unknowing act. . . . In sum, the Fourth Amendment addresses "misuse of power," not the accidental effects of otherwise lawful government conduct.
>
> Thus, if a parked and unoccupied police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment. And the situation would not change if the passerby happened, by lucky chance, to be a serial murderer for whom there was an outstanding arrest warrant—even if, at the time he was thus pinned, he was in the process of running away from two pursuing constables. [**26] It is clear, in other words, that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement through means intentionally

> applied. . . .
> . . . .
>
> . . . In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg. We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result. It was enough here, therefore, that, according to the allegations of the complaint, Brower was meant to be stopped by the physical obstacle of the roadblock—and that he was so stopped.

[*1318] 489 U.S. at 596-99, 109 S. Ct. at 1381-82 (citations omitted).

Lower court decisions [**27] construing Brower have required, in order to state a violation of Fourth Amendment rights, that the officer's action must have been intended to stop the plaintiff, the party suing the officer. This reading of Brower finds strong support in the language quoted above. There is a clear indication that intentional government action directed toward the plaintiff, not accidental effects, is required. See id. at 596, 109 S. Ct. at 1381 ("[T]he Fourth Amendment addresses misuse of power, not the accidental effects of otherwise lawful government conduct." (citation and internal quotation marks omitted)). Also, the Supreme Court's hypothetical of the police car rolling and pinning a person against a wall suggests that a Fourth Amendment violation occurs only when the governmental action intentionally targets the person thus pinned. And no Fourth Amendment violation occurs when the governmental action impacts an innocent passerby, or even when a serial murderer for whom there is an outstanding warrant is thus pinned, but only by lucky chance, as opposed to the murderer having been pinned by intentional action targeting him.

Lower courts have usually construed Brower to require such intentional action. For example, our own decision in Vaughan, 343 F.3d 1323, so construed Brower. There, this Court reversed the [**28] district court's grant of summary judgment in favor of an officer under the following circumstances. The officer, with another officer, was engaged in a high-speed chase of a red pickup truck suspected of having been stolen. The pickup truck was driven by Rayson, and the man in the passenger seat, Vaughan, matched the description of the suspect. During a high-speed chase, the officer, Cox, fired three bullets into the pickup truck, none of which disabled either the truck or the driver. However, the third bullet punctured Vaughan's spine, seriously injuring him. This Court reversed the district court's grant of summary judgment to Officer Cox, but only after we concluded that "Vaughan was hit by a bullet that was meant to stop him," and therefore "he was subjected to a Fourth Amendment seizure." Id. at 1329. In so holding, we rejected as inapplicable cases from other circuits which had rejected Fourth Amendment claims brought by innocent bystanders or hostages accidentally harmed by police fire, noting that those "cases are of little aid to our inquiry . . . because Vaughan was neither an innocent bystander nor a hostage; instead, he was a suspect whom Deputy Cox sought to apprehend." Id. at 1328 n.4.

It is true that the Supreme Court's decision [**29] in Brower, and our Eleventh Circuit decision in Vaughan discussed above, focus on the seizure aspect of the claimed Fourth Amendment violation. And it is also true that we have held that SDC was already temporarily seized at the command of Vickers and the other officers who were controlling the scene in their attempt to capture the suspect, Barnett. Thus, Corbitt argues that Brower's requirement of intentional government conduct targeting SDC is satisfied, and thus she can prove a Fourth Amendment violation pursuant solely to the objective reasonableness test without regard to any

further intentionality element.

We conclude that Corbitt's argument cannot overcome Vickers's claim of qualified immunity. No case capable of clearly establishing the law for this case holds that a temporarily seized person—as was SDC in this case—suffers a violation of his Fourth Amendment rights when an officer shoots at a dog—or any other object—and accidentally hits the person. In other words, Corbitt is not claiming that the officers' command that SDC and the other children lie face down on the ground violated Fourth Amendment rights. Nor is [*1319] she claiming that any other action of the officers directed toward SDC and the other children violated Fourth Amendment rights. Rather, she [**30] is claiming SDC's Fourth Amendment rights were violated by Vickers's shot—an action targeting the dog, not SDC. Corbitt's Fourth Amendment claim is based on a governmental action not directed toward SDC and which only accidentally harmed SDC.

Indeed, dicta in Brower itself (as noted above) suggests that accidental effects do not rise to the level of a misuse of power constituting a Fourth Amendment violation.[12] See Brower, 489 U.S. at 596, 109 S. Ct. at 1381. Cases from other circuits are generally in accord with this principle, especially when bystanders are involved. See Schultz v. Braga, 455 F.3d 470, 479-83 (4th Cir. 2006) (declining to extend Fourth Amendment protections to "reasonably foreseeable" victim of officer's gunshot where victim was already seized by traffic stop and officer did not intend to shoot her but instead intended to shoot her passenger); Childress v. City of Arapaho, 210 F.3d 1154, 1155-57 (10th Cir. 2000) (holding no Fourth Amendment seizure occurred when two escapees abducted plaintiff and her two-year-old daughter and stole their minivan, and law enforcement officers shot intending to restrain the minivan and escapees but accidentally injured plaintiff and her daughter who were hostages in the minivan); Medeiros v. O'Connell, 150 F.3d 164, 167-69 (2d Cir. 1998) (in similar factual situation, holding no Fourth Amendment seizure and relying upon Brower, 489 U.S. at 596, 109 S. Ct. at 1381, for the proposition that the Fourth Amendment addresses misuse of power, not accidental effects of otherwise lawful conduct); Landol-Rivera v. Cruz Cosme, 906 F.2d 791, 795 (1st Cir. 1990) (in a similar factual [**31] situation, holding: "[a] police officer's deliberate decision to shoot at a car containing a robber and a hostage for the purpose of stopping the robber's flight does not result in the sort of willful detention of the hostage that the Fourth Amendment was designed to govern," and relying upon Brower for the proposition that the Fourth Amendment addresses misuse of power, not accidental effects of otherwise lawful conduct);[13] cf. Dodd v. City of Norwich, 827 F.2d 1, 7 (2d Cir. 1987) (rejecting a Fourth Amendment claim of a § 1983 plaintiff where suspected burglar was deemed to have been already seized and holding: "It makes little sense to apply a standard of reasonableness to an accident.").[14]

The foregoing authorities do not support Corbitt's argument that once SDC was [*1320] already

[12] As indicated above, there is a circuit split as to whether government action which accidentally harms the plaintiff can rise to the level of a Fourth Amendment violation. See discussion supra note 6. This only further strengthens Vickers's claim that he is entitled to qualified immunity.

[13] See also discussion infra note 17 (comparing First Circuit case finding Fourth Amendment violation where accidental effects of conduct intentionally directed toward plaintiff resulted in shooting death of plaintiff).

[14] While it is true that "only binding precedent can clearly establish a right for qualified immunity purposes," Gilmore v. Hodges, 738 F.3d 266, 279 (11th Cir. 2013), non-binding persuasive authority can be used to indicate that a particular constitutional right is not clearly established, see Denno ex rel. Denno v. School Bd., 218 F.3d 1267, 1272-75 (11th Cir. 2000) (concluding that school officials were entitled to qualified immunity because, in part, they could justifiably rely on "the perspective of several reasonable jurists" from outside Eleventh Circuit in navigating the "relevant legal landscape"). Thus, we need not, and expressly do not, express an opinion with respect to the correctness of cases like Schultz, Childress, Medeiros, Landol-Rivera, or Dodd. We cite such cases solely as examples of opinions of reasonable jurists which indicate that the relevant law is not clearly established.

seized in an unchallenged manner, the intent requirement of Brower is satisfied, and a Fourth Amendment violation is established if the officer's actions were objectively unreasonable. As the Second Circuit noted in Dodd, that would mean that a Fourth Amendment violation could be based upon simple negligence. Dodd, 827 F.2d at 7-8. Moreover, the cases noted above have not distinguished between the following two factual situations. In the first situation, an officer fires at the robber or escapee and the [**32] vehicle in which he is fleeing with the plaintiff-hostage, but the bullet accidentally also hits the unseized plaintiff-hostage, thus raising the issue of whether the bullet striking the plaintiff-hostage constitutes a Fourth Amendment seizure. This factual situation is presented in the Brower dicta, and in cases like Childress, Medeiros, and Landol-Rivera, all indicating there is no Fourth Amendment seizure in that situation. In the second factual situation, the plaintiff-bystander is already seized in an unchallenged manner, but then is harmed accidentally by a shot fired at someone or something other than the plaintiff-bystander. For example, in Schultz, the officer fired the shot at the person he believed to be a robbery suspect in the passenger seat, but "blood and glass set in motion by the gunshot" hit the already-seized Harkum in the driver's seat. Schultz, 455 F.3d at 483. The court held that the officer was properly granted qualified immunity from Harkum's Fourth Amendment claim "because the force employed was not directed towards her," and because the focus of the Fourth Amendment "did not involve unintended consequences of government action." Id. (second quotation quoting from Brower, 489 U.S. at 596, 109 S. Ct. at 1381). And in the instant case, the already-seized bystander, SDC, was harmed accidentally [**33] when Vickers intentionally fired at the dog. See Dodd, 827 F.2d at 7-8 (holding no Fourth Amendment violation in a factual situation involving an accidental shooting during handcuffing after the suspect was deemed to have been already seized).

Not only have the cases not distinguished between these two factual situations, it is not obvious that there should be a different result in the two situations, in light of the fact that the focus of the Fourth Amendment analysis is on the "misuse of power," not the "accidental effects of otherwise lawful government conduct." Brower, 489 U.S. at 596, 109 S. Ct. at 1381. In other words, it is the "accidental effect" that is significant. Stated in the language of the relevant standard, the law is not clearly established that there is a Fourth Amendment violation when an already-seized bystander, as in the instant case, is accidentally harmed as an unintended consequence of an officer's intentional shot at something else entirely.

In sum, not only is there no materially similar binding case that clearly establishes a Fourth Amendment violation; dicta from the Supreme Court and nonbinding case law indicates that reasonable jurists have found no Fourth Amendment violation in similar circumstances.[15] We conclude that the accidental shooting, as occurred here, does not constitute a clearly established [**34] Fourth Amendment violation as a matter of obvious clarity.[16] Thus, Corbitt [*1321] has failed to demonstrate a clearly established Fourth Amendment violation, either by the first method (a materially similar, binding case), or the second method (the violation is a matter of obvious clarity from such a binding case). We turn therefore to the third method (the challenged

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[15] See also discussion supra note 14.

[16] The district court assumed the Brower intent requirement could be satisfied by the inference the district court derived from plaintiffs' allegations "that Vickers fired his weapon at the animal in order to keep control of SDC . . . [and] continue [his] seizure." Corbitt, 2017 U.S. Dist. LEXIS 199826, 2017 WL 6028640, at *4. Thus, under the district court's construction, Vickers's shot was an attempt to continue his seizure of SDC, and thus satisfied the required intent element. However, the shot fired by Vickers—the act on which Corbitt bases her allegation of excessive force in violation of the Fourth Amendment—was clearly targeting Bruce, the dog; it is absolutely clear that it was by pure accident that the shot struck SDC. In any event, as demonstrated in the text, the district court's position is not supported by clearly established law such that it would be apparent to any reasonable officer in Vickers's shoes that his actions violated the Fourth Amendment.

conduct so obviously violates the Fourth Amendment that prior case law is unnecessary).

This is not a case that so obviously violates the Fourth Amendment that prior case law is unnecessary to hold Vickers individually liable for his conduct. To find otherwise would require us to conclude that no reasonable officer would have fired his gun at the dog under the circumstances. This we are unable to do. With the benefit of hindsight, we do not doubt Vickers could have acted more carefully; the firing of a deadly weapon at a dog located close enough to a prone child that the child is struck by a trained officer's errant shot hardly qualifies as conduct we wish to see repeated. However, even the underlying constitutional issue itself (which of course is easier for a plaintiff to prove than proving that particular circumstances violate clearly established constitutional law) is [**35] evaluated pursuant to a "calculus . . . [that] must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." Graham, 490 U.S. at 396-97, 109 S. Ct. at 1872. In the instant qualified immunity context, we are cognizant that several cases (some of which are mentioned above) have considered similar accidental shootings of bystanders, and that many, if not most, of the jurists involved have concluded that there was no clearly established Fourth Amendment violation. Indeed, we are aware of no case and no jurist indicating that such an accidental shooting (i.e., one resulting from volitional conduct indisputably intended to stop someone or something other than the plaintiff) so obviously violates the Fourth Amendment that prior case law is unnecessary to hold that the officer violated clearly established law.[17] Moreover, the facts alleged here involve "accidental effects" of conduct directed toward something other [*1322] than the plaintiff, not the kind of "misuse of power" which Brower suggests is the focus of a Fourth Amendment violation. Brower, 489 U.S. at 596, 109 S. Ct. at 1381. We conclude that the circumstances alleged in this case do not so obviously violate the Fourth Amendment such that it would be apparent to every reasonable officer [**36] that his actions were in violation of the Fourth Amendment. See Lee, 284 F.3d at 1199 (recognizing that a plaintiff can surmount a qualified immunity defense by showing "that the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law" and emphasizing that "[u]nder this test, the law is clearly established, and qualified immunity can be overcome, only if the standards in Graham and our own case law inevitably lead every reasonable officer in [the defendant's] position to conclude the force was unlawful" (second alteration in original) (citations and internal quotation marks omitted)).

We cannot agree with our dissenting colleague either on the facts or the law. For example, in the absence of allegations of actual facts demonstrating that every objectively reasonable officer in Vickers's shoes would necessarily perceive a total

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[17] Cf. Stamps v. Town of Framingham, 813 F.3d 27 (1st Cir. 2016). In Stamps, the First Circuit denied qualified immunity to an officer accused of using excessive force during the execution of a search warrant where the officer pointed a "loaded assault rifle at the head of a prone, non-resistant, innocent person who present[ed] no danger, with the safety off and a finger on the trigger," then accidentally shot the person to death. Id. at 29, 39-40.

Although relevant to our discussion here, the legal principle deemed clearly established in Stamps is materially different from the principle at issue in this case because Stamps involved the accidental consequences of conduct otherwise intentionally directed toward the plaintiff. In Stamps, the officer intentionally aimed his assault rifle at the plaintiff and then accidentally shot the plaintiff. Here, Vickers intentionally fired his gun at the dog and then accidentally shot SDC. Recognizing a similar distinction, the First Circuit in Stamps noted that its decision there was not inconsistent with its earlier decision in Landol-Rivera, 906 F.2d 791. In particular, it observed that the Landol-Rivera court had relied on Brower's intent requirement in finding no Fourth Amendment violation on grounds that "it was not the officer's intent to seize the hostage." Stamps, 813 F.3d at 37 n.10. Put another way, Landol-Rivera's "holding simply has no relevance [to Stamps] since there is no question that Stamps was the intended target of [the officer's] seizure." Id. We agree and find that this case is more like Landol-Rivera than Stamps because Vickers intended to shoot the dog, not SDC.

lack of reason to subdue a dog roaming freely at the scene of an active arrest, we decline to accept the plaintiffs' conclusory allegations that there was no need to subdue [**37] the dog. See Davila v. Delta Air Lines, Inc., 326 F.3d 1183, 1185 (11th Cir. 2003) ("[C]onclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal."). We think it even more appropriate to disregard such allegations in the context of the qualified immunity and excessive force issues raised by this case, where the Supreme Court has directed us to judge the "reasonableness at the moment" of the officer's actions not from the plaintiff's perspective, but instead "from the perspective of a reasonable officer on the scene," who was operating without the "20/20 vision of hindsight." Graham, 490 U.S. at 396, 109 S. Ct. at 1872.

In any event, the allegations of the complaint are lacking in allegations of actual facts[18] that paint a scenario that so clearly and obviously presented such danger to SDC that every objectively reasonable officer confronted with the situation Vickers encountered would have known, in light of "the standards set forth in Graham and our own case law," Lee, 284 F.3d at 1199, [*1323] and in the ten seconds allegedly available, that a shot at the dog would violate the Fourth Amendment. Thus, we cannot conclude that the instant allegations rise to that rare level of conduct that "lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the [**38] conduct was readily apparent to the official, notwithstanding the lack of case law." Id.; see also Mercado, 407 F.3d at 1159 (noting that, under the third method, the conduct at issue must rise to a level that "so obviously violates [the] constitution that prior case law is unnecessary"). As a result, we also cannot conclude that Corbitt has overcome the high legal threshold placed on plaintiffs who seek to overcome an officer's qualified immunity defense on the basis of the third method on which the dissent focused. That this complaint fails to surmount that high legal threshold is especially apparent in light of the considerable case law indicating that a Fourth Amendment violation must involve official action that intentionally targets the plaintiff. Not only does that case law strongly indicate it is not clearly established that the accidental effects of official actions targeting others gives rise to a Fourth Amendment violation, it even suggests that such actions may not even constitute a Fourth Amendment violation in the first place. The relevant question is not whether a reasonable officer would have refrained from shooting the dog. Instead, the relevant question is whether every reasonable officer would have inevitably refused to do so in light [**39] of the Fourth Amendment standards established by Graham and our own case law. Our answer to that relevant question is in the negative.

Accordingly, Vickers's qualified immunity defense must prevail in the absence of a materially similar case or a governing legal principle or binding case that applies with obvious clarity to the facts of this case.

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[18] Contrary to the dissent's suggestion, we do not discount the complaint's conclusory allegation that the dog presented no threat because we accept instead Vickers's conclusory allegation that he did feel the need to subdue the dog. Rather, we discount the complaint's allegation because it is conclusory. There are no allegations of actual fact indicating that the dog was non-threatening. In contrast to Corbitt's conclusory allegations of no threat and no justification, we suggest hypothetical illustrations of allegations of actual fact which Corbitt might have alleged depending upon what the actual facts were. For example, Corbitt might have alleged that the dog was a small and non-aggressive breed, like a toy poodle, or, if it was a breed known for aggression, that the dog was walking slowly towards its owners and not barking at all.

We also cannot agree with our dissenting colleague that the actual facts alleged warrant the inference that the dog "was surrounded by children." The complaint does not contain allegations of actual fact to support the dissent's assertion that the dog was surrounded by children when Vickers fired at it. To the extent that the allegations focus on the relative locations of the dog to other children, they allege only that Vickers "discharged his firearm in the immediate vicinity of several innocent minor children and bystanders," and "a large number of innocent bystanders, mostly children in the immediate area." The dissent's inference that Vickers shot "into a group of children" overstates the factual allegations contained in Corbitt's complaint.

III. CONCLUSION

In conclusion, we hold that Vickers is entitled to qualified immunity because, at the time of the incident giving rise to this appeal, there was no clearly established law making it apparent to any reasonable officer in Vickers's shoes that his actions in firing at the dog and accidentally shooting SDC would violate the Fourth Amendment. Because we find no violation of a clearly established right, we need not reach the other qualified immunity question of whether a constitutional violation occurred in the first place. This opinion expressly takes no position as to that question. The order of the district court denying Vickers's motion to dismiss is hereby reversed, and the case is remanded to the district court with instructions to dismiss the action against Vickers.

REVERSED and **REMANDED**.

Dissent by: WILSON

Dissent

WILSON, Circuit Judge, dissenting:

The majority accurately points [**40] out that qualified immunity protects "all but the plainly incompetent." Maj. Op. at 10 (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)). Because no competent officer would fire his weapon in the direction of a nonthreatening pet while that pet was surrounded by children, qualified immunity should not protect Officer Vickers. Therefore, I dissent.

I.

On July 10, 2014, several officers, including Deputy Sheriff Michael Vickers, initiated a search to locate and apprehend a criminal suspect, Christopher Barnett.[1] [*1324] The search led them to Amy Corbitt's property after Barnett, "whom [plaintiffs] ha[d] never met," "wandered into the area." Barnett, Damion Steward, and six children—including Corbitt's ten-year-old child S.D.C., and two children under the age of three—were on the property's front yard. The officers detained Barnett and ordered everyone to get on the ground. An unidentified officer handcuffed Steward and held a gun against his back. The detained children "were [also] held at gun point, each having an officer forcefully shove the barrel of a loaded gun into their backs."

While Barnett, Damion, and the children were detained on the lawn, Vickers spotted the Corbitt family pet, a dog named Bruce. Although no one "appear[ed] [**41] to be threatened by [Bruce's] presence," Vickers attempted to shoot the dog. He missed, and Bruce retreated under the Corbitt's residence. Roughly ten seconds later, Bruce reemerged and was "approaching his owners" on the yard. Vickers fired another shot, again missing the pet. The errant bullet struck S.D.C. behind the knee as the child lay in a "face down position on the ground at the request of defendants." Importantly, S.D.C. was "readily viewable" *a mere eighteen inches from Vickers* at the time the shot was fired, and "[o]ther minor children were [ ] within only a few feet of [ ] Vickers." As a result of the bullet wound, S.D.C. suffered severe physical pain and mental trauma.

II.

To overcome a qualified immunity defense, the plaintiff must (1) "establish that the defendant violated a constitutional right" and (2) demonstrate that the violated right was "clearly established." *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1199-1200 (11th Cir. 2007). I agree with the majority's

[1] The summary of the facts is based on the allegations made in the Complaint. *See Sebastian v. Ortiz*, 918 F.3d 1301, 1307 (11th Cir. 2019) (noting that, at the motion to dismiss stage, "[w]e are required to accept all allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor").

determination that Corbitt satisfied the first requirement. *See* Maj. Op. at 14-18. I disagree, however, with the majority's conclusion that Corbitt failed to demonstrate that Vickers violated a "clearly established" constitutional right.

We have identified three ways a plaintiff [**42] can show that a right was clearly established at the time of the defendant's action. First, she can "show that a materially similar case has already been decided." *Mercado v. City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005). Second, she can "show that a broader, clearly established principle should control the novel facts" of a particular situation. *Id.* (citing *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)). Third, she can show that her case "fits within the exception of conduct which so obviously violates [the] constitution that prior case law is unnecessary." *Id.*; *see also Lee v. Ferraro*, 284 F.3d 1188, 1199 (11th Cir. 2002) (noting that, to show that a right is "clearly established," plaintiffs may show "that the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law." (citation omitted)). I believe the instant case falls within the third category.

Under this third recognized category, a plaintiff in an excessive force case can overcome an officer's qualified immunity defense "only if the standards set forth in *Graham* and our own case law inevitably lead every reasonable officer in [the defendant's] position to conclude the force was unlawful." *Lee*, 284 F.3d at 1199 (alteration in original) (citation and internal quotation [**43] marks omitted). In *Graham v. Connor*, the Supreme Court held that the reasonableness analysis "requires careful attention to the facts and circumstances of each particular case," including the severity of the [*1325] crime at issue, the safety interests of officers and others, and any risk of violence or flight by a suspect. 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (citation omitted).

Consider the present facts and circumstances: officers arrived at a home and found the subject of their search. At gunpoint, the officers ordered the suspect and all persons in the area—including six children—to the ground. Everyone complied. A nonthreatening family pet was present on the scene; there is nothing to suggest that this pet acted with hostility or threatened the safety of anyone—including the officers. With all the children and the suspect still lying on the ground pursuant to the officers' commands, Officer Vickers shot at the family pet. He missed. He waited. He shot again. He missed again, instead striking a child who had been—at all times—lying within arm's reach of the officer.

This conduct—discharging a lethal weapon at a nonthreatening pet that was surrounded by children[2]—is plainly unreasonable. The nonthreatening nature of the pet [**44] is crucial to this conclusion.[3] We have consistently denied

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[2] The majority maintains that the Complaint does not "contain allegations of actual fact to support the dissent's assertion that the dog was surrounded by children when Vickers fired at it." Maj. Op. at 37 n.18. But there are allegations in the Complaint that, considered together, lead to the reasonable inference that the dog was surrounded by children at the time Officer Vickers fired the shot. *See Sebastian*, 918 F.3d at 1307 (noting that, at the motion to dismiss stage, we must draw all reasonable inferences in favor of the nonmoving party). Specifically, the Complaint alleges that the dog was "approaching his owners," including S.D.C., on the yard when Officer Vickers fired. It also alleges that S.D.C. "was approximately eighteen inches from Defendant Vickers" and "[o]ther minor children were [ ] within only a few feet of Defendant Vickers" when Officer Vickers fired. Finally, the Complaint alleges that Officer Vickers fired a shot at the dog but instead hit S.D.C. Based on these three allegations—(1) that the dog was approaching S.D.C., (2) that Officer Vickers was a few feet from S.D.C. and the other children, and (3) that Officer Vickers fired a shot at the dog, but instead struck a child—we can, and should, reasonably infer that the dog and the children were closely situated.

[3] The majority declined to accept Corbitt's allegations that the dog was nonthreatening, reasoning that the allegations were "conclusory." Maj. Op. at 37. I disagree with such a characterization. At this stage, we must take plaintiff's allegations as true. *Sebastian*, 918 F.3d at 1307; *St. George v. Pinellas County*, 285 F.3d 1334, 1337 (11th Cir. 2002) ("While there may be a dispute as to whether the alleged facts are the actual facts, in reviewing the grant of a motion to dismiss, we are required [**46] to accept the allegations

qualified immunity when the defendant-officer exhibited excessive force in the face of no apparent threat. *See cf. Saunders v. Duke*, 766 F.3d 1262, 1265 (11th Cir. 2014) ("We have repeatedly ruled that a police officer violates the Fourth Amendment, and is denied qualified immunity, if he or she uses gratuitous and excessive force against a suspect who is under control, not resisting, and [*1326] obeying commands."); *see, e.g.*, *Slicker v. Jackson*, 215 F.3d 1225, 1227 (11th Cir. 2000) (denying qualified immunity to officer who arrested plaintiff, placed him in handcuffs and then, after he had been fully secured, slammed his head into the pavement); *Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919, 926-27 (11th Cir. 2000) (denying qualified immunity to officer who allowed police dog to attack arrestee who was already subdued and lying on the ground); *Smith v. Mattox*, 127 F.3d 1416, 1418-20 (11th Cir. 1997) (denying qualified immunity to officer who broke plaintiff's arm after plaintiff "docilely submitted" to officer's request to "get down"). It is also relevant that Officer Vickers was a mere foot and a half from S.D.C. and was only a few feet from several other children. Nonetheless, facing no apparent threat, Officer Vickers chose to fire his lethal weapon in the direction of these children.[4] No reasonable officer would engage in such recklessness and no reasonable officer would think [**45] such recklessness was lawful. Therefore, I agree with the district court that Officer Vickers should not be entitled to qualified immunity. *Lee*, 284 F.3d at 1199.

I respectfully dissent.

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in the complaint as true."). We are therefore obligated to accept that the dog "posed no threat," that "[no]one appear[ed] to be threatened by its presence," and that it was merely "approaching his owners" at the time Officer Vickers fired. Instead, the majority appears to credit Officer Vickers' own conclusory account—that he shot the dog "because it was approaching him, the officers, and the detained bystanders in a manner that led him to conclude that he needed to subdue it." *See* Maj. Op. at 37 (concluding that some officers may find it reasonable to subdue a dog "roaming freely at the scene of an active arrest"). Neither Officer Vickers nor the majority elaborates on the dog's behavior or explains how its behavior was so outrageous as to warrant shooting into a group of children. And even if such an explanation existed, *we are required to accept Corbitt's allegations as true*. It is not for us to weigh the likelihood of either account. That is a job for the jury.

[4] Officer Vickers emphasizes that he intended to shoot the dog and only accidentally struck S.D.C. He argues that such an inadvertent injury cannot be deemed a result of "excessive force." I do not dispute that the shooting of S.D.C. was accidental. I maintain that Officer Vickers' intentional action—shooting at a dog that was surrounded by children—was unreasonable.

Muschette v. Gionfriddo

United States Court of Appeals for the Second Circuit

September 13, 2018, Argued; December 7, 2018, Decided

No. 17-3817-cv

Reporter
910 F.3d 65 *; 2018 U.S. App. LEXIS 34470 **

AUDLEY MUSCHETTE, ON BEHALF OF A.M., AND JUDITH MUSCHETTE, ON BEHALF OF A.M., Plaintiffs-Appellees, v. PAUL W. GIONFRIDDO, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES, Defendant-Appellant, TOWN OF WEST HARTFORD, AMERICAN SCHOOL FOR THE DEAF, CHRISTOPHER LYTH, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES, CHRIS HAMMOND, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES, JOHN DOE, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES, AND ELWIN ESPINOSA, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES, Defendants.

Prior History: Muschette v. Town of W. Hartford, 2017 U.S. Dist. LEXIS 188710 (D. Conn., Nov. 15, 2017)

Counsel: [**1] For PLAINTIFF-APPELLEE: ANDREW ROZYNSKI, EISENBERG & BAUM LLP, NEW YORK, NY.

For DEFENDANT-APPELLANT: SCOTT M. KARSTEN (WITH DENNIS M. DURAO ON THE BRIEF), KARSTEN & TALLBERG, LLC, ROCKY HILL, CT.

Judges: Before: WALKER, JACOBS, POOLER, Circuit Judges.

Opinion by: DENNIS JACOBS

Opinion

Plaintiffs Audley and Judith Muschette bring suit on behalf of their son, A.M., who was tased twice at his school by the defendant-appellant, Officer Paul Gionfriddo, following an incident between A.M. and his teacher. The United States District Court for the District of Connecticut (Eginton, J.) denied a summary judgment motion by Officer Gionfriddo seeking qualified immunity. Because a reasonable officer could believe that, under the circumstances, the tasing of A.M. was lawful, we reverse.

[*67] DENNIS JACOBS, *Circuit Judge*:

Defendant-Appellant Paul Gionfriddo, a police officer in the town of West Hartford, appeals from the denial of his motion for qualified immunity in the United States District Court for the District of Connecticut (Eginton, J.). A.M. alleges that his Fourth Amendment right to be free from excessive force was violated when he was tased by Officer Gionfriddo following an incident at his school, the American School for the Deaf, in West [**2] Hartford, Connecticut. Officer Gionfriddo argues that he reasonably believed that the use of the taser was necessary to subdue A.M., because A.M. ignored his instructions, even after he warned A.M. that he would use the taser if his instructions were

ignored. A.M.--who is deaf and communicates primarily in American Sign Language ("ASL")--disputes that he received the instructions and warnings. Officer Gionfriddo responds that it was reasonable for him to believe that his verbal instructions and warnings were translated to A.M. by the faculty members, because he observed them signing to A.M. when he gave the instructions and warnings.

Officer Gionfriddo moved for summary judgment on the ground of qualified immunity. [*68] The district court denied the motion, ruling that questions of fact precluded a ruling on qualified immunity. We reverse.

BACKGROUND

The following facts are undisputed, unless otherwise noted.

The plaintiffs, Audley and Judith Muschette, are the parents of A.M., a 12-year-old boy who is profoundly deaf and communicates primarily in ASL. On April 30, 2013, A.M. got into a confrontation over a takeout food order with a teacher at his school. A.M. became angry, ran from the dorm, [**3] and entered a nearby, fenced-off construction area. The teacher, Christopher Hammond, followed. When Hammond approached, A.M. picked up a stick and hit Hammond. A.M. also threw rocks at Hammond, hitting him at least once. A.M. picked up a large rock in the construction area, Hammond and the other faculty who were gathered at the scene left the construction area, leaving A.M. sitting alone and holding the rock.

The Dean, Ron Davis, called 911 and reported a student was "out of control" and "making the situation dangerous". App'x 345-47. Officer Gionfriddo went to the school, and was soon joined by a second officer, Christopher Lyth. Dean Davis advised Officer Gionfriddo that A.M. had gotten into a disagreement with Hammond, and had been throwing things at staff members.

After the briefing, Officers Gionfriddo and Lyth approached the construction area with Hammond and Dean Davis, where A.M. remained sitting with a large rock in his hands. Dean Davis, Officer Gionfriddo, and Officer Lyth positioned themselves behind A.M., while Hammond stood approximately 15 feet in front of A.M., facing A.M., Dean Davis, and the officers. Officer Gionfriddo gave verbal instructions to put down the rock. [**4] Dean Davis translated the instructions into ASL, and Hammond, who was facing A.M., signed in A.M.'s direction. When A.M. did not let go of the rock, Officer Gionfriddo verbally warned A.M. that he would use the taser if A.M. did not put down the rock, and Davis again translated this message to Hammond, who signed toward A.M. When A.M. again appeared to ignore the warning, Officer Gionfriddo tased A.M., and Officer Lyth unsuccessfully attempted to get A.M. into handcuffs. After Officer Gionfriddo deployed the taser a second time, Officer Lyth was able to secure the handcuffs.

A.M. does not dispute that Officer Gionfriddo gave verbal instructions and warnings, or that Davis and Hammond were signing when those instructions and warnings were given. But he denies that he actually received and understood any of those instructions or warnings, or even knew that police officers were at the school until he was tased. A.M. argues that Officer Gionfriddo's belief that his instructions and warnings were being translated and understood by A.M. was unreasonable, and therefore that Officer Gionfriddo's use of the taser was unreasonable.

Officer Gionfriddo moved for summary judgment on the ground of [**5] qualified immunity. The district court denied the motion, finding that "Gionfriddo's entitlement to immunity depends on factual disputes that will hinge on credibility determinations, which must be made by the jury." App'x 31.

This appeal followed.

DISCUSSION

"Ordinarily, the denial of a motion for summary judgment is not immediately appealable because such a decision is not a final judgment." Cowan ex rel. Estate of Cooper v. Breen, 352 F.3d 756, 760 (2d Cir. 2003) (internal quotation marks [*69] omitted). Jurisdiction nevertheless lies when (as here) the appellant argues entitlement to qualified immunity "even under plaintiff's version of the facts." Coons v. Casabella, 284 F.3d 437, 440 (2d Cir. 2002) (internal quotation marks omitted). Accordingly, all disputed facts are construed (and reasonable factual inferences are drawn) in A.M.'s favor.

We review the district court's summary judgment decision de novo. Roe v. City of Waterbury, 542 F.3d 31, 35 (2d Cir. 2008). Summary judgment is appropriate if "there is no genuine dispute as to any material fact" and "the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

I.

"Qualified immunity protects officials from liability for civil damages as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Taravella v. Town of Wolcott, 599 F.3d 129, 133 (2d Cir. 2010) (internal quotation marks omitted). When [**6] a defendant invokes qualified immunity, courts consider whether the plaintiff has shown "(1) that the [defendant] violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." Wood v. Moss, 572 U.S. 744, 757, 134 S. Ct. 2056, 188 L. Ed. 2d 1039 (2014) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)). "A right is clearly established only if its contours are sufficiently clear that 'a reasonable official would understand that what he is doing violates that right.'" Carroll v. Carman, 574 U.S. 13, 135 S. Ct. 348, 350, 190 L. Ed. 2d 311 (quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). Courts have discretion to decide the order in which they consider whether the officers violated a federal right and whether the right was clearly established. Tolan v. Cotton, 572 U.S. 650, 656, 134 S. Ct. 1861, 188 L. Ed. 2d 895 (2014).

Officer Gionfriddo does not argue on appeal that the plaintiff has failed to allege a constitutional violation (of the Fourth Amendment right to be free from excessive force), and we therefore decline to address whether there was such a violation. Instead, Officer Gionfriddo argues that he is entitled to qualified immunity because his use of force in this case did not violate any clearly established right or, alternatively, that it was objectively reasonable for him to believe that his conduct was lawful.

The primary factual dispute identified by the district court is whether Officer Gionfriddo's [**7] instructions and warnings were successfully conveyed to A.M. Officer Gionfriddo alleges that Hammond translated his verbal warnings to A.M. and that the warnings were understood by A.M. A.M. disputes this account. He argues that he was not disobeying the officer or resisting arrest, because the officer's instructions and warnings were not conveyed to him in ASL, and that the use of a taser under those circumstances was excessive.

It is clearly established that officers may not use a taser against a compliant or non-threatening suspect. Tracy v. Freshwater, 623 F.3d 90, 96-98 (2d Cir. 2010);[1] see also Garcia v. Dutchess Cty., [*70] 43 F. Supp. 3d 281, 297 (S.D.N.Y. 2014) (concluding that it is clearly established in the Second Circuit that "it [is] a Fourth Amendment violation to use 'significant' force against arrestees who no longer actively resisted arrest or posed a

[1] Although in 2013 there were relatively few excessive force cases involving a taser, "novel technology, without more, does not entitle an officer to qualified immunity." Edrei v. Maguire, 892 F.3d 525, 542 (2d Cir. 2018); see also Terebesi v. Torreso, 764 F.3d 217, 237 (2d Cir. 2014) ("An 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." (internal quotation marks omitted)).

threat to officer safety"). Under A.M.'s theory of the case, this clearly established right was violated. A.M. alleges that his failure to comply with the instructions was not a choice to be non-compliant and threatening, but rather the result of his ignorance that any instructions were given. Therefore, the right A.M. argues was infringed--the right to be free from a taser when one is compliant with an officer's instructions and non-threatening--was clearly [**8] established.

However, Officer Gionfriddo is entitled to qualified immunity because it was objectively reasonable for him to believe that, given the undisputed facts, his conduct complied with this clearly established law.

"To determine whether the relevant law was clearly established, we consider the specificity with which a right is defined, the existence of Supreme Court or Court of Appeals case law on the subject, and the understanding of a reasonable officer in light of preexisting law." Terebesi, 764 F.3d at 222. An officer is entitled to qualified immunity if "*any* reasonable officer, out of the wide range of reasonable people who enforce the laws in this country, *could have* determined that the challenged action was lawful". Figueroa v. Mazza, 825 F.3d 89, 100 (2d Cir. 2016). "[O]ur inquiry [on qualified immunity] is not whether the officer *should have* acted as he did. Nor is it whether a singular, hypothetical entity exemplifying the 'reasonable officer' . . . *would have* acted in the same way." Id. (citations omitted).

Given the undisputed facts of this case, we cannot say that no reasonable officer, situated as Officer Gionfriddo was, would have used a taser to secure A.M.

On arrival at the American School for the Deaf, Officer Gionfriddo was [**9] faced with a 12-year-old boy who had fled his dorm and hunkered down in a restricted construction area, holding a large rock. Officer Gionfriddo had been informed that A.M. had thrown a folding chair at a staff member, struck Hammond with a stick, and hurled rocks at Hammond and other staff members. Officer Gionfriddo therefore had a reasonable basis to believe that A.M. posed a threat to himself or the other staff members and that there was a risk of further flight over the terrain of a construction site.

Moreover, Officer Gionfriddo had a reasonable basis to believe that his instructions and warnings were being conveyed to A.M. and that A.M. was ignoring them. When Officer Gionfriddo approached A.M. in the construction area, he gave verbal instructions to A.M. to put down the rock. Officer Gionfriddo observed Davis signing to Hammond, who in turn signed "very animated[ly and] very purposeful[ly]" to A.M. The intermediary signers were a teacher and a dean at a school for the deaf, who could be counted upon to communicate with a deaf student. When A.M. did not comply, Officer Gionfriddo verbally warned A.M. that he would use the taser if A.M. did not put down the rock, and Officer Gionfriddo [**10] again observed Davis signing to Hammond, who signed to A.M. It was only then--when it appeared to Officer Gionfriddo that A.M. was ignoring his instructions--that Officer Gionfriddo deployed the taser. Officer Gionfriddo deployed [*71] the taser a second time to allow Officer Lyth to secure handcuffs on A.M.

A.M. makes no argument that is particular to the second deployment. He argues that the second deployment was even more unreasonable, but he makes the same arguments as to both. See, e.g., Appellee's Br. 25-26 (arguing that Officer Gionfriddo tased A.M. because he was impatient and noting that fact is "solidified by the fact that he tasered A.M. a second time because P.O. Lyth was not on top of him within 5 seconds"). He does not argue that the second taser use was unreasonable even if the first was reasonable.

A.M. disputes whether he received Officer Gionfriddo's instructions, but "our focus is not on [A.M.'s] motivations but instead on the sequence of events from the perspective of a reasonable officer at the scene." Tracy, 623 F.3d at 97; see id. ("[F]rom [the officer's] perspective, Tracy appeared

to fail to comply with a direct order and to instead actively resist arrest, thus necessitating a forceful [**11] response.").

Under these circumstances, we cannot say that no reasonable officer would have believed that the use of the taser to subdue A.M. was lawful. See id. (concluding that the use of a flashlight to subdue a suspect was objectively reasonable where suspect posed a "real and imminent" threat and "appeared to fail to comply with a direct order and to instead actively resist arrest"). We have repeatedly concluded in summary orders that it is not unreasonable for an officer to use a taser in analogous circumstances.[2]

A.M. argues that it was unreasonable for Officer Gionfriddo to believe that Hammond was conveying his instructions and warnings to A.M., because Officer Gionfriddo admitted that A.M.'s head was down and that he could not tell if A.M.'s eyes were open. But Officer Gionfriddo actually testified that he "saw A.M. shaking his head with his head down" after Hammond signed to him. App'x 158-59. In any event, one may be looking up even if one's head is down. And Officer Gionfriddo had a reasonable basis for presuming that his warnings were being conveyed to A.M.: he observed Hammond signing to A.M. after he gave verbal warnings (which supports an inference that Hammond [**12] believed that A.M. was seeing him), and Hammond gave no indication that he believed his communication to A.M. was unsuccessful.

A.M. also argues that Officer Gionfriddo's reliance on Hammond to accurately convey his instructions and warnings was unreasonable because Hammond was the victim of A.M.'s stick-hitting and rock-throwing. But a reasonable officer could believe that Hammond would fulfill his responsibility as a teacher (and a translator) to accurately convey serious warnings from a police officer, even if he had been the object of a student's tantrum. A reasonable officer need not assume that Hammond wished to harm a student in his charge, and would act on that wish by [*72] purposefully mistranslating Officer Gionfriddo's warnings. Moreover, Dean Davis, who was translating the warnings to Hammond, never indicated to Officer Gionfriddo that Hammond's translation was inaccurate.

Accordingly, because it was objectively reasonable for Officer Gionfriddo to believe that his conduct was lawful, he is entitled to qualified immunity.

CONCLUSION

The district court's decision denying Officer Gionfriddo's motion for summary judgment is reversed, and the case is remanded to the district court with [**13] instructions to enter judgment for Officer Gionfriddo on the ground of qualified immunity.

End of Document

[2] See Penree by Penree v. City of Utica, 694 F. App'x 30, 33 (2d Cir. 2017) ("Our precedents suggest that it is *not* excessive force to deploy tasers, after a warning, against arrestees who are dangerous or resisting arrest."); MacLeod v. Town of Brattleboro, 548 F. App'x 6, 8 (2d Cir. 2013) (concluding that the use of a taser "to subdue an actively non-compliant suspect . . . who posed a real and imminent threat to the safety of the officers and any bystanders" was objectively reasonable where the officers gave "repeated, clear commands" to the plaintiff to return to the ground); Crowell v. Kirkpatrick, 400 F. App'x 592, 595 (2d Cir. 2010) (concluding that the use of a taser was objectively reasonable where the plaintiffs were resisting arrest by refusing to unchain themselves from a barrel and the officers warned the plaintiffs that they would be tased if they did not remove themselves from the barrel).

Estate of Jaquez v. City of New York

United States Court of Appeals for the Second Circuit

September 8, 2017, Decided

16-1366-cv

Reporter

706 Fed. Appx. 709 *; 2017 U.S. App. LEXIS 17352 **; 2017 WL 3951759

THE ESTATE OF MAURICIO JAQUEZ, by The Public Administrator of Bronx County as administrator of the Good, Chattels and Credit of the deceased Mauricio Jaquez, ANA MARTINEZ, Plaintiffs - Appellants, v. CITY OF NEW YORK, SERGEANT WILLIAM FLORES, Shield No. 1023, Individually and in his official capacity, DETECTIVE RAYMOND MORRISSEY, Shield No. 744, Individually and in his official capacity, DETECTIVE RAYMOND FLOOD, Shield No. 744, Individually and in his official capacity, DETECTIVE RICHARD HENDERSON, Shield No. 1033, Individually and in his official capacity, DETECTIVE DAVID MCNAMEE, Shield No. 7273, Individually and in his official capacity, Defendants - Appellees, NYC Police Officers JOHN DOES, Defendants.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [**1] Appeal from an Order dated June 9, 2014, an Order dated May 8, 2015, and Judgment entered April 12, 2016 by the United States District Court for the Southern District of New York (Forrest, J.).

Estate of Jaquez v. City of New York, 104 F. Supp. 3d 414, 2015 U.S. Dist. LEXIS 60734 (S.D.N.Y., May 8, 2015)

Estate of Jaquez v. City of New York, 2014 U.S. Dist. LEXIS 81577 (S.D.N.Y., June 6, 2014)

Counsel: For Appellants: ZACHARY MARGULIS-OHNUMA, New York, NY.

For Appellees: SUSAN PAULSON, Assistant Corporation Counsel (Deborah A. Brenner, on the brief), for Zachary W. Carter, Corporation Counsel of the City of New York, New York, NY.

Judges: Present: PETER W. HALL, GERARD E. LYNCH, CHRISTOPHER F. DRONEY, Circuit Judges.

Opinion

[*711] **SUMMARY ORDER**

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiffs-Appellants the Estate of Mauricio Jaquez and Ana Martinez ("Appellants") appeal from the district court's orders dismissing their claims

against the City of New York,[1] and granting summary judgment in favor of Defendants-Appellees New York City police officers Flores, Morrissey, Flood, Henderson, and McNamee ("Appellees") on the basis of qualified immunity for their use of non-lethal force and initial use of lethal force. Appellants also appeal from the district court's order, issued following a jury trial, granting qualified immunity to Defendant-Appellee [**2] Officer Flores with respect to his use of lethal force in firing the final shot, as well as a jury verdict in favor of Officer Flores determining that he was not liable for firing the final shot.

[*712] **I. BACKGROUND**

A. The Arrest

The following facts are undisputed unless otherwise noted. This appeal concerns a series of events that took place in a Bronx apartment on April 12, 2009. Appellees arrived at the residence of Mauricio Jaquez ("Jaquez") in response to a 911 call reporting that Jaquez and his wife were fighting and that Jaquez was armed with a knife.

When the officers arrived, they entered the apartment and tried to persuade Jaquez to surrender. At some point, Jaquez advanced down the hallway of the apartment, and a struggle ensued as the officers attempted to arrest Jaquez. During that struggle, after Officer Henderson had deployed his Taser, Jaquez attacked Officer Flood with the knife, swinging the knife over Flood's ballistic shield, and making contact with Officer Flood in the shoulder and elbow. Officer Flores and Officer Morrissey deployed their Tasers, but that did not stop Jaquez. Because, according to the officers' testimony, Jaquez remained armed and continued to attack the [**3] officers, after yelling at Jaquez to drop the knife, Officer McNamee shot Jaquez with three to four rubber bullets from a "Sage gun," which also failed to stop Jaquez. As the struggle continued, Jaquez attempted to stab Officer McNamee, Officer Henderson again deployed his Taser, and Officers Morrissey and Flores fired live ammunition. Jaquez was struck with four bullets, one of which, according to the medical examiner, ultimately proved fatal, and he fell to the ground face-down while still holding the knife. Officer Flores fired a final shot of live ammunition that struck Jaquez in the head when Flores perceived Jaquez to be pushing himself off the floor. Jaquez was placed in an ambulance and died on his way to the hospital.

B. Summary Judgment

Jaquez's estate commenced this § 1983 action in the Southern District of New York. The officers moved for summary judgment based on qualified immunity. Appellants countered that proffered testimony of their proposed expert, Dr. Richard Sullivan, created a factual dispute about the officers' description of the shooting. Dr. Sullivan opined that Jaquez was in a psychotic state and that when the officers entered the apartment with weapons and body armor, [**4] this escalated Jaquez's reactions. Dr. Sullivan further opined that the trajectory of the bullets described by Dr. Kristen Landi, the assistant medical examiner who completed the autopsy report, contradicted the officers' accounts of the events. That is, Dr. Sullivan also opined that, because the autopsy report indicated that the bullets entered Jaquez's body from above, the bullets' trajectory indicated that the officers were above Jaquez when he was shot, which Appellants contend would contradict the officers' claim that Jaquez was standing and attacking them at the time they deployed live ammunition. Finally, Dr. Sullivan proposed to testify that it would have been impossible, based on the injuries suffered, for Jaquez to push himself off the floor and continue attacking the officers after

[1] Although Appellants' notice of appeal indicates their intent to appeal the June 9, 2014 order dismissing their claims against the City of New York, they have abandoned that claim by failing to brief the issue.

the first gunshot wounds. This led Dr. Sullivan to conclude that "Mr. Jaquez . . . was on the ground when four out of five of the shots were fired and likely already on the ground or on the way when the remaining shot . . . was fired," and that he "posed no conceivable threat to anyone after [the fatal wound] was inflicted." Suppl. App. 920. Appellees moved to preclude Dr. Sullivan's testimony [**5] under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

Initially, the district court denied summary judgment, concluding that Dr. Sullivan's [*713] proffered expert testimony created a genuine issue of fact material to the officers' liability. On further consideration of the expert report, however, the district court excluded Dr. Sullivan's proposed testimony and granted the Appellees' motion for summary judgment except with respect to Officer Flores's final shot. The district court concluded that Dr. Sullivan's testimony was unreliable because his expertise was in emergency medicine, not in analyzing crime scenes, and his opinions were not based on scientific evidence, experience, or research. The district court also determined that Dr. Sullivan's testimony usurped the jury's role because he made credibility determinations regarding whether the officers' testimony was truthful. The district court, however, denied summary judgment with respect to Officer Flores's final shot, concluding that there was a triable issue of fact as to whether a reasonable officer could conclude that Jaquez posed a threat when Officer Flores fired the final shot.

C. Trial

Before trial, Appellees moved to exclude certain evidence. The district court concluded that [**6] Appellants' motorized life-sized model of Jaquez would be unduly prejudicial given other available evidence explaining the trajectory of the bullets. The district court also excluded as unduly prejudicial two photographs from before the events of April 12, 2009 that depicted Jaquez with his wife and child, and Jaquez holding an infant. The district court next denied Appellees' motion to preclude the crime scene report and allowed the report subject to redactions. With respect to the photographs attached to the crime scene report, the district court allowed eight of ninety photos showing where the final shot occurred. The court prevented Appellants from introducing into evidence some of the officers' weapons, tools, and ammunition, but did allow Appellants to introduce the Sage gun, which fires rubber bullets, a ballistic vest, and a ballistic shield.

The only issue presented to the jury was whether Officer Flores used excessive force when he fired the final shot after Jaquez was on the floor. The jury returned two verdicts with respect to the final shot. In the first verdict, the jury responded to two special interrogatories, finding that Jaquez was pushing himself up from the floor [**7] and had a knife in his hand as Officer Flores fired the final shot. In the second verdict, the jury found that Officer Flores did not use excessive force against Jaquez. On the basis of the jury's factual findings in response to the special interrogatories, the district court granted Officer Flores's motion for qualified immunity. Following the trial, Appellants moved for judgment as a matter of law, which the court denied.

II. STANDARDS OF REVIEW

We review *de novo* a district court's grant of summary judgment, viewing the facts in the light most favorable to the Appellants. Fed. R. Civ. P. 56(a); *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 138 (2d Cir. 2017). We review *de novo* a district court's denial of a judgment as a matter of law. *Morse v. Fusto*, 804 F.3d 538, 546 (2d Cir. 2015). We review the district court's evidentiary rulings for abuse of discretion. *Boyce v. Soundview Tech. Grp., Inc.*, 464 F.3d 376, 385 (2d Cir. 2006). Finally, "[a] jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law."

Gordon v. N.Y.C. Bd. of Educ., 232 F.3d 111, 116 (2d Cir. 2000). The formulation of special verdict questions further "rests in the sound discretion of the trial judge, and will warrant reversal only if the questions mislead or confuse the jury, or inaccurately frame the issues to be resolved." *Cash v. [*714] Cty. of Erie*, 654 F.3d 324, 340 (2d Cir. 2011) (citation omitted).

III. DISCUSSION

A. Qualified Immunity

Qualified immunity [**8] serves as a defense when an officer's conduct does not violate clearly established law or it was objectively reasonable for the officer to believe that his conduct did not violate such law. *Salim v. Proulx*, 93 F.3d 86, 89 (2d Cir. 1996). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Messerschmidt v. Millender*, 565 U.S. 535, 546, 132 S. Ct. 1235, 182 L. Ed. 2d 47 (2012) (alteration in original) (internal quotation marks omitted). "The objective reasonableness test is met—and the defendant is entitled to immunity—if officers of reasonable competence could disagree on the legality of the defendant's actions." *Thomas v. Roach*, 165 F.3d 137, 143 (2d Cir. 1999) (internal quotation marks omitted). The determination of reasonableness must account for "the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). Because Jaquez cannot testify to contradict the officers' testimony, "the court must also consider circumstantial evidence that, if believed, would tend to discredit the police [**9] officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably." *O'Bert ex rel. Estate of O'Bert v. Vargo*, 331 F.3d 29, 37 (2d Cir. 2003) (internal quotation marks omitted).

Taking the facts in the light most favorable to Appellants, there is no triable issue of fact with respect to the objective reasonableness of the officers' use of non-lethal force. *See Doninger v. Niehoff*, 642 F.3d 334, 349 (2d Cir. 2011). Even assuming Jaquez did not have the knife in his hand when he walked down the hallway,[2] the officers testified that they could not see Jaquez's hand in that moment and they could not determine that he was unarmed when they deployed the Taser. Thus, in the moments that Jaquez was walking down the hallway "officers of reasonable competence could disagree" as to whether Jaquez was a threat because the officers knew Jaquez had easy access to a fillet knife, was acting erratically, and was refusing to obey the officers' commands. *Thomas*, 165 F.3d at 143; *see Graham*, 490 U.S. at 396-97.

After the first deployment of the Taser, Jaquez moved backwards around the corner into the bathroom, out of the officers' view. The officers proceeded down the hallway towards the bathroom to arrest Jaquez. Appellants argue that there is a genuine material dispute about whether Jaquez was attacking the officers [**10] when they entered the bathroom and used non-lethal and lethal force. We disagree. Appellants did not put forth sufficient competent evidence to create a genuine dispute about whether Jaquez was attacking the officers with a knife in the bathroom. Moreover, because of Jaquez's refusal to [*715] follow commands, his close proximity to a lethal weapon, and his behavior up to that point, the arresting officers

[2] In support of this view, Appellants point to deposition testimony by Detective Cannizzaro, who was operating a camera in Jaquez's apartment and relaying what he observed to the other officers. According to Cannizzaro, Jaquez appeared to have complied with the officers' orders to put the knife down before he moved down the hallway toward the officers.

reasonably could have believed that Jaquez posed a threat. *See Graham*, 490 U.S. at 396-97. Officers of reasonable competence, therefore, could disagree whether the officers' later use of their Tasers and, after a physical altercation between an officer and Jaquez, the officers' use of the Sage Gun were reasonable.

Appellants also contend that the district court improperly granted summary judgment on the officers' initial use of lethal force. Appellants' assertions that (1) the downward trajectory of bullets demonstrated that Jaquez was lying on the ground, (2) the trajectory of the bullets reflects that Jaquez's right arm was pulled back and not advancing at the officers, and (3) Jaquez was shorter than Officer McNamee and could not have reached his neck with the knife, do not create material disputes of fact as [**11] to whether the officers' initial decision to use deadly force was reasonable. In other words, the limited circumstantial evidence indicating the possible positions of the officers and Jaquez at the time that they initially fired live ammunition is insufficient to defeat summary judgment on qualified immunity. There is no dispute that immediately prior to the officers' use of lethal force Jaquez threatened the officers with a knife—thus engaging in the use of lethal force himself. Considering the facts and circumstances of this case "from the perspective of a reasonable officer on the scene" and "allow[ing] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation," a reasonable officer could believe that Jaquez's attack on Officer McNamee reasonably posed a continued "threat to the safety of the officers." *Graham*, 490 U.S. at 396-97. At bottom, therefore, reasonable officers could disagree as to whether lethal force was an appropriate response. *See Thomas*, 165 F.3d at 143. Absent any evidence contradicting the facts above, Appellees were entitled to summary judgment on their qualified [**12] immunity defense for their use of non-lethal and initial use of lethal force.

B. The District Court Did Not Err in Denying Appellants' Request for a Directed Verdict

"[A] district court must deny a motion for judgment as a matter of law unless, viewed in the light most favorable to the nonmoving party, the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached." *Cobb v. Pozzi*, 363 F.3d 89, 101 (2d Cir. 2004) (second alteration in original) (internal quotation marks omitted). A movant's burden under Rule 50(b) to obtain post-verdict relief "is particularly heavy," and "the district court may set aside the verdict only where there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or . . . [there is] such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him." *Cross v. N.Y. City Transit Auth.*, 417 F.3d 241, 248 (2d Cir. 2005) (alteration in original) (internal quotation marks omitted).

Viewing the record in the light most favorable to the Appellees, at the time Officer [**13] Flores fired the final shot, the jury was able to conclude that Officer Flores [*716] reasonably perceived Jaquez as a continued threat. Officers McNamee and Morrissey testified that Jaquez was pushing himself up off the floor prior to the moment Officer Flores fired the final shot. The jury's finding was not the "result of sheer surmise and conjecture," but based on the officers' testimony, the crime scene report, and other evidence in the record that the jury determined to be credible. *Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 133 (2d Cir. 2008). The district court therefore properly denied Appellants' motions for a directed verdict.

C. The District Court Did Not Abuse Its Discretion in Its Evidentiary Rulings

The district court did not exceed the bounds of its discretion by excluding Dr. Sullivan's expert testimony in which he would have opined on Jaquez's psychological state and police tactics when arresting an emotionally disturbed person. Dr. Sullivan was not shown to have expertise in psychiatric diagnosis, or on the standard police tactics in dealing with situations like that confronting the officers on the day in question. Although Dr. Sullivan's ability to opine on the immediate effects of the gunshot wounds Jaquez had already suffered on [**14] his ability to continue attacking the officers at the time of Flores's final shot is a closer question, we conclude that the district court's exclusion of that testimony was also within its discretion. Dr. Sullivan had only treated four or five gunshot wounds in his career, and it was permissible for the district court to conclude that his opinion on that subject was insufficiently reliable. (We note, moreover, that the district court invited Appellants to submit a replacement expert report before the trial on the final shot. Appellants declined to do so.).

With respect to Appellants' challenges to the district court's exclusion of a life-sized model of Jaquez, portions of the crime scene report, two photographs of Jaquez and his family, and the officers' weapons not used to fire the final shot, we conclude the district court acted within its discretion. The court weighed the probative value of this evidence against the potential for it to confuse the jury and prejudice the defense. Its conclusion that some of this evidence was cumulative of other evidence already admitted in the record was reasonable. The district court did not abuse its discretion in ruling as it did here.

Appellants [**15] also contend that the district court abused its discretion when it allowed Dr. Landi, who authored the autopsy report on Jaquez, to testify on the effect of the gunshot wounds. Specifically, Dr. Landi at several points testified that the injuries resulting from the live ammunition would not have affected Jaquez's ability to push himself up off the floor. Appellants' trial counsel did not object to that line of questioning until later, when the district court overruled an objection to a question concerning whether the injuries from the gunshot wounds would "have any impact on Mr. Jaquez's ability to hold a knife inside his hand and grasp it." Suppl. App. 1936-37. Appellants' general objection to the question about Jaquez's ability to hold the knife was insufficient to preserve an objection to the earlier questions concerning Jaquez's ability to push himself up off the floor. Thus, we review for plain error, which we have long held "should only be invoked with extreme caution in the civil context." *Rasanen v. Doe*, 723 F.3d 325, 333 (2d Cir. 2013). Although Dr. Landi's testimony was arguably improper, it did not so clearly "contravene an established rule of law" and "go to the very essence of the case" that we can find its admission [**16] plainly erroneous. *Id.*

[*717] **D. The District Court Did Not Commit Error By Instructing the Jury That It Had Granted Qualified Immunity to the Other Officers or Abuse Its Discretion By Providing the Jury with Special Interrogatories**

The district court's jury instructions were not erroneous as they properly informed the jury of the narrow issue before it—whether Flores's firing of the final shot was reasonable. *See Graham*, 490 U.S. at 396-97. The district court explained at the beginning of trial that the only issue before the jury was the reasonableness of Flores's final shot. To limit the questions before the jury, and because there was testimony introduced at trial as to these officers' conduct and their use of force, the district court instructed that it had already determined that the officers acted reasonably in connection with the uses of force other than the final shot by Officer Flores. The district court also instructed the jury that none of its rulings or actions represented a determination concerning the credibility of witnesses or revealed its opinion about the appropriate verdict in this case. Nothing about these instructions could have misled the jury concerning the correct legal standard to be applied [**17] or

otherwise misinformed the jury on the law. *See Gordon*, 232 F.3d at 116.

The district court's special interrogatories were not erroneous. *See Cash*, 654 F.3d at 340. Despite Appellants' argument that they were "sandbagged," Appellants' Br. 59, the district court informed the parties of its intent to provide the jury with special interrogatories at a pre-trial conference, and again on the first day of trial. Much of the testimony at trial discussed the events leading up to the final shot. It was reasonable for the district court to ask the jury specific factual questions the answers to which would assist the district court in determining whether Flores was entitled to qualified immunity with respect to the final shot. Whether Jaquez was pushing himself off the floor and holding a knife at the time of the final shot were plainly relevant to the question of whether Flores acted reasonably in shooting him again. Submitting these interrogatories to the jury did not mislead the jury or inadequately inform it of the law. The district court did not exceed the bounds of its discretion in issuing these special interrogatories.

We have considered Appellants' remaining arguments and conclude that they are without merit. Accordingly, the [**18] judgment of the district court is **AFFIRMED**.

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Verdict Sheets

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANCISCO VARGAS, Plaintiff, -v- DETECTIVE JOSEPH M. MARQUEZ, Defendant.	:	14-cv-2511 (KBF) VERDICT SHEET

KATHERINE B. FORREST, District Judge.

1. Did defendant Detective Joseph Marquez have a reasonable belief, even if mistaken, that plaintiff Francisco Vargas committed, was committing, or was about to commit an offense involving a controlled substance?

Yes _____ No _____

If you answered "yes," you are done. Do not answer any further questions. Sign this form on the last page and give it to the marshal.

Only proceed to Question 2 if you answered "no."

2. Do you find that the defendant falsely arrested the plaintiff on January 19, 2013?

Yes _____ No _____

If you answered "no," you are done. Do not answer any further questions. Sign this form on the last page and give it to the marshal.

Only proceed to Questions 3 and 4 if you answered "yes."

3. If you answered "yes" to Question 2, what amount of damages has the plaintiff proven he suffered as a result of the false arrest? (You must award at least $1 as nominal damages if you answered "yes" to Question 2.)

$ _____

4. If you find that punitive damages are appropriate as to false arrest, enter the amount that the plaintiff has proven he is entitled to here. (If you find that the plaintiff was falsely arrested, but do not find punitive damages appropriate, you may leave it blank or enter $0.)

$ _____

Please sign and date the form and tell the marshal that the jury has reached a verdict.

Dated: New York, New York
March ____, 2016

_____ _____
FOREPERSON

_____ _____

_____ _____

_____ _____

VERDICT SHEET #1

1. Do you find by a preponderance of the evidence that Mauricio Jaquez was pushing himself up from the floor when Sgt. Flores fired the final shot?

Yes _____ No _____

2. Do you find by a preponderance of the evidence that Mauricio Jaquez had a knife in his hand when Sgt. Flores fired the final shot?

Yes _____ No _____

Please sign and date the form and tell the marshal that the jury has reached a verdict.

Dated: New York, New York
April ____, 2016

_____ _____

FOREPERSON

_____ _____

_____ _____

_____

VERDICT SHEET #2

1. Do you find that plaintiff has proven by a preponderance of the evidence that defendant Sgt. Flores subjected Mauricio Jaquez to excessive force on April 12, 2009 when he fired the final shot?

Yes _____ No _____

If you answered "no," you are done. Do not answer any further questions. Sign this form on the last page and give it to the marshal.

Only proceed to Questions 2 and 3 if you answered "yes."

2. If you answered "yes" to Question 1, what amount of compensatory damages have the plaintiffs proven they suffered as a result of the excessive force? (You must award at least $1 as nominal damages if you answered "yes" to Question 3.)

$ _____

3. If you find that punitive damages are appropriate, enter the amount that the plaintiffs have proven they are entitled to here. (If you find that Mauricio Jaquez was subject to excessive force, but do not find punitive damages appropriate, you may leave it blank or enter $0.)

$ _____

Please sign and date the form and tell the marshal that the jury has reached a verdict.

Dated: New York, New York
April ____, 2016

_____ _____

FOREPERSON

_____ _____

_____ _____

_____

COURT EXHIBIT

1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOSTHEN NOBOA,

Plaintiff,

-against-

POLICE OFFICERS ALLAN WARD and JAMAR GODDARD,

Defendants.

SPECIAL INTERROGATORIES

15 Civ. 5159 (AMD) (RER)

Defendant Allan Ward

1) Did the defendant Allan Ward reasonably believe, even if mistaken, that the plaintiff had committed the crime of criminal possession of marijuana in the fifth degree?

YES ✓ NO _____

2) Did the defendant Allan Ward reasonably believe, even if mistaken, that the plaintiff had committed the crime of criminal trespass?

YES ✓ NO _____

Defendant Jamar Goddard

1) Did the defendant Jamar Goddard reasonably believe, even if mistaken, that the plaintiff had committed the crime of criminal possession of marijuana in the fifth degree?

YES ✓ NO _____

2) Did the defendant Jamar Goddard reasonably believe, even if mistaken, that the plaintiff had committed the crime of criminal trespass?

YES ✓ NO _____

Dated: Brooklyn, New York
January 10, 2017

_____
FOREPERSON

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KEVIN JOHNSON,		
Plaintiff,	:	15 Civ. 4789 (PAE)
-v-	:	VERDICT FORM
JEROME BURNS and MATTHEW WRIGHT,	:	
Defendants.	:	

PLEASE CHECK (√) YOUR ANSWERS AND FILL IN THE BLANKS

All Answers Must Be Unanimous

False Arrest

1. Has plaintiff proved, by a preponderance of the evidence, that he was falsely arrested by any of the defendants?

(a)	Jerome Burns	YES_____	NO__✓__
(b)	Matthew Wright	YES__✓__	NO_____

[If you answered "No" to all parts of Question 1, then skip to Question 4. If you answered "Yes" to any part of Question 1, then answer Question 2 as to any defendant for whom you have given a "Yes" answer.]

2. Has plaintiff proved, by a preponderance of the evidence, that he suffered compensatory damages as a result of being falsely arrested by any of the defendants?

(a)	Jerome Burns	YES_____	NO__✓__
(b)	Matthew Wright	YES_____	NO__✓__

[Question 2 continues on the next page.]

If so, what amount of compensatory damages do you award?

Compensatory Damages: $_____

[If you answered "No" to Question 2 as to any defendant, then proceed to Question 3. If you answered "Yes" to Question 2 as to all defendants, then skip to Question 4.]

3. If you have found that plaintiff proved his claims against a defendant (Question 1), but have found that plaintiff has not proved compensatory damages, you must award nominal damages. What amount of nominal damages (not to exceed $1) do you award?

Nominal Damages: $0.50

[Proceed to Question 4 regardless of your answer to Question 3.]

Malicious Prosecution

4. Has plaintiff proved, by a preponderance of the evidence, that he was maliciously prosecuted by any of the defendants?

(a) Jerome Burns YES_____ NO ✓

(b) Matthew Wright YES_____ NO ✓

[If you answered "No" to all parts of Question 1 and all parts of Question 4—i.e., if you have not found for plaintiff on either his false arrest claim or his malicious prosecution claim—then skip the rest of the questions, sign your names on the last page, fill in the date, and inform the officer that you have reached a verdict. If you answered "Yes" to any part of Question 1 and "No" to all parts of Question 4, then skip to Question 7. If you answered "Yes" to any part of Question 4, then answer Question 5 as to any defendant for whom you have given a "Yes" answer.]

5. Has plaintiff proved, by a preponderance of the evidence, that he suffered compensatory damages as a result of being maliciously prosecuted by any of the defendants?

(a) Jerome Burns YES_____ NO X

(b) Matthew Wright YES_____ NO X

If so, what amount of compensatory damages do you award?

Compensatory Damages: $_____

[*If you answered "No" to Question 5 as to any defendant, then proceed to Question 6. If you answered "Yes" to Question 5 as to all defendants, then skip to Question 7.*]

6. If you have found that plaintiff proved his claims against a defendant (Question 4), but have found that plaintiff has not proved compensatory damages, you must award nominal damages. What amount of nominal damages (not to exceed $1) do you award?

Nominal Damages: $_____

[*Proceed to Question 7 if you answered "Yes" to any part of Question 1 and/or "Yes" to any part of Question 5.*]

Punitive Damages

7. If you have found that plaintiff proved either or both of his claims against a defendant—i.e. if you have answered "Yes" to either Question 1 or Question 4 or both, as to that defendant—has plaintiff proved, by a preponderance of the evidence, that he is entitled to punitive damages from that defendant?

(a) Jerome Burns YES_____ NO ✓

(b) Matthew Wright YES_____ NO ✓

If so, what amount of punitive damages do you award?

(a) Jerome Burns $ 0

(b) Matthew Wright $ 0

[*Proceed to Question 8 if you answered "Yes" to any part of Question 1 and/or "Yes" to any part of Question 5.*]

Additional Questions

8. If you have found that Mr. Johnson has proved either or both of his claims against a defendant—i.e., if you answered "Yes" to either Question 1 or Question 4 or both, as to that defendant—please answer the following additional questions as to that defendant:

Questions as to Matthew Wright:

(a) Did Matthew Wright reasonably believe, even if mistaken, that he observed Gilda Giscombe hand Kevin Johnson an amount of money on August 30, 2013?

YES_____ NO_____ Deadlocked

[*Question 8 continues on the next page.*]

(b) Did Matthew Wright reasonably believe, even if mistaken, that he observed Kevin Johnson hand an object or objects to Gilda Giscombe on August 30, 2013?

YES ✓ NO_____

(c) Did Matthew Wright reasonably believe, even if mistaken, that he witnessed Kevin Johnson sell heroin on August 30, 2013?

YES_____ NO_____ Did not see

(d) Did Matthew Wright inform Jerome Burns that he (Matthew Wright) observed Kevin Johnson sell heroin on August 30, 2013?

YES ✓ NO_____

Questions as to Jerome Burns:

(e) Did Jerome Burns observe Kevin Johnson drop heroin on the ground on August 30, 2013?

YES ✓ NO_____

(f) Did Jerome Burns recover heroin from or near Kevin Johnson on August 30, 2013?

YES ✓ NO_____

(g) Did Jerome Burns recover marijuana from Kevin Johnson on August 30, 2013?

YES ✓ NO_____

(h) Did Jerome Burns reasonably believe, even if mistaken, that any of the drugs that were recovered on August 30, 2013 belonged to Kevin Johnson?

YES ✓ NO_____

[*Please sign your names in the space provided on the next page, fill in the date, and inform the officer that you have reached a verdict.*]

Scholarly Perspectives

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ARTICLE: QUALIFIED IMMUNITY'S SELECTION EFFECTS

2020

Reporter
114 Nw. U.L. Rev. 1101 *

Length: 78190 words

Author: Joanna C. Schwartz

Professor of Law, UCLA School of Law. This Article benefited greatly from comments on earlier drafts by participants in a faculty workshop at the University of Virginia School of Law, and by Karen Blum, Alan Chen, Richard Fallon, Barry Friedman, Michele Goodwin, Rachel Harmon, William Hubbard, Aziz Huq, Benjamin Nyblade, Alexander Reinert, Daniel Schwartz, Stephen Yeazell, and the anonymous reviewer solicited by the Northwestern University Law Review. Many thanks to the editors at the Northwestern University Law Review, including Abigail Bachrach, Andrew Borrasso, Kevin Brown, Kara Grandin, Kerri Howard, Elena Joffroy, Andrew Kunsak, Bill Lawrence, Annie Prossnitz, and Kristen Stoicescu for their editorial assistance. Thanks also to Blake Berich, Richard Frye, Ayan Jacobs, Hannah Pollack, and Luke Ward for excellent research assistance.

Highlight

ABSTRACT--The Supreme Court has described the "driving force" behind qualified immunity to be its power to dismiss "insubstantial" cases before discovery and trial. Yet in a prior study of 1,183 Section 1983 cases filed against law enforcement in five federal court districts around the country, I found that just seven (0.6%) were dismissed at the motion to dismiss stage and just thirty-one (2.6%) were dismissed at summary judgment on qualified immunity grounds. These findings undermine assumptions about the role qualified immunity plays in filed cases, but leave open the possibility that qualified immunity serves its intended role by screening out insubstantial cases before they are ever filed. Indeed, some have raised this possibility as reason to maintain the status quo.

This Article tests this alternative "screening" justification for qualified immunity. Drawing on my prior study of 1,183 Section 1983 cases, as well as qualitative data from ninety-four surveys and thirty-five interviews of attorneys who entered appearances on behalf of plaintiffs in those cases, I find that qualified immunity almost certainly increases the cost, risk, and complexity of constitutional litigation, but has a more equivocal effect on attorneys' case-selection decisions. Attorneys do not reliably decline cases vulnerable to attack or dismissal on qualified immunity grounds. And when lawyers do decline cases because of qualified immunity, they do not appear to be screening out "insubstantial" cases under any plausible definition of the term. These empirical findings enrich our understanding of the role qualified immunity plays in civil rights cases, contribute to mounting evidence that qualified immunity doctrine fails to achieve its intended policy goals, and support growing calls to better align the doctrine with the realities of constitutional litigation.

Text

[*1102] INTRODUCTION

Available evidence suggests that only 1% of people who believe they have been wronged by the police ultimately sue. [1]This Article asks what role **[*1103]** qualified immunity plays in decisions to forgo litigation by the remaining 99%. [2]

The answer to this question is critically important for an informed understanding of the extent to which qualified immunity doctrine serves its intended policy goals. The Supreme Court has described the "'driving force' behind [the] creation of the qualified immunity doctrine" to be resolving "'insubstantial claims' against government officials . . . prior to discovery" [3]and at summary judgment. [4]But in a recent study of constitutional litigation against law enforcement officers and agencies in five federal districts across the country, I found that just seven (0.6%) of the 1,183 cases in my dataset were dismissed at the motion to dismiss stage and just thirty-one (2.6%) were dismissed at summary judgment on qualified immunity grounds. [5]These findings undermine assumptions that qualified immunity causes most Section 1983 cases to be dismissed before discovery and trial, [6]but leave **[*1104]** open the possibility that qualified immunity nonetheless serves its intended function by screening out insubstantial cases before they are ever filed.

Understanding the impact of qualified immunity on case selection is also key to better appreciating the role qualified immunity doctrine plays in civil

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[1] MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC: FINDINGS FROM THE 2002 NATIONAL SURVEY 16-20 (2005) (finding that the police had used force against 664,458 people, 87.3% of whom believed that the police acted improperly, and just 7,416 (1.1%) of whom filed a lawsuit regarding the alleged misconduct). Note that this survey concerns only police uses of force. Each year, millions of people believe they are wrongfully stopped by the police while driving or walking. *See* ELIZABETH DAVIS ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015, at 4, 11, 14 (2018). We do not know how often people sue who believe they have been mistreated by the police in ways that do not involve the use of force.

[2] Qualified immunity shields law enforcement officers and other executive officials from damages liability--even if they have violated the U.S. Constitution--so long as they have not violated "clearly established statutory or constitutional rights." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). A law enforcement officer or executive official sued under 42 U.S.C. § 1983 for violating a plaintiff's constitutional rights can raise qualified immunity--usually in a motion to dismiss or at summary judgment--and the Supreme Court has instructed lower courts that defendants should prevail unless the plaintiff can point to "controlling authority in their jurisdiction" or a "consensus of cases of persuasive authority" holding factually similar conduct to be unconstitutional. Wilson v. Layne, 526 U.S. 603, 617 (1999). For an overview of qualified immunity, the ways in which it has shifted over the past fifty years, and criticisms of the doctrine, see generally Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) [hereinafter Schwartz, *The Case Against*]. For an overview of § 1983 litigation, see generally Martin A. Schwartz, *Section 1983 Litigation, Third Edition*, FED. JUD. CTR. (2014), https://www.fjc.gov/sites/default/files/2014/Section-1983-Litigation-3D-FJC-Schwartz-2014.pdf [https://perma.cc/SC5K-VYG9].

[3] Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987)).

[4] *Harlow*, 457 U.S. at 818.

[5] *See generally* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017) (reporting the results of a study of § 1983 filings against law enforcement officers and agencies in five federal districts over a two-year period and finding, contrary to conventional wisdom, that qualified immunity was rarely the formal reason cases were dismissed).

[6] *See, e.g.*, John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) ("The Supreme Court's effort to have more immunity determinations resolved on summary judgment or a motion to dismiss--in other words, to create immunity from *trial* as well as from *liability*--has been largely successful."); Stephen R. Reinhardt, Essay, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015) (reporting that the Supreme Court's qualified immunity jurisprudence has "created such powerful shields for law enforcement that people whose rights are violated, even in egregious ways, often lack any means of enforcing those rights"); Martin A. Schwartz, *supra* note 2, at 143 (reporting that "courts decide a high percentage of § 1983 personal-capacity claims for damages in favor of the defendant on the basis of qualified immunity").

rights litigation. Based on my previous finding that few cases are dismissed on qualified immunity grounds, one might assume that the doctrine plays an insignificant role in the litigation of constitutional claims. Yet drawing this conclusion would vastly overstate the implications of that research. Although my study showed that qualified immunity rarely is the formal reason that Section 1983 cases against law enforcement end before discovery and trial, it did not answer other important questions concerning the role qualified immunity plays in the decision to file a lawsuit, and the ways in which the doctrine influences pleading, litigation, and settlement decisions. [7]A complete understanding of the role qualified immunity plays in constitutional litigation requires taking account of these additional litigation effects.

Although understanding the impact of qualified immunity on case selection would enrich descriptive accounts of the doctrine and help answer whether qualified immunity serves its policy aims, measuring qualified immunity's selection effects is no easy feat. It is conventional wisdom that most grievances never become filed lawsuits. [8]It is also conventional wisdom that it is exceedingly difficult to measure which grievances are never pursued in court, or to measure the impact of particular doctrines or other considerations on the case-selection process. [9]Some studies have used filed **[*1105]** cases and other objective data in combination with presumed models of attorney behavior to estimate selection effects. [10]Others have drawn conclusions from interviews with plaintiffs' attorneys about their filing decisions. [11]

In this Article, I combine these two approaches. [12]First, I examined an original docket dataset of 1,183 police misconduct cases filed in five federal districts to better understand the role played by qualified immunity in the litigation of these cases. I then surveyed ninety-four attorneys who entered appearances on behalf of plaintiffs in these 1,183 cases and conducted semi-structured interviews with thirty-five of these attorneys as a way of getting a "ground-level, gestalt sense" [13]of the role qualified immunity plays in constitutional litigation and in case-selection decisions. All empirical studies have methodological limitations,

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[7] *See* Schwartz, *supra* note 5, at 48-51 (reporting findings regarding filed cases but observing that open questions remain regarding the role qualified immunity plays in case filing and litigation decisions).

[8] *See generally* William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980) (describing many factors that influence whether incidents become grievances, claims, or legal disputes); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 52 (1980) (measuring the rate of grievances, claims, disputes, and court filings for tort, discrimination, and divorce claims). For filing rates in police misconduct cases, see *supra* note 1, which reports available evidence of filing rates in cases concerning police uses of force.

[9] *See, e.g.*, Ellen Berrey & Laura Beth Nielsen, *Rights of Inclusion: Integrating Identity at the Bottom of the Dispute Pyramid*, 32 LAW & SOC. INQUIRY 233, 242 (2007) ("Despite the legal, social, and political importance of what happens at the bottom of the dispute pyramid, it is difficult to empirically study what happens there."); David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1224 (2013) (describing the ways in which studies of the impact of *Twombly* and *Iqbal*, two Supreme Court cases defining pleading standards, have struggled to account for selection effects); Felstiner et al., *supra* note 8, at 634-36 (describing the "conceptual and methodological difficulties" in measuring the transformation of disputes); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 12 (1983) (describing disputes as "difficult to chart. They are not some elemental particles of social life that can be counted and measured. Disputes are not discrete events like births and deaths; they are more like such constructs as illnesses and friendships, composed in part of the perceptions and understandings of those who participate in and observe them").

and this study is no exception. [14]But it offers the richest and most comprehensive evidence available with which to explore these important questions.

Based on my docket dataset, surveys, and interviews, I find that qualified immunity almost certainly increases the costs and risks of Section 1983 litigation. Although qualified immunity is rarely the reason that cases end, there remains a risk that cases will be dismissed on qualified immunity grounds--most likely after the parties have completed costly discovery. Litigating the defense is also costly--qualified immunity was raised in approximately one-third of the cases in my dataset and was sometimes raised by defendants multiple times. Each time defendants raise qualified immunity, plaintiffs' counsel must take the time to research and brief their motions in opposition. [15]Qualified immunity motions and interlocutory appeals of qualified immunity denials also result in delays--of months or years--while the motions are pending. [16]These delays can increase the cost of preparing for trial, and can weaken a plaintiff's case if witnesses' **[*1106]** recollections of the underlying facts get hazier over time. [17]Apart from the challenges of defeating qualified immunity motions in any given case, qualified immunity makes civil rights practice more challenging in general. Attorneys must learn about and keep abreast of changes in what is considered to be an extremely complex doctrine, and the specter of interlocutory appeal means that attorneys must be skilled in both trial and appellate advocacy. [18]

Prevailing models of attorney case selection suggest that these costs and risks would discourage plaintiffs' attorneys from filing any cases vulnerable to attack on qualified immunity grounds. [19]If so, and if such cases are in fact "insubstantial," the "driving force" behind qualified immunity would be achieved by the doctrine before plaintiffs ever open the courthouse door. Yet my dockets, surveys, and interviews offer two compelling reasons to conclude that qualified immunity poorly serves this screening function.

First, qualified immunity has a more equivocal effect on case-selection decisions than attorney case-selection models would suggest. More than two-thirds of the attorneys I interviewed reported that qualified immunity in and of itself rarely or never causes them to decline civil rights cases. [20]These attorneys agree that qualified immunity poses many challenges, but believe that those challenges replicate other case-selection considerations, are too unpredictable to influence filing decisions, can be mitigated by including claims that cannot be dismissed on qualified immunity grounds, or pose risks worth taking in order to advance important interests. For reasons I will explain, I believe that my data likely overrepresents attorneys who hold this view. [21]But their perspectives indicate that the costs and risks of qualified immunity do not reliably cause attorneys to decline cases.

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10 *See* studies cited *infra* note 47.

11 *See* studies cited *infra* note 48.

12 For a detailed description of my methodology, see *infra* Part II.

13 *See* Engstrom, *supra* note 9, at 1238.

14 For discussion of the methodological limitations of this study, see *infra* notes 58-67 and accompanying text.

15 *See infra* note 71 and accompanying text.

16 *See infra* notes 86-89 and accompanying text.

17 *See infra* notes 92-93 and accompanying text.

18 *See infra* notes 81-85, 94 and accompanying text.

19 *See infra* Part I.

20 Of the thirty-five attorneys I interviewed, eleven reported that they consider qualified immunity at case selection, but that it rarely or never influences their selection decisions, and thirteen reported that they do not consider qualified immunity at case selection. For further description of these perspectives, see *infra* Section IV.B; Appendix Table 7.

21 *See infra* notes 213-215 and accompanying text.

Second, when attorneys do decline cases because of qualified immunity, they do not appear to be screening out "insubstantial" cases under any plausible definition of the term. [22]Attorneys I interviewed reported declining cases because the cost of litigating qualified immunity outweighed the likely financial rewards, and because the factual allegations had not **[*1107]** previously been ruled unconstitutional. [23]One attorney reported that he stopped bringing any Section 1983 cases because immunities pose an insurmountable barrier, and there is circumstantial evidence to suggest the challenges of civil rights litigation--including qualified immunity--may cause many more attorneys to reduce the number of civil rights cases they accept, or get out of the business of civil rights litigation altogether. [24]Attorneys' answers suggest that qualified immunity is decreasing the total number of cases filed, but that it is not screening out cases for lack of merit.

These findings could not come at a more important time. In recent years, the United States Supreme Court has issued a spate of decisions reversing lower court denials of qualified immunity--often in cases involving fatal force by law enforcement--and proclaiming the importance of qualified immunity to "society as a whole." [25]At the same time, circuit and district judges around the country, [26]advocacy groups across the political **[*1108]** spectrum, [27]and several sitting Supreme Court Justices [28]have called on the Court to modify qualified immunity or do away with the defense. These critics argue that qualified immunity bears no resemblance to common law defenses in effect when Section 1983 became law, undermines government accountability, and is both unnecessary and ill-suited to shield government officials who have acted reasonably from financial liability and other burdens of litigation. [29]

One key empirical question left unanswered thus far in this debate is posed by this Article: Whether qualified immunity fulfills its policy goals by screening out insubstantial cases before they are filed. Indeed, some have raised this possibility as a

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[22] For further discussion of these findings, see *infra* Section IV.C.

[23] For further discussion of the Supreme Court's qualified immunity doctrine, which requires plaintiffs' counsel to identify a prior case holding similar conduct to be unconstitutional, see Schwartz, *The Case Against*, *supra* note 2, at 1814-16.

[24] For further discussion of these findings, see *infra* Section IV.D.

[25] City and County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015) ("Because of the importance of qualified immunity 'to society as a whole,' the Court often corrects lower courts when they wrongly subject individual officers to liability.") (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982)). For other instances in which the Court described qualified immunity as important to "society as a whole," see, for example, Kisela v. Hughes, 138 S. Ct. 1148 (2018) (per curiam); White v. Pauly, 137 S. Ct. 548, 551 (2017); Mullenix v. Luna, 136 S. Ct. 305 (2015) (per curiam).

[26] For recent circuit and district court decisions critical of qualified immunity, see, for example, Horvath v. City of Leander, No. 18-51011, 2020 WL 104345, at *5-13 (5th Cir. Jan. 9, 2020) (Ho., J., concurring in judgment in part and dissenting in part) (explaining that he would "welcome a principled reevaluation of our precedents" related to qualified immunity); Zadeh v. Robinson, 902 F.3d 483, 499-500 (5th Cir. 2018) (Willett, J., concurring dubitante) (observing that he and "a growing, cross-ideological chorus of jurists and scholars" are calling for reconsideration of qualified immunity), *opinion withdrawn on reh'g*, 928 F.3d 457 (5th Cir. 2019); Ventura v. Rutledge, 398 F. Supp. 3d 682, 698 n.6 (E.D. Cal. 2019) ("[T]his judge joins with those who have endorsed a complete reexamination of the doctrine which, as it is currently applied, mandates illogical, unjust, and puzzling results in many cases."); Manzanares v. Roosevelt Cty. Adult Det. Ctr., 331 F. Supp. 3d 1260, 1293-94 n.10 (D.N.M. 2018) ("The Court disagrees with the Supreme Court's approach. The 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 § 1983 remedy."); Estate of Smart v. City of Wichita, No. 14-2111-JPO, 2018 WL 3744063, at *18 n.174 (D. Kan. Aug. 7, 2018) ("[T]he court is

reason to maintain the status quo. [30]My study has **[*1109]** the best available evidence with which to answer this question and offers compelling reasons to conclude that qualified immunity cannot be defended on these grounds. My study also reveals that qualified immunity undermines government accountability in underappreciated ways: by discouraging lawyers from filing cases involving novel claims, making it more difficult for lawyers to make a living bringing civil rights cases, and causing lawyers to abandon this line of work. [31]As the Supreme Court considers growing calls to modify or do away with qualified immunity, it should heed this additional evidence of the doctrine's failures.

The remainder of this Article proceeds as follows. Part I describes prevailing models of attorneys' case-selection decisions. In Part II, I describe the methodology of my study. Part III draws on the docket dataset, surveys, and interviews to describe the costs and risks of qualified immunity in constitutional litigation. In Part IV, I rely primarily on attorney surveys and interviews to describe the impact of qualified immunity on case-selection decisions. And, in Part V, I consider the implications of these findings for descriptions of qualified immunity's role in constitutional litigation, the extent to which qualified immunity doctrine achieves its intended policy goals, and proposals to reconsider or do away with the defense.

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troubled by the continued march toward fully insulating police officers from trial--and thereby denying any relief to victims of excessive force--in contradiction to the plain language of the Fourth Amendment."); Thompson v. Clark, No. 14-CV-7349, 2018 WL 3128975, at *7 (E.D.N.Y. June 26, 2018) ("The legal precedent and policy justifications of qualified immunity, it has been charged, fail to validate its expansive scope. The law, it is suggested, must return to a state where some effective remedy is available for serious infringement of constitutional rights."); Wheatt v. City of East Cleveland, No. 1:17-CV-377, 2017 WL 6031816, at *1 n.7 (N.D. Ohio Dec. 6, 2017) (criticizing the Supreme Court for allowing interlocutory appeals of qualified immunity denials).

[27] Advocacy organizations also criticize qualified immunity. *See, e.g.*, Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner, at 6, Almighty Supreme Born Allah v. Milling, No. 17-8654, 2018 WL 3388317 (July 11, 2018) [hereinafter, Brief of Cross-Ideological Groups for Official Accountability, *Almighty Supreme Born Allah*] (describing a "cross-ideological consensus that this Court's qualified immunity doctrine under 42 U.S.C. § 1983 misunderstands that statute and its common law backdrop, denies justice to victims of egregious constitutional violations, and fails to provide accountability for official wrongdoing"). This collection of organizations has filed briefs raising similar arguments in other cases. *See* Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner, Baxter v. Bracey, 751 F. App'x 869 (6th Cir. 2018), *appeal docketed*, No. 18-1287 (Apr. 10, 2019) [hereinafter, Brief of Cross-Ideological Groups for Official Accountability, *Baxter*]; Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner, Doe v. Woodard, 912 F.3d 1278 (10th Cir. 2019), *cert. denied*, 139 S. Ct. 2616 (2019) (mem.); *see also, e.g.*, Alan Feuer, *Advocates from Left and Right Ask Supreme Court to Revisit Immunity Defense*, N.Y. TIMES (July 11, 2018), https://www.nytimes.com/2018/07/11/nyregion/qualified-immunity-supreme-court.html [https://perma.cc/9F7Z-T8EZ] (describing a petition for certiorari in a qualified immunity case joined by advocates across the political spectrum); Nicolas Sonnenburg,*Unlikely Bedfellows in the Fight Against Qualified*

I. A THEORY OF QUALIFIED IMMUNITY'S ROLE IN FILING DECISIONS

The Supreme Court has described qualified immunity as a shield from the burdens of discovery and trial in insubstantial cases. [32]Although the Court's decisions have always suggested that qualified immunity would achieve this goal through the dismissal of filed cases, qualified immunity could also conceivably achieve this goal by screening out insubstantial cases before they are filed. [33]

How might qualified immunity serve this prefiling screening function? Scholars generally expect that a plaintiff will file a case if the likelihood of prevailing and their expected monetary gain is greater than or equal to their anticipated costs. [34]In this model, the expected recovery equals the amount **[*1110]** awarded if the plaintiff prevails (J), discounted by the probability that they will prevail (*p*). The costs (C) are the plaintiff's expected litigation costs. So, a plaintiff will file suit if:

p J >= C

This model needs some tweaking to reflect attorneys' typical fee arrangements in the types of cases in which qualified immunity is raised. [35]Attorneys generally accept civil rights cases on contingency, with a provision entitling them to seek their reasonable attorneys' fees from the defendant if the plaintiff prevails. [36]As William Hubbard has observed, attorneys considering whether to accept a case on contingency should assess the probability of success (*p*), the size of a judgment (J), and the percentage of the judgment they will recover under the terms of their fee agreement (*f*), against the cost of litigation (C).

Immunity, L.A. DAILY J. (Sept. 21, 2018) (describing criticisms of qualified immunity by Justices Thomas and Sotomayor, as well as the Cato Institute, ACLU, and other groups).

[28] *See* Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (expressing concern that the Court's decision "sends an alarming signal to law enforcement officers . . . . that they can shoot first and think later"); Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring) (recommending that, "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence"); Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting) (criticizing the Court's qualified immunity doctrine for "sanctioning a 'shoot first, think later' approach to policing").

[29] *See* sources cited *supra* notes 26-28; *see also* sources cited *infra* note 222 (describing these arguments against qualified immunity).

[30] *See, e.g.*, Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 975 (2019) (expressing concerns about "frivolous and distracting litigation" in a world without qualified immunity); Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1881 (2018) ("[Q]ualified immunity's core effectiveness might well not be in district courts formally utilizing the defense to dispose of Section 1983 lawsuits. Instead, its main influence could be in discouraging plaintiffs to file Section 1983 lawsuits at all . . . .").

[31] *See infra* notes 237-247 and accompanying text (describing these findings).

[32] *See, e.g.*, *supra* notes 3-4 and accompanying text.

[33] *See supra* note 30.

[34] For a foundational account of this model, see Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982), which imagines rational economic calculations regarding filing, settlement, and trial depending on the system for allocating litigation costs. *See also, e.g.*, SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 22 (2010) (describing models of litigant behavior drawn from law and economics literature that assume "both parties are guided in their decisions at each stage [of litigation] by the expected monetary gain or loss should the case be tried" but also

[37]So, presumably, a plaintiff's attorney will agree to file a suit on contingency if:

$$p\,f\,J >= C$$

[*1111] As Hubbard recognized, this calculation is dynamic and complex. Costs will increase over the course of litigation. [38]The probability of prevailing and the size of an expected judgment may also shift, depending on which judge is assigned to the case, the information unearthed during discovery, and the results of motions to dismiss or motions for summary judgment. Moreover, if the plaintiff prevails after trial, or the attorney is otherwise authorized to seek fees pursuant to Section 1988, the attorney may be able to recover their reasonable fees from the defendant instead of taking a percentage of the plaintiff's award. [39]An attorney who accepts a Section 1983 case on contingency must conclude that the expected recovery at some stage of the litigation--taking account of all of these contingencies--will outweigh their expected costs at that stage.

Although the civil rights bar that brings damages actions appears to be dominated by private attorneys, [40]there are also pro bono and nonprofit lawyers bringing civil rights cases who do not rely on a contingency fee. To the extent that pro bono and nonprofit lawyers bring civil rights damages actions, they are not expected to have the same financially driven calculations of risk and reward. [41]But pro bono and nonprofit attorneys are not immune to the financial implications of bringing these cases. Even if pro bono attorneys and nonprofits do not bring cases on contingency, they can still recover fees if the plaintiff prevails, and that money would likely be welcomed by an attorney or organization with limited funds. Moreover, because pro bono attorneys and nonprofits have limited time and resources, they will want to select cases most likely to achieve their intended goals and may be

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recognizing that "the choice of whether or not to sue may be influenced by forms of utility or disutility distinct from and not reducible to money"); Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 742 (1988) (expecting that plaintiffs in constitutional tort cases "will file suit if the expected recovery from the suit outweighs the expected costs").

35 I focused on plaintiffs' attorneys in my interviews and surveys--instead of uncounseled people with grievances against the police--because I assume that qualified immunity plays a limited role in pro se plaintiffs' decisions to file suits. *See infra* notes 51-53 and accompanying text.

36 *See, e.g.*, Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 NW. U. L. REV. COLLOQUY 182, 184 (2007) (explaining that most civil rights litigation is brought "by individual lawyers who are trying to make a living"); Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 756-57 (1993) (asserting that "most suits are taken on a contingency basis"); Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL'Y 1, 3-5 (2008) (describing typical fee arrangements in § 1983 cases); Schwab & Eisenberg, *supra* note 34, at 768 ("[M]ost civil rights litigation is not brought by institutional litigators or by large firms engaging in pro bono activity."). More than 72% of the ninety-four attorneys I surveyed for this study reported that they always or usually (70%-99% of the time) enter into contingency fee arrangements with plaintiffs in § 1983 cases. Another 4% always take cases on contingency, supplemented with a limited retainer. Twelve percent take cases pro bono, with the ability to seek fees pursuant to Section 1988. Another almost 10% rely on some combination of contingency, contingency with retainer, and pro bono arrangements. Just two of the ninety-four lawyers who responded to my survey always require their clients to pay them by the hour. *See* Joanna C. Schwartz, Police Misconduct Attorney Survey Results (on file with journal).

37 *See* William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 707 (2016). For an in-depth exploration of contingency fee attorneys' calculations of risk and reward in case selection, see HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 67-88 (2004).

38 Hubbard, *supra* note 37.

39 *See* 42 U.S.C. § 1988(b) (2012) (allowing reasonable attorneys' fees for prevailing parties in § 1983 cases); *see also* Mark R. Brown, *A Primer on the Law of Attorney's Fees Under § 1988*, 37 URB. LAW. 663 (2005) (describing various ways attorneys can seek fees under § 1988).

40 *See supra* note 36.

41 *See* Hubbard, *supra* note 37, at 713; *see also infra* note 188 (contrasting the financial incentives of nonprofit and private attorneys).

disinclined to take a case that will be particularly expensive or timeconsuming to litigate. [42]In other words, whether or not attorneys rely on fees from civil rights cases to pay their bills, cases likely become less attractive as the cost of litigation increases and the likelihood of success decreases.

If the prevailing model accurately reflects attorneys' case-selection process, qualified immunity could discourage attorneys from accepting cases **[*1112]** by shifting their calculation of risk and reward. Qualified immunity might do so in several different ways. It could increase the risk that a case would be dismissed, thereby decreasing the probability of success (*p*). Qualified immunity could also increase the risk that the plaintiff's case will be dismissed in part, thereby reducing the size of any possible judgment (J). Or qualified immunity could increase the costs of litigation (C). If qualified immunity decreases the probability of success, decreases the likely size of a judgment, and/or increases the costs of litigation, then under prevailing models of attorney case-selection decisions, attorneys will be less willing to accept cases in which qualified immunity is likely to be raised--and especially unwilling to accept cases where the defense is likely to be successful.

The Supreme Court's stated hope is not that qualified immunity will shield government officials from the burdens of discovery and trial in *all* cases, but that it will protect government officials from these burdens in "insubstantial" cases. [43]The Court has not defined what constitutes an insubstantial case, however. In some decisions, the Court has suggested that insubstantial claims are "baseless" and "frivolous," brought against "innocent" government officials. [44]In other decisions, the Court has written that qualified immunity should protect "all but the plainly incompetent or **[*1113]** those who knowingly violate the law" [45]--suggesting that qualified immunity's protections should have a broader reach. Putting aside for the moment whether the Court intends qualified immunity to shield only the innocent, or also the incompetent and reckless, [46]if qualified immunity functions as the Supreme Court intends, it should increase the predicted cost of litigation, and/or reduce the predicted size of judgment in insubstantial cases--such that it discourages attorneys from filing these types of cases--without simultaneously discouraging the filing of "substantial" cases.

II. METHODOLOGY

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[42] *See* Hubbard, *supra* note 37, at 713 ("To the extent that attorneys working on a pro bono basis and legal aid providers are oversubscribed--and they usually are--one should again expect these attorneys to screen cases on plausible merit before filing. Whether an attorney's motivation is maximizing profit or maximizing relief to deserving plaintiffs (or both), the incentive will be to select those cases with higher merit."); *see also* Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. (forthcoming 2020) (describing the incentives of pro bono and nonprofit attorneys when selecting cases).

[43] *See supra* notes 3-4 and accompanying text.

[44] *See, e.g.*, Crawford-El v. Britton, 523 U.S. 574, 590 (1998) (explaining that *Harlow*'s "reformulation of the qualified immunity defense" to eliminate consideration of officers' subjective intent was justified by two considerations: "First, there is a strong public interest in protecting public officials from the costs associated with the defense of damages actions. That interest is best served by a defense that permits insubstantial lawsuits to be quickly terminated. Second, allegations of subjective motivation might have been used to shield *baseless* lawsuits from summary judgment") (emphasis added); Mitchell v. Forsyth, 472 U.S. 511, 553-54 (1985) (Brennan, J., concurring in part and dissenting in part) ("I have no doubt that trial judges employing [*Harlow*'s] standard will have little difficulty in achieving *Harlow*'s goal of early dismissal of *frivolous* or insubstantial lawsuits.") (emphasis added); Harlow v. Fitzgerald, 457 U.S. 800, 813-14 (1982) ("The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative. In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees . . . . At the same time, however, it cannot be disputed seriously that claims frequently run against the *innocent* as well as the guilty--at a cost not only to the defendant officials, but to society as a whole.") (emphasis added); Butz v. Economou, 438 U.S. 478, 507-08 (1978) (noting that qualified immunity is a workable standard for executive officers because "[i]nsubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading . . . . Moreover, the Court recognized in *Scheuer* that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment

Several studies have attempted to measure the effects of various doctrines on case-filing decisions. Some have used filed cases and other objective data in combination with presumed models of attorney behavior. [47]Others have drawn conclusions from interviews with plaintiffs' attorneys about their filing decisions. [48]In this Article, I combine these two approaches.

[*1114] First, I examined my dataset of all Section 1983 actions filed against law enforcement defendants [49]in 2011-2012 in five federal districts--the Southern District of Texas, the Middle District of Florida, the Northern District of Ohio, the Northern District of California, and the Eastern District of Pennsylvania. I chose these five districts because a high volume of Section 1983 cases are brought there, they have a range of different sized law enforcement agencies and agencies of comparable sizes, and I expected judges in these districts would vary in their approach to qualified immunity. [50]I hand-coded each case, taking note of when motions to dismiss and motions for summary judgment on qualified immunity and other grounds were made by defendants, granted by courts, and dispositive. I also tracked the timing and disposition of interlocutory and final appeals of qualified immunity decisions. And I compared these results in cases where plaintiffs represented themselves--referred to here as pro se cases--and cases where plaintiffs were represented by legal counsel.

Next, I surveyed and interviewed plaintiffs' attorneys who entered appearances in the 1,183 cases in my docket dataset to gather insights about the role qualified immunity plays in their case-selection decisions. [51]I focused on plaintiffs' attorneys in my interviews and surveys--instead of uncounseled plaintiffs with grievances against the police--because I assumed that qualified immunity plays a limited role in pro se plaintiffs' decisions to file suits. Many people who believe they have been wronged by **[*1115]** government officials never

based on the defense of immunity. In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by *frivolous* lawsuits") (emphasis added and citation omitted).

45 Malley v. Briggs, 475 U.S. 335, 341 (1986). The Roberts Court has repeatedly cited with approval the notion that qualified immunity should protect "all but the plainly incompetent or those who knowingly violate the law." *See* Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018); District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018); Ziglar v. Abbasi, 137 S. Ct. 1843, 1867 (2017); White v. Pauly, 137 S. Ct. 548, 551 (2017); Mullenix v. Luna, 136 S. Ct. 305, 308 (2015); Taylor v. Barkes, 135 S. Ct. 2042, 2044 (2015); City and County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 (2015); Carroll v. Carman, 135 S. Ct. 348, 350 (2014); Stanton v. Sims, 134 S. Ct. 3, 5 (2013); Messerschmidt v. Millender, 565 U.S. 535, 546 (2012); Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011).

46 For further discussion of what constitutes an "insubstantial" claim, see *infra* notes 230-235 and accompanying text.

47 *See, e.g.*, Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270 (2012) (measuring the effects of *Twombly* and *Iqbal* on filing and settlement decisions); Schwab & Eisenberg, *supra* note 34, at 745-47 (examining the effects of § 1988 fee shifting on the decision to file cases).

48 *See, e.g.*, THOMAS E. WILLGING & EMERY G. LEE III, FED. JUD. CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 1-2, 25-27 (2010) (interviewing thirty-six attorneys about their litigation practice); Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197 (1997) (interviewing thirty-five plaintiffs' attorneys to understand how Supreme Court decisions interpreting the Civil Rights Attorney's Fees Awards Act of 1976 impacted filing and litigation decisions); Daniel Nazer, *Conflict and Solidarity: The Legacy of* Evans v. Jeff D., 17 GEO. J. LEGAL ETHICS 499 (2004) (reporting results of interviews with public interest attorneys about the effects of *Evans* on filing and litigation decisions). Alexander Reinert used this approach to examine the impact of qualified immunity on plaintiffs' attorneys' decisions to file *Bivens* cases. *See* Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477 (2011). " *Bivens* cases" refer to cases asserting a cause of action--similar to a § 1983 claim--against federal government actors. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). For a discussion of the ways in which this study reaches findings similar to and distinct from Reinert's, see *infra* notes 155, 161, 214, 245 and accompanying text.

sue for a whole host of reasons. [52]People who file lawsuits without legal assistance may be aware that Section 1983 cases are difficult to bring, but I assume for the purposes of this discussion that they will be unaware of the precise doctrinal challenges associated with these claims and unfamiliar with the contours of qualified immunity--except to the extent that an attorney who has declined to take their case has described these challenges to them. [53]

A total of 1,022 plaintiffs' attorneys entered appearances in these 1,183 cases--138 attorneys in the Southern District of Texas, 184 in the Middle District of Florida, 174 in the Northern District of Ohio, 266 in the Northern District of California, and 260 in the Eastern District of Pennsylvania. I sent an online survey to each of the 1,022 attorneys whose email address(es) I could find from court records. [54]The anonymous survey has twenty multiple choice and open-ended questions regarding the frequency with which the respondents file police misconduct suits, the percentage of their practice dedicated to these types of cases, the effects of various doctrines on their practice, and what they consider to be the most significant barriers to relief in police misconduct cases. Of the 976 survey requests I sent out, seventyone emails failed to deliver, and ninety-four attorneys filled out surveys. [55]

[*1116] The final question in my online survey asked attorneys to send me their email address if they wished to be contacted for a follow-up interview. Fiftyseven attorneys did so. I emailed each of these attorneys, and twenty-five responded and agreed to be interviewed. I then reached out to twenty-five additional attorneys across the five districts, requesting interviews. I chose these attorneys because they had filed three or more cases in their district during the study period and/or because I knew the attorneys' reputations for

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[49] I focused on lawsuits against law enforcement defendants both because the Supreme Court's qualified immunity decisions have often involved cases brought against law enforcement, and because limiting my study to cases against one type of defendant creates some substantive consistency across cases and allows for more direct comparison of filing and litigation decisions across districts. For further discussion of my rationale for focusing on lawsuits against law enforcement defendants, see *infra* note 61 and accompanying text; see also Schwartz, *supra* note 5, at 22.

[50] The expectation about judicial variation is based in part on a commonly-held view that courts in these circuits vary in their approach to qualified immunity. *See, e.g.*, *Ashcroft*, 563 U.S. at 742 ("We have repeatedly told courts--and the Ninth Circuit in particular--not to define clearly established law at a high level of generality." (citation omitted)); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 39-42 (2015) (describing variation between the Fifth, Sixth, and Ninth Circuits regarding whether courts rule on the merits of constitutional claims in their qualified immunity decisions and the frequency with which they recognize new rights in those decisions); Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447-48 (2000) (describing circuit variation in courts' interpretations of "clearly established law," with the First, Third, Fourth, and Eighth Circuits defining the standard in a manner friendlier to plaintiffs than the Eleventh Circuit). For further discussion of my rationale for choosing these five federal districts, see Schwartz, *supra* note 5, at 19-20.

[51] I received Institutional Review Board approval from UCLA (IRB # 16-000470) for this survey and the subsequent interviews.

[52] Available evidence suggests that just 1% of people who believe they have been wronged by the police actually sue. *See* DUROSE, *supra* note 1. For some theories about why people do not sue law enforcement see, for example, Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 284 (1988), which explains that people might not sue for a number of different reasons, including "ignorance of their rights, poverty, fear of police reprisals, or the burdens of incarceration." For possible reasons that various types of grievances may never become filed lawsuits see, for example, Galanter, *supra* note 9, at 13-18, which describes several studies measuring behaviors and decisions at the bottom of the dispute pyramid.

[53] *See* Theodore Eisenberg & Kevin M. Clermont, Essay, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193, 206 (2014) (studying the effects of *Twombly* and *Iqbal* pleading requirements on case filing decisions and finding that pro se

bringing such cases. Ten of those attorneys agreed to be interviewed. [56]In total, I interviewed thirty-five attorneys--seven attorneys from each of the five districts in my docket dataset.

During these interviews, I asked attorneys about their case-selection decisions, the role qualified immunity doctrine plays in their filing decisions, the litigation of claims against law enforcement more generally, and their views about the challenges and rewards of civil rights litigation. I used a semi-structured format and explored additional topics as they arose. As a result, some interviews covered topics that were not addressed in other interviews, and interviews varied in the depth with which they explored certain topics. These interviews lasted between eighteen and eighty-five minutes. All but one was recorded and transcribed. [57]I promised these attorneys confidentiality, although several made clear that they were happy for me to use their names.

This mixed-methods approach presents a more complete and nuanced portrait of qualified immunity's role in litigation and case-selection decisions than would any single method alone. The docket dataset offers valuable information about the ways in which qualified immunity is raised and decided across the five districts in my study. The surveys and interviews provide insight into how attorneys perceive qualified immunity's costs and risks--key to understanding what role the doctrine plays in attorneys' case-selection decisions. Yet all empirical studies have methodological limitations, and this study is no exception.

First, the study focuses on practices in five federal districts. I chose these five districts in part because I believed the judges in these districts and **[*1117]** in the corresponding circuits would vary in their approach to qualified immunity and other aspects of Section 1983 litigation. [58]But, each year, in ninety-four federal districts and in state courts around the country, thousands of lawyers file thousands of Section 1983 cases against law enforcement defendants. [59]I cannot be certain that the ways in which Section 1983 cases are litigated in the five districts in my study are consistent with litigation practices in these federal

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plaintiffs are "comparatively immune to selection effect, because those plaintiffs more slowly adjust by ceasing to pursue some of the cases that could not surmount the new barrier").

54 Although I sent the online survey to a total of 976 email addresses, I do not know for certain how many attorneys I reached with those emails. Some lawyers reported no email address in court records; some attorneys included multiple email addresses; and, in some cases, multiple attorneys in a firm appeared to share the same email address.

55 Attorneys filled out the survey responses between April 17, 2017 and May 11, 2017. Of the 905 survey requests that presumably reached their intended targets, I had a response rate of at least 10.4%. For some context regarding this response rate, see Scott Keeter et al., *What Low Response Rates Mean for Telephone Surveys*, PEW RES. CTR. (May 15, 2017), https://www.pewresearch.org/wpcontent/uploads/2017/05/RDD-Non-response-Full-Report.pdf [https://perma.cc/A2YN-RYJJ], where Keeler notes that Pew Research telephone surveys have a response rate of 9% and citing research suggesting "response rate is an unreliable indicator of bias."*See also* Geon Lee et al., *Survey Research in Public Administration: Assessing Mainstream Journals with a Total Survey Error Framework*, 72 PUB. ADMIN. REV. 87, 91 (2011) (reporting that articles are published with survey response rates ranging from 10%-90%+ in public administration).

56 These ten attorneys did not take the online survey, but I did add to their interview protocol the questions that were posed in the online survey.

57 This interview was not recorded because of a technological error; I and the interviewee both expected the interview would be recorded and transcribed. Once I realized the interview was not being recorded, I transcribed what I could of the interview in real time. Additionally, the transcription service used for all thirty-five interviews produced transcripts with several grammatical errors. For ease of reading, I have corrected those errors and have not indicated deviations from transcripts in-line.

58 *See supra* note 50 and accompanying text.

59 Available data indicates that 37,802 "civil rights" cases were filed in federal court in 2017, which includes voting, employment, housing and education cases, among others. *See U.S. District Courts-Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending March 31, 2016 and 2017*, U.S. COURTS, http://www.uscourts.gov/sites/default/files/data_tables/fjcs_c2_0331.2017.pdf [https://perma.cc/D9NJ-KNJ4]. Section 1983 cases against law enforcement would likely be included in a subcategory of "civil rights" cases called "other civil rights" cases. There were 14,941 "other civil rights" cases filed in federal court in 2017.*See id.*

and state courts, or that the lawyers litigating in these five districts share the views of lawyers litigating these cases around the country. [60]

Second, this study focuses on Section 1983 cases against state and local law enforcement. I focused on lawsuits against law enforcement defendants both because the Court's qualified immunity jurisprudence--particularly in recent years--has largely developed in these types of cases, and because it creates some substantive consistency across the cases in the dataset. [61]I do not know for certain whether these findings about the costs and risks of qualified immunity or the role qualified immunity plays in case-selection decisions are equally applicable to other types of civil rights claims. But the attorneys I surveyed and interviewed who brought other types of civil rights claims did not indicate that their litigation or case-selection processes are different when they bring Section 1983 claims against other types of government defendants.

Third, I cannot be certain that the attorneys I surveyed and interviewed accurately described their views about qualified immunity or the role the doctrine plays in their case-selection decisions. One could, for example, imagine that attorneys might exaggerate the damaging effects of qualified immunity to build a case against the doctrine, or underplay the disruptive effect of qualified immunity as a way of demonstrating their skillfulness as litigators. But attorneys were assured confidentiality in their surveys and interviews to minimize self-serving statements and encourage them to speak frankly about their views. A different concern about attorneys' accuracy is that they might inadvertently misperceive the effects of qualified immunity on their case-selection decisions and other aspects of their work. But the **[*1118]** attorneys' verifiable observations--about the frequency with which qualified immunity resulted in case dismissals, for example--were consistent with data from the docket dataset, which should inspire confidence in the accuracy of their other observations.

Finally, I do not know whether the thirty-five attorneys I surveyed and interviewed hold views representative of the 1,022 attorneys who entered appearances in the 1,183 cases in my docket dataset. Attorneys willing to take the time to fill out surveys and be interviewed might, for example, be especially frustrated about the costs and challenges of Section 1983 litigation, or they might be motivated to bring Section 1983 litigation for different reasons than the lawyers who did not respond to my requests. The attorneys I surveyed and interviewed are clearly unrepresentative in one way--they filed more police misconduct cases, on average, than other attorneys who entered appearances in the cases in my dataset. [62]Attorneys who file fewer police misconduct cases may have different views about the costs and risks associated with qualified immunity--or the impact of those costs and risks on filing decisions--than those who file more.

Despite the overrepresentation in my study of attorneys with a more active civil rights docket, the attorneys in my study vary in many ways regarding their civil rights litigation practices. [63]Some have brought hundreds of police misconduct cases, and others have brought only a few. [64]Some spend virtually all of their time litigating police misconduct suits, and others devote only a small

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[60] For further discussion of this methodological limitation, see Schwartz, *supra* note 5, at 23-24.

[61] *See supra* note 49 and accompanying text.

[62] See Appendix Tables 1-3, which reflect the total number of appearances by all of the 1,022 attorneys who entered appearances during the two-year study period in my docket dataset (Appendix Table 1); the appearances of attorneys I interviewed during the two-year period in my docket dataset (Appendix Table 2); and the appearances surveyed attorneys reported over a five-year period in police misconduct cases (Appendix Table 3).

[63] See Appendix Table 7 for information about the attorneys I interviewed, including the percentage of time they spend on civil rights cases, the other types of work they take on, their fee arrangements with clients, and their practice setting.

[64] *See* Appendix Table 7.

percentage of their time to these cases. [65]Some primarily represent plaintiffs bringing the highest damages cases--those involving wrongful convictions and deadly force. Others usually represent plaintiffs in cases concerning what one attorney referred to as the "smaller indignities" of police stops and frisks. [66]The attorneys I interviewed and surveyed include **[*1119]** partners at midsized and small firms, solo practitioners, and employees of nonprofits. [67]And the attorneys have, combined, several centuries-worth of experience bringing thousands of police misconduct cases on behalf of plaintiffs. Accordingly, these attorneys' varied perspectives and experiences can offer valuable insights into the role qualified immunity doctrine plays in litigation and case selection.

III. THE COSTS AND RISKS OF QUALIFIED IMMUNITY

Standard models of case selection assume that an attorney will only agree to represent a plaintiff if she believes that the likelihood of prevailing and her expected monetary gain equals or is greater than her anticipated costs. [68]Accordingly, assuming these models are accurate, to appreciate the effects of qualified immunity on case selection, one must first understand how attorneys believe qualified immunity doctrine affects the cost of litigation (C), the probability of success (*p*), and the size of judgments (J).

In this Part, drawing on my surveys and interviews of attorneys who entered appearances in the police misconduct cases in my docket dataset, I report attorneys' perceptions that qualified immunity increases cost and delay, decreases the size of judgments, and raises the risk of dismissal. The docket dataset reveals litigation patterns and practices consistent with attorneys' perceptions. Then, in Part IV, I describe attorneys' observations about the ways in which these costs and risks influence their case-selection decisions.

A. How Qualified Immunity Affects the Cost of Litigation

The dockets, surveys, and interviews all suggest that qualified immunity doctrine increases the cost, time, and complexity of litigating police misconduct cases. Defendants raised qualified immunity in 368 (31.1%) of the 1,183 cases in my docket dataset. [69]In sixty of these 368 cases, **[*1120]** defendants brought qualified immunity motions two or more times over the course of litigation. [70]For plaintiffs to respond effectively to a qualified immunity motion, they must find factually similar cases--either from their circuit or from multiple other circuits--holding defendants' conduct unconstitutional, and then must brief and argue their oppositions to the motions.

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65 *See* Appendix Table 7.

66 N.D. Cal. Attorney E; *see also* N.D. Cal. Attorney D (reporting that he does not bring shooting cases but, instead, brings cases concerning "all the little incremental violations--the false arrest stuff, the kick in your door and trashing the house stuff; you know, the traffic stop unreported toss your car stuff. You know, rough you up a little bit stuff; you know, lie about what you said; stuff that needs addressing and that people don't make any money on."); N.D. Cal. Attorney G (explaining that he does not take "death cases" that other firms in the area take. "I'm a sole practitioner and I want to just kind of lay in the weeds and jump out of the bushes at the right time."); M.D. Fla. Attorney C (describing himself as a "bottom feeder" who has "fought a lot of battles on principle for very small amounts").

67 There are relatively few nonprofit attorneys represented in my surveys and interviews: Just one of the attorneys I interviewed and four attorneys I surveyed are employed by nonprofits. But this may well reflect the limited role nonprofits play in the civil rights plaintiffs' bar that brings damages actions. *See supra* note 40 and accompanying text.

68 *See supra* notes 36-37 and accompanying text.

69 Schwartz, *supra* note 5, at 29. Qualified immunity could not be raised in 204 of the cases in my dataset either because the cases were brought against municipalities or sought solely injunctive or declaratory relief (ninety-nine cases), or because the cases were brought against individuals, seeking damages, but were dismissed by the district court before defendants had the opportunity to respond (105 cases). *Id.* at 27-28. Defendants declined to raise qualified immunity in the other 611 cases. *Id.* at 29.

70 *See id.* at 33.

[71]

Defendants are also entitled to immediately appeal qualified immunity denials that turn on questions of law, [72]and in my docket dataset, defendants brought interlocutory appeals of forty-one (21.7%) of the 189 qualified immunity motions that were denied in whole or in part. [73]Plaintiff's counsel will likely have done much of the relevant qualified immunity research in the district court. But the style of briefing and argument will likely be different in the court of appeals. [74]Plaintiffs' attorneys may also move to dismiss the interlocutory appeal and/or ask the district court not to stay trial proceedings on the ground that the appeal is frivolous--which necessitates additional rounds of briefing. [75]

[*1121] Attorneys I interviewed reported that qualified immunity motions are "burdensome" [76]and that the doctrine requires plaintiffs to "litigate everything to the nth degree." [77]Attorneys also observed that defense counsel may use qualified immunity motions and interlocutory appeals strategically to "wear . . . out" [78]and "beat down the plaintiff's counsel," [79]and make their lives "somewhat miserable." [80]

Apart from the cost of researching and briefing individual qualified immunity motions, learning about and staying abreast of changes in qualified immunity doctrine is time-consuming. Courts and commentators have long observed that qualified immunity is exceedingly complex. [81]Attorneys I interviewed reported that mastering this complexity requires a significant amount of time and commitment. [82]As one attorney explained, "qualified immunity is not easily understandable. You have to read a lot of cases and do a lot of research." [83]Another attorney described qualified immunity as a "morass" that attorneys entering into this practice area need to "sort through." [84]He continued: "[I]t takes an enormous amount of dedication to do these cases

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[71] *See* Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (explaining that defendants violate "clearly established law" only when "'[t]he contours of [a] right [are] sufficiently clear' that *every* 'reasonable official would [have understood] that what he is doing violates that right'") (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)); Wilson v. Layne, 526 U.S. 603, 617 (1999) (requiring that plaintiffs point to "controlling authority in their jurisdiction" or a "consensus of cases of persuasive authority" to defeat qualified immunity). There is circuit variation regarding who bears the burden of proving entitlement to qualified immunity. *See* Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065, 2071-72 (2018). Nevertheless, plaintiffs generally bear the burden of finding cases where factually similar conduct was ruled unconstitutional--even in circuits that place the burden of pleading and proving entitlement to qualified immunity on the defendant.

[72] *See* Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887, 1905-17 (describing the standards for interlocutory appeals of qualified immunity denials and criticizing the practice because it increases cost, delay, and complexity).

[73] Schwartz, *supra* note 5, at 40.

[74] *See* N.D. Cal. Attorney B (describing her dislike of interlocutory appeals because she prefers trial court practice).

[75] *See* E.D. Pa. Attorney A ("I'm particularly irked when frivolous qualified immunity claims which are shut down by the district court on summary judgement end up being the subject of interlocutory appeal. So you've got to spend another six to twelve months or longer dealing with that. I've been disappointed in those cases that the circuits haven't come down stronger on attorneys that bring frivolous interlocutory appeals where the findings by the district court make it clear that there are factual disputes that render the grant of summary judgement simply inapt."); N.D. Ohio Attorney E (describing a motion opposing defendants' motion for a stay while their interlocutory appeal was pending); N.D. Cal. Attorney F (explaining that, at the time of the interview, he was writing a motion opposing defendants' motion for a stay while their interlocutory appeal was pending on the ground that the appeal was frivolous).

[76] N.D. Cal. Attorney B.

[77] M.D. Fla. Attorney B; *see also* N.D. Ohio Attorney G (predicting that his fees would "go down" if qualified immunity were eliminated).

[78] M.D. Fla. Attorney B.

[79] E.D. Pa. Attorney A.

[80] *Id.*

[81] *See* Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 925 (2015) ("One has to work hard to find some doctrinal consistency or predictability in the case law and the circuits are

properly. I think it takes an enormous amount of experience to do them properly. And there's a huge learning curve." [85]

Qualified immunity motion practice and interlocutory appeals additionally increase the time associated with litigating these cases. [86]In my **[*1122]** docket dataset, the interlocutory appeals that were decided on the merits took, on average, 441 days from filing to resolution. [87]In almost 6% of the cases in which defendants brought motions to dismiss on qualified immunity grounds, defendants sought and received formal stays of discovery while the motions were pending. [88]Discovery was stayed in these cases for more than 150 days, on average. [89]

Several attorneys observed that qualified immunity increased the time it takes to litigate civil rights cases. [90]Attorneys were clearly frustrated by these delays in and of themselves, [91]but additionally reported that these delays add to the cost necessary to litigate these cases and can, in some cases, weaken the cases on the merits. One attorney described the uncomfortable choice of either continuing to prepare for an uncertain trial while the case is on interlocutory appeal, or growing unfamiliar with the case in the year or more that it is on appeal and relearning its details again later in preparation for trial. [92]Witnesses' recollections of critical facts may fade over the months **[*1123]** or years that qualified immunity motions are litigated and appealed. [93]And interlocutory appeals require attorneys to brief and argue their cases in a court of appeals--a setting that may be less familiar and less comfortable than a district court for some attorneys. [94]

My docket dataset suggests some regional variation in the costs associated with litigating qualified immunity. Defendants in the Southern District of Texas and Middle District of Florida raised qualified immunity in a greater percentage of

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hopelessly conflicted both within and among themselves." (footnote omitted)); John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) (describing qualified immunity as "a mare's nest of complexity and confusion").

82 *See, e.g.*, M.D. Fla. Attorney F (explaining that lawyers who "don't regularly" bring civil rights cases get "caught on qualified immunity"); N.D. Ohio Attorney C (explaining that civil rights cases "require a huge amount of work, investment of time by the attorney and you better know your stuff like qualified immunity for example"); S.D. Tex. Attorney C ("I went through a three-year learning curve to get up to grasp--up to speed on [civil rights doctrines], and it's a lot of information."); *see also infra* notes 83-85 and accompanying text.

83 S.D. Tex. Attorney F.

84 M.D. Fla. Attorney C.

85 *Id.*

86 *Accord* Reinert, *supra* note 71, at 2082 (finding that the median time from filing to trial was longer in cases in which qualified immunity was raised, which he found "unsurprising, because one would assume that cases involving qualified immunity would take longer to resolve, given the opportunity for motion practice and interlocutory appeal").

87 Of the forty-one interlocutory appeals I tracked in my docket dataset, one was dismissed for lack of jurisdiction, and sixteen were withdrawn.

88 Discovery stays were formally granted in eight cases, which amounts to 5.9% of the cases in which qualified immunity was raised at the motion to dismiss stage (136), and 5.2% of all motions to dismiss raising qualified immunity (154). *See* Schwartz, *supra* note 5, at 30, 33.

89 *See* Butcher v. City of Cuyahoga Falls, No. 5:11-cv-939, 2011 WL 5971043, at *2 (N.D. Ohio Nov. 28, 2011) (case stayed eighty-eight days while motion for judgment on the pleadings pending); Belniak v. Fla. Highway Patrol, No. 8:12-cv-1334-T-35MAP, 2014 WL 11394864 (M.D. Fla. March 24, 2014) (case stayed twenty-six days while motion to dismiss pending); Simmons v. Rutherford, No. 3:12-cv-946-J-25MCR, 2012 WL 4828582, at *1 (M.D. Fla. Oct. 10, 2012) (case stayed 171 days while motion to dismiss pending); Holton v. Blankinship, No. 3:11-cv-00325, at 2 (M.D. Fla. Aug. 8, 2011) (case stayed sixty-three days while motion to dismiss pending); Stiles v. Judd, No. 8:12-cv-02375-T-27EAJ, 2013 WL 4714402, at *1 (M.D. Fla. Aug. 30, 2013) (case stayed 199 days while motion to dismiss pending); Harvey v. Montgomery County, No. 11-cv-1815, 2012 WL 12530, at *1 (S.D. Tex. Jan. 3, 2012) (case stayed 174 days while motion to dismiss pending); Hinojosa v. Sandlin, No. 1:12-cv-00012, at 1 (S.D. Tex. Jan. 23, 2012) (case stayed 293 days while motion to dismiss pending); Shabazz v. City of Houston, No. 4:11-cv-1125, 2012 WL 12877853,

cases than did defendants in the other three districts. [95]Defendants in the Southern District of Texas and the Middle District of Florida more often raised qualified immunity at the motion to dismiss stage than did defendants in the other three districts, [96]and more often raised qualified immunity at multiple stages of litigation. [97]Courts in the Southern District of Texas and the Middle District of Florida also granted stays of discovery while qualified immunity motions were pending more often than did courts in the other districts. [98]By each of these metrics, the costs of **[*1124]** litigating qualified immunity are higher in the Southern District of Texas and the Middle District of Florida than in the other three districts in my study. But plaintiffs in the Northern District of Ohio bear one type of qualified immunity-related cost more than those in any other district in my study: defendants in the Northern District of Ohio are far more likely to immediately appeal denials of qualified immunity. [99]

Attorneys' reports of the costs associated with qualified immunity are consistent with the regional variation apparent in the docket dataset. Attorneys from the Eastern District of Pennsylvania, Northern District of California, and Northern District of Ohio reported that defendants usually raise qualified immunity at summary judgment. [100]In contrast, attorneys from the Southern District of Texas and Middle District of Florida reported that defendants regularly raise qualified immunity in both motions to dismiss and at summary judgment. [101]Attorneys from Texas and Florida described **[*1125]** defendants' efforts to stay proceedings while motions to dismiss raising qualified immunity were pending, [102]and attorneys from Ohio complained about delays associated with interlocutory appeals. [103]

B. How Qualified Immunity Affects the Probability of Success

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at *1 (S.D. Tex. Mar. 30, 2012) (case stayed 213 days while motion was pending).

90 *See, e.g.*, N.D. Cal. Attorney B (describing a case that took eight years to resolve because of qualified immunity appeals); N.D. Cal. Attorney F (explaining that interlocutory appeals "delay everything by 18 months"); N.D. Ohio Attorney D (explaining that qualified immunity increases the time it takes to litigate a case by "six months to a year" because of the appeals); N.D. Ohio Attorney G (explaining that one of his cases "got delayed for a year and a half when it went up [to the] Sixth Circuit and back."); *see also infra* notes 91-93, 103 and accompanying text.

91 *See, e.g.*, E.D. Pa. Attorney A ("I'm particularly irked when frivolous qualified immunity claims which are shut down by the district court on summary judgment end up being the subject of interlocutory appeal. So you've got to spend another six to twelve months or longer dealing with that."); M.D. Fla. Attorney G ("You used to be able to get a jury trial and go win money. Now you'll get an interlocutory appeal to the 11th Circuit . . . .").

92 *See, e.g.*, M.D. Fla. Attorney E (describing preparing jury instructions, his witness list, and exhibits while a denial of qualified immunity was on interlocutory appeal).

93 *See* Brief of Cross-Ideological Groups for Official Accountability, *Almighty Supreme Born Allah*, *supra* note 27, at 19 ("The resources required to see [an interlocutory appeal] through may render the effort untenable, with financial outlays compounding as evidence grows stale. These effects will be especially pronounced for claims promising only modest monetary recovery."); Alphonse A. Gerhardstein, *Making a Buck While Making a Difference*, 21 MICH. J. RACE & L. 251, 264 (2016) ("Interlocutory appeals cause witnesses' memories to fade or disappear . . . ."); *see also* S.D. Tex. Survey 5 ("I have never handled a 1983 suit that didn't have an interlocutory appeal in the middle--while witnesses disappear and documents get shredded.").

94 *See, e.g.*, N.D. Cal. Attorney B (explaining that interlocutory appeals are frustrating in part because "we're trial lawyers and we don't want to be appellate lawyers").

95 In the Southern District of Texas and the Middle District of Florida, defendants raised qualified immunity in 54.7% and 54.2% of the cases in which the defense could be raised, respectively, compared to 47.5% of the cases in the Northern District of Ohio, 33.8% of the cases in the Northern District of California, and 23.9% of the cases in the Eastern District of Pennsylvania. *See* Schwartz, *supra* note 5, at 29.

96 In the Middle District of Florida and the Southern District of Texas, defendants raised qualified immunity in a motion to dismiss in 32.9% and 19.8% of the cases in which the defense could be raised, respectively, compared to 12.2% of the cases in the Northern District of Ohio, 7.8% of the cases in the Northern District of

Qualified immunity can reduce the likelihood of success because a successful motion can cause a plaintiff's case to be dismissed. In my docket dataset, I found that this happened relatively rarely. [104]Just seven (0.6%) of the 1,183 cases in my dataset were dismissed at the motion to dismiss stage on qualified immunity grounds, and just thirty-one (2.6%) of the 1,183 cases in my dataset were dismissed at summary judgment (or on appeal of a summary judgment denial) on qualified immunity grounds. [105]But the likelihood of dismissal on qualified immunity is greater in some districts than in others. Cases in the Southern District of Texas had the highest risk of dismissal on qualified immunity--9.2% of cases filed there were dismissed on qualified immunity grounds. In contrast, 6.7% of cases filed in the Middle **[*1126]** District of Florida, 2.3% of cases in the Northern District of Ohio, 1.2% of cases in the Northern District of California, and 1% of cases in the Eastern District of Pennsylvania were dismissed on qualified immunity grounds. [106]

Attorneys from the different districts described the likelihood of dismissal on qualified immunity grounds in a manner consistent with the regional variation seen in the docket dataset. In the Eastern District of Pennsylvania, Northern District of California, and Northern District of Ohio, attorneys reported that defendants regularly raise qualified immunity--particularly in false arrest cases--but that qualified immunity motions are infrequently granted. [107]Attorneys in these districts reported that they can avoid dismissal on qualified immunity grounds if they can create an issue of fact, and reported that excessive force cases are rarely if ever dismissed on qualified immunity grounds. [108]In contrast, attorneys from the Southern District of Texas and the Middle District of Florida expressed more concern about the prospect of dismissal on qualified immunity grounds in all types of cases and at all stages of litigation. [109]

California, and .08% of the cases in the Eastern District of Pennsylvania. *See id.* at 29, 30.

97 In the Middle District of Florida and the Southern District of Texas, defendants raised qualified immunity two or more times in 13.6% and 9.4% of the cases in which the defense could be raised, respectively, compared to 6.1% of the cases in the Eastern District of Pennsylvania, 6% of the cases in the Northern District of California, and 3.6% of the cases in the Northern District of Ohio. *See id.* at 33.

98 Of the twenty-three qualified immunity motions to dismiss in the Southern District of Texas, three (13%) cases were stayed while the motions were pending. Of the fifty-nine qualified immunity motions to dismiss in the Middle District of Florida, four (6.8%) cases were stayed while the motions were pending. Of the seventeen qualified immunity motions to dismiss in the Northern District of Ohio, one (5.8%) case was stayed while the motion was pending. There were thirty motions to dismiss on qualified immunity grounds brought in the Eastern District of Pennsylvania and fourteen motions to dismiss on qualified immunity grounds brought in the Northern District of California; no cases were stayed while any of these motions were pending.

99 Defendants in the Northern District of Ohio brought interlocutory appeals in seventeen of thirtyfive (48.6%) partial or full denials of qualified immunity. In contrast, defendants in the Southern District of Texas brought interlocutory appeals in five of twenty-six (19.2%) partial or full denials of qualified immunity; defendants in the Middle District of Florida brought interlocutory appeals in nine of the fortysix (19.6%) partial or full denials of qualified immunity, defendants in the Northern District of California brought interlocutory appeals in nine of forty-three (20.9%) partial or full denials of qualified immunity; and defendants in the Eastern District of Pennsylvania brought interlocutory appeals in one of forty-one (2.4%) partial or full denials of qualified immunity. *See id.* at 40.

100 *See, e.g.*, N.D. Cal. Attorney A (explaining that qualified immunity practice depends on the jurisdiction, that "San Francisco does not typically file a 12(b) motion on a police excessive force case," and that "defense attorneys will always include a qualified immunity section of their summary judgment motions"); N.D. Cal. Attorney E (explaining that "most of the lawyers in the Bay Area" wait until summary judgment to raise qualified immunity); N.D. Cal. Attorney F (explaining that defendants usually include qualified immunity in their summary judgment motions but that he has not seen qualified immunity raised at the motion to dismiss); N.D. Ohio Attorney C ("I don't think I've ever had a police misconduct case where defendant's counsel did not file a motion for summary judgment and which allows in large part qualified immunity. So

[*1127] Even when the chances of dismissal on qualified immunity grounds are relatively small, the risk of dismissal may loom large in attorneys' minds. If an attorney takes a case on contingency and that case is dismissed, the attorney will lose all the money she invested in the case. As one attorney explained:

> [I]f you're going to go to federal court you're committing for one attorney . . . a fairly substantial amount of time and a substantial amount of funds for the client . . . . There's nothing worse than championing a client's claim for two or three years and having it turn out to be a zero. That's not [a] good use of the attorney time--especially if you're on contingency fee. It's not a good use of the client's time--they end up unhappy, they get their hopes up, they turn down mediation money and then get nothing. That's not . . . desirable for anybody. [110]

Although cases are infrequently dismissed in the Eastern District of Pennsylvania and the Northern District of California on qualified immunity grounds, defendants in these districts generally raise qualified immunity at summary judgment, after plaintiffs' counsel have invested in costly discovery and motion practice. [111] Lawyers in these districts expressed concern that they would spend significant time and money in discovery, only to have the case dismissed on qualified immunity grounds at summary judgment. [112]

C. How Qualified Immunity Affects the Size of Judgments

Qualified immunity may also decrease the size of judgments. In seventy-nine of the 1,183 cases (6.7%) in my dataset, district courts granted qualified immunity motions in whole or in part, but additional parties or claims remained in the case. It is possible that in some of these cases, courts may have dismissed the higher damages claims on qualified immunity grounds, even as they allowed

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absolutely qualified immunity is a huge issue in these types of cases."); N.D. Ohio Attorney F (explaining that qualified immunity is not raised in excessive force cases at the motion to dismiss, but that it sometimes is in "more murky legal case[s]"); N.D. Ohio Attorney G (explaining that "district judges really don't like qualified immunity motions at the pleading stage" but that "we still get qualified immunity motions on summary judgment in almost every case"); E.D. Pa. Attorney F (explaining that defense counsel "put [qualified immunity in] every summary judgment motion" but "almost never at motion to dismiss stage"); E.D. Pa. Attorney G (reporting that defense counsel will "save" qualified immunity arguments for summary judgment).

[101] *See, e.g.*, M.D. Fla. Attorney B (explaining that, even a few years ago, qualified immunity motions "did not appear in some motions for summary judgment" but "now it's coming up in more and more motions to dismiss"); M.D. Fla. Attorney D (explaining that qualified immunity is raised "every time, even if it's not valid they'll take a stab at it, they'll take a run at it"); M.D. Fla. Attorney G (explaining that defendants raise qualified immunity in motions to dismiss); S.D. Tex. Attorney B (reporting that defendants raise qualified immunity in motions to dismiss "[e]very single time without fail. . . . [in] every kind of police misconduct case every time").

[102] *See* M.D. Fla. Attorney B (explaining that defense attorneys "always try" to get stays while qualified immunity motions are pending but "I would say that maybe once or twice in all the cases that I can think of they were actually able to get stays"); S.D. Tex. Attorney B (describing that "the first thing [defendants] do is file a motion to dismiss and since the court will not allow discovery in a . . . case where they assert qualified immunity prior to ruling on a motion to dismiss, you're just hamstrung because you can't get the discovery before suit").

[103] *See, e.g.*, N.D. Ohio Attorney D (explaining that cases would be "completed sooner" without qualified immunity "because if qualified immunity is granted, I appeal it. If qualified immunity is denied, they appeal it. It adds time and then [adds] lawyer hours, it [adds] briefing hours, it adds argument hours. The whole court of appeals component adds another year, year and a half to a case in our circuit"); N.D. Ohio Attorney E ("[Qualified immunity] gives the defendants the ability to call timeout in the middle of litigation . . . . [D]efendants get a free shot [to get the case dismissed through an interlocutory appeal and] they often take it."); N.D. Ohio Attorney F (describing interlocutory appeals as "a tactic that most of the defense lawyers just feel they have to use . . . . They don't care if they are shut down [on appeal], because at least they get the benefit of the delay" and observing that defendants appeal qualified immunity denials "whenever they can"); N.D. Ohio Attorney G (describing a case that was delayed for a year and a half while on interlocutory appeal).

other federal claims to proceed. [113]

[*1128] In other cases, courts dismissed all of plaintiffs' federal claims on qualified immunity grounds but allowed plaintiffs' parallel state law claims to proceed. [114]Even though these state law claims concerned the same conduct as the federal claims that were dismissed, plaintiffs may have been able to recover less for the state law claims than they could have for the federal claims. For example, Florida caps damages for state law claims at $ 300,000 per claim. [115]Accordingly, when federal claims are dismissed on qualified immunity grounds, the total potential recovery--including attorneys' fees--is limited to $ 300,000. This cap can diminish the potential size of recovery or discourage plaintiffs from continuing to pursue their claims. [116]Plaintiffs whose federal claims are dismissed also lose their opportunity to seek attorneys' fees under Section 1988. [117]

[*1129] * * *

Attorneys across the five jurisdictions in my study report qualified immunity increases the cost, complexity, and delay associated with Section 1983 litigation. There is regional variation in attorneys' views about the likelihood of dismissal on qualified immunity grounds--variation that tracks my findings in the docket dataset. But in all five districts, even in districts where the actual risk of dismissal on qualified immunity grounds is lowest, attorneys fear that cases will be dismissed on qualified immunity grounds at summary judgment or interlocutory appeal of a summary judgment denial, after they have invested time and money in discovery. Partial dismissals on qualified immunity grounds can also reduce cases' potential value.

Some attorneys report--and my docket dataset suggests--that concerns about the costs and risks of qualified immunity sometimes cause them to encourage their clients to settle. [118]But do

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[104] *See generally* Schwartz, *supra* note 5 (finding that qualified immunity was rarely the formal reason cases were dismissed in five federal districts over a two-year period). Although my study did not consider the role of qualified immunity at trial, Alexander Reinert has recently studied this question by looking at 287 cases in which qualified immunity was raised, jury instructions were proposed, and the case went to or through a jury trial. Reinert, *supra* note 71. Consistent with my findings about the impact of qualified immunity when raised in motions to dismiss and at summary judgment, Reinert found that "qualified immunity rarely plays a significant role in jury trials." *Id.* at 2088.

[105] Schwartz, *supra* note 5, at 45. When one eliminates pro se filings from the dataset, just 0.2% of the 910 cases were dismissed on qualified immunity grounds at the motion to dismiss stage, and 3.4% were dismissed at summary judgment (or on appeal of a summary judgment denial) on qualified immunity grounds.

[106] *Id.* at 46. If one looks only at represented plaintiffs, the results are approximately the same: Ten of 104 (9.6%) counseled cases filed in the Southern District of Texas were dismissed on qualified immunity grounds, compared with twelve of 148 (8.1%) counseled cases filed in the Middle District of Florida, four of 131 (3.1%) counseled cases filed in the Northern District of Ohio, three of 187 (1.6%) counseled cases filed in the Northern District of California, and four of 340 (1.2%) counseled cases filed in the Eastern District of Pennsylvania. *Id.*

[107] *See, e.g.*, E.D. Pa. Attorney A (explaining that if he gathers the evidence necessary to create a factual dispute that defeats summary judgment, the "great bulk of the judges here are going to follow the law and not grant qualified immunity in most cases"); E.D. Pa. Attorney E (reporting that defendants do raise qualified immunity, but "it doesn't work [in the Eastern District of Pennsylvania] for the most part"); N.D. Cal. Attorney A (reporting that "defense attorneys will always include a qualified immunity section of their summary judgment motions" but "with more video [recordings] available, we can create triable issues of fact, and the qualified immunity defense, so long as we have an expert and they have an expert, does not tend to be disposing of as many of these cases"); N.D. Ohio Attorney G (explaining that he "can't think of one" case of his that has been dismissed on the pleadings).

[108] *See, e.g.*, E.D. Pa. Attorney A ("I think the law is now so well developed . . . that it's really tough . . . to lose . . . an excessive force case on qualified immunity grounds."); E.D. Pa. Attorney D ("I have never heard of a motion for qualified immunity in just excessive force [cases] here. Not just my cases but any cases."); E.D. Pa. Attorney F ("[W]ith respect to excessive force cases, I seldom . .

those costs and risks cause plaintiffs' attorneys to screen out cases before filing? And, if so, are the cases screened out "insubstantial," as the Supreme Court has written it intends? In Part IV, I consider these questions.

IV. QUALIFIED IMMUNITY AND CASE SELECTION

Theories of case selection expect that lawyers accepting cases on contingency will be less inclined to accept cases where the anticipated costs exceed the likely return. [119]As I showed in Part III, attorneys across the five federal districts in my study reported that qualified immunity increases the costs and risks of civil rights litigation, and can reduce the size of a judgment. Accordingly, one would assume that attorneys would be less likely to accept cases where defendants are likely to raise qualified immunity in pretrial motions, and particularly unlikely to accept cases vulnerable to dismissal on qualified immunity grounds.

The docket dataset can only measure the effects of qualified immunity on case selection in an indirect way--by comparing the role of qualified immunity in pro se and counseled cases. If one assumes that attorneys--but **[*1130]** not pro se plaintiffs--evaluate the costs and risks of qualified immunity when deciding whether to file a case, and decline to file cases where those costs and risks are high, [120]one might expect that pro se plaintiffs would more often file cases vulnerable to dismissal on qualified immunity grounds, and more of their cases would, in fact, be dismissed on qualified immunity. My docket dataset does not support this theory. Pro se plaintiffs were successful far less often than represented plaintiffs, [121]and cases

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. if ever see the court grant a summary judgment on those qualified immunity issues . . . ."); E.D. Pa. Attorney G ("If we [think force used by an officer is unreasonable], I don't think qualified immunity deters us in those cases."); N.D. Cal. Attorney G (explaining that, in excessive force cases, "there are a lot more cases and even though you may not have a case on all fours, it's easier to make the argument that the officer should have known that what he was doing violated the Constitution when he struck that person while he was on the ground in handcuffs or with one handcuff on with his face down, right?").

109 *See, e.g.*, M.D. Fla. Attorney F (explaining that he fears getting "bounced" on qualified immunity); M.D. Fla. Attorney G (describing one case in which a police officer fired forty-four bullets into a car but the Eleventh Circuit granted qualified immunity because there was not a prior case on point, and another case in which the Eleventh Circuit granted qualified immunity based on the pleadings); S.D. Tex. Attorney B ("Motions to dismiss [on qualified immunity] get granted a lot."); S.D. Tex. Attorney C (explaining that when cases are dismissed at the motion to dismiss stage, "a large percentage are qualified immunity"); S.D. Tex. Attorney E ("[N]ine times out of ten they will win the qualified immunity argument."); S.D. Tex. Attorney F (describing a case in which police shot the plaintiff in the face while he was in a stationary vehicle but the court dismissed on qualified immunity grounds).

110 M.D. Fla. Attorney D.

111 *See supra* notes 97, 100 and accompanying text.

112 *See, e.g.*, N.D. Cal. Attorney B (explaining that attorneys need to factor in the fact that their case may be delayed by motion practice and interlocutory appeals, and that attorneys "have to factor in the appeal, and especially now with the courts going the way they are and your chances are reducing by having that level of uncertainty intervening"); E.D. Pa. Attorney D (explaining that a concern in case selection is "whether I think I'm going to get two years down the road, a year down the road, and then they file a qualified immunity [motion] and I'm out").

113 For example, in *Porter v. City of Santa Rosa*, No. 3:11-cv-04886-EDL (N.D. Cal. Dec. 5, 2012), the district court dismissed the plaintiff's § 1983 claims against defendant police officers, leaving only his *Monell* claim against the City of Santa Rosa. *See* Notice of Motion, No. 3:11-cv-04886-EDL (N.D. Cal. May 7, 2012); Motion for Summary Judgment (July 2, 2012). Plaintiff's counsel stopped responding to defendant's communications, and the case was dismissed for failure to prosecute. *See* Order Dismissing Case, No. 3:11-cv-04886-EDL (N.D. Cal. Dec. 5, 2012). In *Killian v. City of Monterey*, No. 5:12-cv-05418-PSG, 2014 WL 1493941 (N.D. Cal. Apr. 16, 2014), the plaintiff alleged that he was falsely arrested for driving under the influence after he was found asleep in his car. He brought claims for unreasonable search and seizure, excessive force, malicious prosecution, and violation of due process and equal protection. *Id.* The court granted defendant qualified immunity for all but the equal protection claim. *See* Order Granting-in-Part Defendants' Motion for Summary Judgment, *Killian*, No. 5:12-cv-05418-PSG, 2013 WL 6577064 (N.D. Cal. Dec. 13, 2013). Given the claims that were dismissed and the claim that remained, the summary judgment order may well have decreased the case's value. The parties subsequently entered settlement negotiations, and the plaintiff approved--but later refused to sign--the settlement agreement. *See* Order to Show Cause, *Killian*, No. 5:12-cv-05418-PSG (N.D. Cal. Feb. 20, 2014). Plaintiff's counsel then withdrew from the case and the last claim was dismissed. *See* Order Granting Summary Judgment and Motion to Withdraw, *Killian*, No. 5:12-cv-05418-PSG, 2014 WL 1493941 (N.D. Cal. Apr.

brought by pro se plaintiffs were, on average, dismissed earlier in the course of litigation. [122]But defendants raised qualified immunity in the same percentage of pro se and counseled cases (37.6%). And three times more counseled cases than pro se cases were dismissed on qualified immunity grounds. [123]Courts were more likely to grant defendants' motions to dismiss and for summary judgment in cases brought by pro se plaintiffs--but they were less likely to grant those motions on qualified immunity grounds. [124]These data suggest that pro se plaintiffs are far less likely to succeed, but that neither defendants nor courts view pro se cases as more vulnerable to dismissal on qualified immunity grounds. This evidence is consistent with my previously stated view that qualified immunity is neither necessary nor well-suited to dismiss "insubstantial" cases before discovery and trial. [125]However, it does not foreclose the possibility that attorneys' concerns about qualified immunity cause them to file more "substantial" cases than plaintiffs proceeding pro se.

Accordingly, to better understand the role qualified immunity plays in plaintiffs' attorneys'

16, 2014).

[114] There were eight cases in my dataset in which federal claims were dismissed on qualified immunity grounds and the state law claims were dismissed without prejudice or remanded to state court. *See* Schwartz, *supra* note 5, at 42 n.103. In at least four additional cases, plaintiffs voluntarily dismissed their federal claims while qualified immunity motions were pending, so their state law claims were remanded to state court. *See, e.g.*, Glass v. City of Saint Petersburg, No. 8:12-cv-02405-RAL-TGW (M.D. Fla. filed Oct. 24, 2012); Cooks v. Bailey, No. 3:12-cv-00869-HES-JBT (M.D. Fla. filed Aug. 1, 2012); Joseph v. City of Orlando, No. 6:12-cv-00131-JA-DAB (M.D. Fla. filed Jan. 27, 2012); Forde v. Home Depot, No. 2:11-cv-05823-JS (E.D. Pa. filed Sept. 15, 2011).

[115] *See* Fla. Stat. Ann. § 768.28 (West 2017).

[116] In one case in my docket dataset, *Spann v. Verdoni*, a Sarasota County deputy sheriff shot and killed a 20-year-old after he and a friend rang the deputy's doorbell late at night as a prank. *Spann v. Verdoni*, No. 8:11-cv-00707-TBM (M.D. Fla. filed Apr. 4, 2011). The district court granted the deputy summary judgment on the federal claims (granting qualified immunity in the alternative) and remanded the state claims to state court. *See* Summary Judgment Order, *Spann v. Verdoni*, No. 8:11-cv-0707 (M.D. Fla. Nov. 27, 2012). The decedent's family's attorney informed me that his clients "made the decision not to pursue an action in State court" because the damages cap "severely restrict[ed] potential damages." E-mail from W. Cort Frohlich, attorney for plaintiffs in *Spann v. Verdoni*, to author (Mar. 2, 2017, 10:15 AM) (on file with journal).

[117] *See supra* note 39 and accompanying text.

[118] *See, e.g.*, N.D. Cal. Attorney D ("[E]ven if I win on summary judgment, I might settle the case knowing that there's a possibility that . . . qualified immunity could be a problem at trial."); E-mail from N.D. Ohio Attorney B to author (Jan. 18, 2018, 11:14 AM) (reporting that concerns about qualified immunity caused clients to settle a case because they "did not want to either win and have [defendants] appeal or us lose and us appeal--this would have stopped the case dead in the water for approximately a year and a half").

[119] *See supra* note 34-37 and accompanying text.

[120] For the bases for this assumption, see *supra* notes 52-53 and accompanying text.

[121] Just 16.1% of cases (44 out of 273) brought by pro se plaintiffs ended with a settlement, voluntary dismissal, or verdict partially or wholly in plaintiffs' favor, whereas 71% of cases (637 out of 910) brought by represented plaintiffs ended with one of these outcomes.

[122] A total of 41.4% of pro se cases (113 out of 273) were dismissed sua sponte before the defendant answered, as compared to 1.4% of cases (13 out of 910) brought by represented plaintiffs. And 19% (52) of pro se plaintiffs' cases were dismissed at the motion to dismiss stage, as compared to 4.5% (41) of cases brought by represented plaintiffs.

[123] A total of 3.6% of counseled cases and 1.5% of pro se cases were dismissed on qualified immunity.

[124] Although I did not track the bases for dismissals in these cases, cases at the motion to dismiss stage often fail because plaintiffs have not pled plausible claims or because a criminal conviction bars the claims, and at summary judgment courts often find that the plaintiffs have not presented sufficient evidence to create a material factual dispute about the existence of a constitutional violation. *See* Schwartz, *supra* note 5, at 56-57.

[125] *See id.* at 53-57.

case-selection decisions, I asked each of the thirty-five attorneys I interviewed to describe the considerations they take into account when deciding whether to accept a case. Attorneys' responses to this question, and our subsequent discussions, lead me to four observations about **[*1131]** the role qualified immunity plays in these attorneys' case-selection decisions.

First, the attorneys I interviewed all take a number of different factors into account when deciding whether the potential benefits of a case outweigh its costs and risks, including: whether the judge and jury will find the plaintiff sympathetic and credible; the strength of the evidence supporting the plaintiff's claims; the costs of litigating the case; and the amount of recoverable damages. So, to the extent that attorneys are assessing the costs and risks of qualified immunity at case selection, they do not consider these costs and risks in a vacuum.

Second, attorneys do not reliably decline cases vulnerable to motion practice or dismissal on qualified immunity. Thirteen lawyers I interviewed report that they do not take qualified immunity into account when selecting cases, and another eleven report rarely declining cases because of qualified immunity. These twenty-four attorneys agreed that qualified immunity increases the risks, costs, and complexities of Section 1983 litigation, but offered several reasons why they do not select cases based on whether qualified immunity might be raised or successful.

Third, attorneys who decline cases vulnerable to motion practice and dismissal on qualified immunity reported doing so for reasons unrelated to the cases' merits. Instead, attorneys I interviewed reported declining cases if the cost of litigating qualified immunity outweighs the likely financial rewards, cases with fact patterns that have not previously been held unconstitutional, and cases involving certain types of claims--especially false arrest claims--where attorneys believe they must produce evidence of intentional misconduct to defeat qualified immunity motions.

Fourth, qualified immunity appears to cause some lawyers to reduce the number of civil rights cases they bring and discourage other attorneys from filing any civil rights cases. One attorney I interviewed reported that he has stopped accepting Section 1983 cases because immunities pose an insurmountable barrier. Circumstantial evidence suggests that the challenges of civil rights litigation--including qualified immunity--may cause many more lawyers to decrease the number of civil rights cases they file or get out of the business of civil rights litigation altogether.

In this Part, I describe each of these findings in more detail.

A. Attorneys' Case-Selection Considerations

When I asked attorneys what factors they take into account when deciding whether to accept a case, five volunteered qualified immunity as a consideration, and another seventeen agreed, when asked, that qualified immunity plays a role. When I asked why attorneys considered qualified **[*1132]** immunity when selecting cases, I received predictable responses about the costs and risks associated with the doctrine. But every attorney I interviewed described multiple additional factors related to the probability of success, anticipated size of judgment, and cost of litigation that inform their case-selection decisions.

1. Considerations Related to the Probability of Success

Many attorneys I surveyed and interviewed believe that judges and juries are more sympathetic to police officer defendants and generally hostile to plaintiffs' claims. When I surveyed attorneys about the biggest obstacle to bringing police misconduct cases, attorneys' most common answers were judges and juries. [126]Attorneys I interviewed

[126] Eighty-five of the ninety-four attorneys who took the survey answered this question, and offered a total of 114 responses. Twenty-seven (31.8%) of these attorneys described juries as one of the biggest obstacles to success, and twenty-two (25.9%) described judges as one of their biggest obstacles. *See* Appendix Table 6;

agreed, observing that judges and juries are often unsympathetic to their clients, and that this perceived preference for government defendants can cause judges and juries to dismiss plaintiffs' claims or award plaintiffs minimal damages. [127]

[*1133] Accordingly, it should come as no surprise that attorneys look for cases and plaintiffs that judges and juries might find compelling. Part of this calculation concerns the underlying facts of the case. Attorneys report that they look for cases where the facts not only establish a constitutional violation, but are "horrific" or "outrageous." [128]As one attorney explained, "I mean, if I'm shocked . . . I figure then maybe some jurors will be shocked." [129]

Attorneys also look for cases with strong evidence of government liability. Ideally, the police department's own reports establish that the police officer had engaged in wrongdoing. [130]If not--and it will be the officer's word against the plaintiff's--attorneys reported that they are more likely to take a case if there is a video or other evidence to corroborate the plaintiff's claims and undermine the claims of the officer(s). [131]

[*1134] Attorneys also reported considering whether the plaintiff would be compelling to a jury. [132]Attorneys want clients that juries will find sympathetic, [133]and therefore reported preferring plaintiffs who are "likeable," "credible," and "articulate." [134]Some attorneys will not represent a person who was convicted of the underlying offense; a conviction or guilty plea bars a Section 1983 claim inconsistent with the criminal conviction, [135]and, even when the Section 1983 claim is not barred, some attorneys reported declining cases where the plaintiff was convicted of a crime in connection with the incident for fear that a jury would not find them sympathetic or credible.

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see also, e.g., E.D. Pa. Survey 11 ("Judges and juries still tend to believe police officers over citizens."); E.D. Pa. Survey 17 (describing "more rural/suburban juries" in federal court); E.D. Pa. Survey 18 ("Jury bias."); E.D. Pa. Survey 5 ("[C]itizens, judges and jurors believe a police officer's word over that of anybody else."); E.D. Pa. Survey 2 ("Juries believing cops."); N.D. Cal. Survey 10 ("The deference the courts give to police officers and law enforcement agencies."); N.D. Cal. Survey 8 ("The judges are extremely conservative. Pro-police bias all around."); N.D. Cal. Survey 7 ("Juries like police."); N.D. Cal. Survey 20 ("Judges excluding evidence of past misconduct of officers involved while including evidence of prior bad acts of victims thereby tainting the jurors' view of the victims."); N.D. Cal. Survey 9 ("Juror bias against minorities."); N.D. Ohio Survey 11 ("Public perception that police are acting in good faith."); N.D. Ohio Survey 1 ("Racism by public and judges."); N.D. Ohio Survey 2 ("Pro-police bias by judges."); M.D. Fla. Survey 15 ("Federal law and federal judges."); M.D. Fla. Survey 9 ("Jury sympathy with police."); M.D. Fla. Survey 5 ("Very conservative juries who lack empathy towards minorities and love [t]he police."); M.D. Fla. Survey 4 ("Having a sympathetic finder of fact."); S.D. Tex. Survey 17 ("Inherent racism."); S.D. Tex. Survey 16 ("Public attitude is very supportive of law enforcement."); S.D. Tex. Survey 11 ("Community perceptions about law enforcement."); S.D. Tex. Survey 10 ("Jurors and judges trust cops more than citizens."); S.D. Tex. Survey 5 ("Racial prejudice. If the cop doesn't bloody the arrestee . . . juries are more likely to let the cop off."); S.D. Tex. Survey 12 ("Juries will give police '2 strikes' before holding them accountable.").

[127] *See, e.g.*, E.D. Pa. Attorney A (explaining that federal juries are often conservative and "when we win . . . they give us very little"); E.D. Pa. Attorney C (observing that it is difficult to win before federal juries and that "federal courts are just very hostile to these kinds of cases"); E.D. Pa. Attorney D ("[F]ederal juries are very difficult."); M.D. Fla. Attorney A (explaining that judges in the Middle District of Florida "see these cases as almost a nuisance, waste of time" and describing a case in which a jury awarded $ 1 to a man who, while in handcuffs, was kneed in the abdomen so hard that he lost his spleen); M.D. Fla. Attorney B ("The judges tend to simply accept what the police say as gospel."); M.D. Fla. Attorney E (describing a case where the plaintiff was bitten by a police dog, and the plaintiff was left "with [a] leg that look[ed] a chicken bone" and the jury entered a defense verdict); M.D. Fla. Attorney F (explaining "the jurors here are pretty damn conservative in the federal court"); S.D. Tex. Attorney B (explaining that "[c]ourts are so conservative" in the Southern District of Texas, and juries are "very pro police"); S.D. Tex. Attorney D ("[A] lot of the judges here are pro-police, pro-government and the cases are just more difficult to prosecute here.").

[128] M.D. Fla. Attorney A ("[T]he conduct has to be somewhat

[136]Some lawyers reported reluctance to represent a person who has **[*1135]** *ever* been convicted of a crime, for fear that a jury will not believe them, or will award minimal damages because they have already been in the criminal justice system. [137]

2. Concerns Related to the Amount of Damages

Despite the availability of attorneys' fees if a plaintiff prevails at trial, plaintiffs' civil rights attorneys generally expect that their cases will settle--if they are successful--and that they will be paid a percentage of their client's settlement. [138]Accordingly, attorneys have strong incentives to accept cases with high potential damages. [139]Unsurprisingly, then, many attorneys reported that the amount of recoverable damages plays a significant role in their case-selection decisions, [140]and several attorneys reported declining cases with low damages. [141]As one attorney explained:

> **[*1136]** Obviously death cases or severe injury cases, I'm going to take a longer look at the case. But if it's a simple, like, they called me a name, or they used a derogatory term or--I spent--they kept me in the back of their car for four hours. I'm not going to take a case like that. But if there's a significant injury then I will. [142]

Another attorney put it more bluntly: "[I]t sounds crass but we say, 'Well, is there blood on the street? Because if there isn't, why are we doing it?'" [143]

3. Concerns Related to the Cost of Litigation

When a plaintiff's attorney receives a portion of her client's settlement, she profits only if she

egregious [and] the client didn't provoke the conduct or cause what happened to him."); M.D. Fla. Attorney B ("You're looking for cases where the facts are horrific."); N.D. Cal. Attorney C (explaining that he considers "how outrageous the conduct looks on the video"); *see also* E.D. Pa. Attorney B ("[I]f I tell the story of what happened here the person who is sitting on the other side hearing that story is going to go, 'Really? They did that?' If I don't get that reaction that's going to be a difficult case."); E.D. Pa. Attorney F ("I consider, does what they're telling me sound like a constitutional violation where there would be some measure of maliciousness involved or some kind of racial prejudice or other kind of prejudice?"); N.D. Ohio Attorney D (looking for cases with facts that "really demonstrate abuse and excessive [use] of force"); S.D. Tex. Attorney A ("It really just depends on the facts of the case and if I think it's something that's viable and more importantly is it something that I think the jury will understand."); S.D. Tex. Attorney F ("[W]hat are the facts? Like, are you saying an officer called you a bad name and you want to sue them? Are you saying an officer shot you in the back ten times and you want to sue [them?]").

129 N.D. Cal. Attorney C.

130 *See, e.g.*, M.D. Fla. Attorney C ("[T]here has to be a constitutional claim that I can prove. It's helpful but not necessarily dispositive that when you read the police report, if you assumed everything is accurate that the cops still loses, which means that they have to lie their way out of it, and they're not bashful about that--but that's at least a good starting point.").

131 *See, e.g.*, E.D. Pa. Attorney G ("[T]he excessive force cases we bring, we almost always have something more than our client's versions whether it's on video or a photograph or very strong medical documentation or a witness."); S.D. Tex. Attorney A ("Your typical tackling cases, or putting them to the ground, those are extremely difficult without some sort of video or witnesses or things of that nature, at least to illustrate that it's not necessary."); S.D. Tex. Attorney B ("If there's video of course that's a big factor."); N.D. Cal. Attorney B ("There has to be a good witness to your version of events. Like this one I was just looking at there's a guy who's on probation and an officer sees him and sees he has a gun in his waistband and he was just talking with a friend. And the guy ran and of course the officer says he turns around and points the gun at him. So I need either a good witness or a video that gives us some evidence that that didn't happen."); N.D. Cal. Attorney G ("I take cases that a lot of lawyers don't take and would never touch, either because I have a video that proves the officer lied or just because we have a great shot of proving that the officer lied in his report . . . and/or independent witnesses that are good witnesses that corroborate the victim's story . . . ."); M.D. Fla. Attorney C ("[I]f it turns out that the police report does at least allege something that rises to the level of a criminal offense, then do I have independent witnesses or objective evidence like a videotape that supports the argument that the police officer was dishonest in how they wrote their report."); N.D. Cal. Attorney F ("We look to see were there witnesses? Is there video?"); N.D. Ohio Attorney G ("Sometimes, the person will feel very strongly that they were mistreated, and I'll get the . . . . bodycam and the video or cruiser cam, and I don't

receives more than the value of her time plus any money she spent litigating the case. Accordingly, lawyers may estimate how much time and money they will need to invest in a case before prevailing, and qualified immunity is one of many costs associated with these cases. For example, one attorney reported considering the need for an expert when deciding whether a case made financial sense to accept. [144]Two attorneys reported that they consider where the law enforcement agency is, and how long it will take to travel to and from the department and the courthouse. [145]Some lawyers reported considering which jurisdiction is involved because different defense counsel have different approaches to defending these **[*1137]** cases. [146]As one attorney explained: "[T]he agencies matter, they do. Some of them you just know that you're going to have to go all the way, and you got to make the decision, am I going to go all the way." [147]

4. Weighing the "Cornucopia of Factors"

No lawyer described all of these considerations regarding the likelihood of success, amount of damages, and cost of litigation as relevant to their case-selection analysis, but every lawyer reported that some combination of these factors played into their decisions. Some lawyers noted one area of strength can make up for weaknesses in another area. [148]And several lawyers could not pinpoint what causes them to take a case. [149]As one described, "it's a little like, how the United States Supreme Court defined pornography way back in the day . . . they can't define it, but they know [it] when they see it." [150]

[*1138] For the twenty-one lawyers who reported considering qualified immunity when selecting cases, it is one among many considerations related to the likelihood of recovery, the amount of recovery, and the cost of litigation. As one attorney

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agree.").

[132] Plaintiffs' attorneys' interests in selecting plaintiffs they believe judges and juries will find sympathetic, likeable, and credible may make attorneys less likely to represent people of color, LGBTQ+ people, the mentally ill, and members of other marginalized groups--the very groups subject to disproportionate levels of policing. *See, e.g.*, DAVIS ET AL., *supra* note 1, at 4, 8, 16 (finding that Black residents were more likely to be stopped by police than white or Hispanic residents; that Black and Hispanic residents were more likely than white residents to have multiple contacts with police; and that police were twice as likely to threaten or use force against Black and Hispanic residents than white residents); DORIS A. FULLER ET AL., TREATMENT ADVOC. CTR., OVERLOOKED IN THE UNDERCOUNTED: THE ROLE OF MENTAL ILLNESS IN FATAL LAW ENFORCEMENT ENCOUNTERS 1 (2015) (reporting evidence that the mentally ill make up a disproportionate number of people killed by police); CHRISTY MALLORY ET AL., THE WILLIAMS INST., DISCRIMINATION AND HARASSMENT BY LAW ENFORCEMENT OFFICERS IN THE LGBT COMMUNITY 4-11 (2015) (describing studies showing discrimination and harassment of LGBTQ+ communities by law enforcement).

[133] *See, e.g.*, M.D. Fla. Attorney D (describing several cases brought on behalf of senior citizens who had interactions with the police).

[134] *See* E.D. Pa. Attorney F ("My number one consideration is whether it's a case that I could take to trial and win. So I look at who the plaintiff is and what they tell me about what happened to them. Do they sound credible?"); E.D. Pa. Attorney C ("[C]redibility of the plaintiff is of course paramount . . . ."); N.D. Cal. Attorney C ("[P]art of it is the overall circumstances; the client, who is the client, do I think the client is likable, or do I think the jury would like or feel sympathetic to the client. That's not necessarily a deal breaker but it's nice . . . [if the client] is going to come across sympathetic and articulate."); S.D. Tex. Attorney B (describing the credibility of the plaintiff or complainant as a factor when deciding whether to take a case).

[135] *See* Heck v. Humphrey, 512 U.S. 477, 487 (1994).

[136] *See, e.g.*, E.D. Pa. Attorney E (reporting that he will not take a false arrest case if the plaintiff was "convicted of the underlying crime" because then jurors will believe "he either got what he deserved," or conclude "'I don't believe it.'"). Attorneys reported being less concerned when the civil claim was for excessive force. *See, e.g., id.* (explaining that "a different type of analysis" goes into excessive force cases because "a guy can be in the midst of committing a robbery, a police officer pursues him, but the police officer walks away without a scratch and this guy winds himself up in the hospital and he's convicted of, say, the robbery, that is not an impediment at all to me taking the case"); M.D. Fla. Attorney C ("I

explained, qualified immunity "is part of a bunch of factors . . . [j]udge, type of government sued, criminal history of the plaintiff, plaintiff's personality, and damages to name a few." [151]Although "QI is always a negative weighing against taking a case," it is among "a cornucopia of factors [he considers] in deciding whether to take a case." [152]

B. Why Some Lawyers Rarely or Never Decline Cases Because of Qualified Immunity

Thirteen of the lawyers I interviewed reported that they do not consider qualified immunity at case selection. [153]Another eleven reported that they do consider qualified immunity at case selection, but rarely decline cases because of qualified immunity. [154]These twenty-four attorneys recognized that qualified immunity is often raised in civil rights cases, often makes litigation more complex and costly, and sometimes results in dismissal. Nevertheless, they offered four reasons why they rarely decline cases because of qualified immunity.

1. Other Considerations Duplicate the Challenges of Qualified Immunity

One reason that qualified immunity does not play a dominant role in these attorneys' case-selection decisions is that other concerns duplicate and thereby minimize qualified immunity concerns. [155]For example, several attorneys reported that concerns about judges' and juries' predispositions against police misconduct suits cause them to select cases with facts so egregious and evidence so strong that the cases are not vulnerable to dismissal on qualified immunity grounds. [156]As an

tend to shy away from people who have not prevailed in the criminal arena . . . if it's a use of force case, I'm far less likely to be concerned about the outcome in the criminal case, because I've known since the very beginning, people can be--can be guilty, and just beaten senseless.").

[137] *See, e.g.*, E.D. Pa. Attorney F ("Do they have a prior criminal history? Do they have a prior conviction history? Do they have a prior arrest history?"); M.D. Fla. Attorney A ("Generally, I won't take a case if it's somebody that's ever been arrested before or spent time in jail because, usually, the only real damage you have is their loss of liberty and the trauma of going through the jail process and having charges pending. If somebody's already had that in the past, then it's not as traumatic or worth it in my opinion to take those cases."); S.D. Tex. Attorney F ("[E]ventually the jury is the one who awards your client money and a three-time convicted child molester or a murderer . . . may get no money."). Other attorneys expressed less concern about their clients' criminal history. *See, e.g.*, N.D. Cal. Attorney E ("I don't care what crime he's committed or whatever."); S.D. Tex. Attorney A ("[M]ost of the people that have had a run in with the law, it's not their first time to the rodeo so to speak. I've represented people that were two-time convicted murderers in regards to a due process case, so that does not necessarily sway my opinion one way or another. It really just depends on the facts of the case and if I think it's something that's viable and more importantly is it something that I think the jury will understand.").

[138] *See supra* notes 35-39 (describing attorney fee arrangements).

[139] Despite these strong incentives, some attorneys accept cases with lower potential damages. Some attorneys reported that they are less concerned about taking a case with low damages if they expect to take the case to trial and win, some attorneys made clear that they are more interested in the values underlying the cases than the amount of recoverable damages, and some attorneys reported taking a combination of low- and high-damages cases to spread these financial risks. For further discussion of attorneys' varying views regarding the importance of damages in case selection, see Schwartz, *supra* note 42.

[140] *See, e.g.*, E.D. Pa. Attorney C ("[O]f course we look at

attorney from the Eastern District of Pennsylvania explained, "[i]n the intake of the case I want to know that--qualified immunity or not--that if I tell the story of what happened **[*1139]** here the person who is sitting on the other side hearing that story is going to go, 'Really? They did that?' If I don't get that reaction that's going to be a difficult case." [157]As another attorney from the Eastern District of Pennsylvania explained:

> [W]hen I say qualified immunity is not a major factor [in case selection,] I think that's because on excessive force particularly we're pretty careful to begin with, putting aside any possible qualified immunity. I think our screening is such that--because we know particularly with juries [that they] often rule for the police in these cases anyway--we want to make sure we've got a pretty strong claim. And that will incorporate almost always enough evidence to show what the officer claims to have happened isn't true and therefore, no qualified immunity. [158]

In response to a question about whether qualified immunity played into his case-selection decisions, an attorney from the Northern District of Ohio offered a similar answer:

> We're always evaluating: "Can we win?" If we think we can win, then we're not worried about the situation where it's close. Qualified immunity, I guess, would affect the marginal case where you're not sure you're going to win, and if it's close enough, the judge might say, "Well, I think the defendants were acting in good faith." But even just talking it through and think[ing] about it, I don't think qualified immunity affects our case selection. [159]

Several other attorneys agreed that they only take cases with egregious facts and clear constitutional violations because judges and juries tend to be very sympathetic to police and qualified immunity does not tend to be an issue in these types of cases. [160]

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damages."); N.D. Cal. Attorney A ("Well, there has to be some damage, obviously. Nominal damages don't get us anything in these cases, so you have to have some damage."); N.D. Cal. Attorney C ("I will usually start with the victim's injuries, either it's a serious injury or the video is outrageous or both."); E.D. Pa. Attorney F (reporting they consider "what their injuries are. For example, if I'm going to take a malicious prosecution case or a wrongful false arrest case, I consider how long they were in jail."); M.D. Fla. Attorney B ("Obviously you're looking for cases where the damages are significant."); M.D. Fla. Attorney G ("I look at the case--of course the seriousness of the abuse is a big driver."); S.D. Tex. Attorney B (describing the "severity of the injury" as one of the considerations when deciding whether to take a case); S.D. Tex. Attorney D (considers "the severity of the injury"); S.D. Tex. Attorney F ("[Y]ou look at the physical damages and the monetary damages just like you would in any other case.").

[141] *E.g.*, N.D. Ohio Attorney C ("[A]lways one of the issues is, you know, 'Were they physically assaulted by the police officer?' and if they say they [weren't], I'm happy for them. No one wants someone to be violently assaulted by a police officer. But [by] the same token there's quite a lesser chance that I will take the case. So, they have to illustrate to me some type of tangible and somewhat substantial damages . . . ."); N.D. Ohio Attorney F ("[W]e've been focusing on the cases where the damages are significant enough [for] the investment that we put into the case in time, and money, because you know these cases are expensive."); N.D. Ohio Attorney G ("Sometimes it's just the damages are really, really low."); M.D. Fla. Attorney F ("[I]f someone is just arrested, I'm not a big fan of those. Frankly, it's not worth my time."); S.D. Tex. Attorney C (explaining that the main factor going into a decision about whether to take a case "is the extent of the injuries; a lot of people get handcuffed or falsely arrested or whatever, or even taken to jail for a few hours or overnight. It's kind of like getting hit by a car but you don't sustain any personal injury so they don't have any kind of injuries. I'll let those go . . . ."); *accord* KRITZER, *supra* note 37, at 84 (reporting that, for contingency fee attorneys, "lack of liability and inadequate damages (singly or together) are the dominant reasons for declining cases, accounting for about 80 percent").

[142] S.D. Tex. Attorney D.

[143] M.D. Fla. Attorney E.

[144] *See* M.D. Fla. Attorney E; *see also* M.D. Fla. Attorney F (explaining he would be willing to bring cases in state court (which has a $ 300,000 damages cap) that he "would rate $ 50,000 to $ 200,000 and don't have a lot of expense," and describing them as "kind of safe bets, because of where I could get them to settle").

[145] *See* M.D. Fla. Attorney B ("You know distance might make a difference. So it's kind of a mathematical calculation of miles

[*1140] *2. Case Strategy Can Limit the Costs and Risks of Qualified Immunity*

A second reason that qualified immunity appears not to be a driving factor in case-selection decisions for some lawyers is that they have figured out how to structure cases in ways that limit the impact of the doctrine. [161]Attorneys reported bringing federal claims that cannot be dismissed on qualified immunity grounds--including claims for injunctive relief and claims against municipalities--when they think qualified immunity could be an issue. [162]

Other attorneys reported filing state law claims instead of or in addition to Section 1983 claims to minimize the threat of qualified immunity. As one attorney from the Middle District of Florida explained:

> [T]here are clearly instances where police officers find incredibly unique ways to violate people's rights, and I know that qualified immunity from the outset is going to be a problem. It may or may not deter me from accepting the case. But more commonly I'll try to find a way to work around it . . . . [163]

This attorney explains he will "work around" qualified immunity by bringing a state law claim instead of a Section 1983 claim. He explained:

> I can think of instances where I filed cases in the federal court, got the wrong judge. I voluntarily dismissed and refiled in the state court. . . . I'm always going to try to squeeze some money out of it in the state court if qualified immunity is going to be an impenetrable barrier. [164]

An attorney from the Eastern District of Pennsylvania described the same strategy, observing that, "[w]hen we have a Philadelphia police case, we routinely will file in state court alleging only state torts, where we don't have to run up against the [qualified immunity] doctrine."

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divided by damages or you know whatever the formula is . . . . I've done some pretty serious police cases in Key West which is, you know, like 12 to 14 hours from here."); N.D. Cal. Attorney D (explaining that "distance and location . . . is somewhat important"); M.D. Fla. Attorney D (explaining that she limits the number of federal cases she accepts in part because the federal courthouse is an hour from her office).

146 *See* N.D. Cal. Attorney E (explaining that the City of San Jose offers very low settlements before trial because they want "to discourage lawyers from bringing 1983 claims," but attorneys representing the county of Santa Clara "are willing to offer reasonable money to resolve the case sometimes" because "they look at it a little bit more from a business point of view"); M.D. Fla. Attorney F (reporting considering which jurisdiction is involved when deciding whether to take a case "because your chances of getting a resolution, short of getting in front of a jury . . . become more limited when you're . . . dealing with a government entity like the City of Jacksonville"); M.D. Fla. Attorney D (explaining that some contract defense attorneys' compensation is capped at $ 50,000, so defense counsel "runs me around until they've gotten themselves paid $ 50,000 and then they'll start talking about settlements").

147 M.D. Fla. Attorney E.

148 *See, e.g.*, M.D. Fla. Attorney A (describing his general reluctance to accept a case where the plaintiff was previously arrested, but accepting one case despite the plaintiff's criminal history because of the egregiousness of the facts); M.D. Fla. Attorney C ("[T]he stronger the Fourth Amendment violation, perhaps the less strong the client needs to be. Like, they can have obviously a horrific history of arrests, but if they're a proven innocent person, if the case isn't defensible, absent the police having a lie contradicting what's in their police reports, I'll probably do it. Unless the person is just such a jerk that I know that . . . they'll never be happy with anything that I do."); N.D. Ohio Attorney D ("I take cases for the following reasons. Number one, I really like the client and the client has a great case, the facts are--really demonstrate abuse and excessive of force. I take the case because I don't like the client necessarily but the facts are great. I take the case because--I'll take a case because everything sucks--not only do I not like the client but I don't like the facts, but the issue is so important that I feel the need to litigate it, which I'm criticized for [by] my office because I lose money, but it fulfills me."); N.D. Cal. Attorney G ("If it's a he-said, she-said situation, I'm really less inclined to take that unless there's some special factors like perhaps my client here is a salt of the earth little old lady who's never had problems, and she tells a story that's hard to believe, but the event can only be explained with her version, so, if there's something unique, I'll take a one-on-one, but it has to [be] something kind of really dramatic and novel and unique to that circumstance.").

149 *See, e.g.*, M.D. Fla. Attorney C ("I cannot wrap my arms around what it is that causes me to think that this is the case I can work with."); E.D. Pa. Attorney F ("[I]n the same way that the court considers the totality of circumstances, that's kind of how I consider the cases.").

150 M.D. Fla. Attorney C.

[165]As another Florida attorney explained, qualified immunity is "not the end-all be-all . . . .[I]t's a **[*1141]** barrier but it's a barrier to go around and if you're in litigation that's all you do every day all day anyway." [166]

3. The Risks of Qualified Immunity are Unpredictable

Some attorneys reported that qualified immunity plays a limited role in their case-selection decisions because courts' applications of the doctrine are so unpredictable. These attorneys observed that the judges in their jurisdiction have widely varying views of the doctrine, and so the dangers of qualified immunity often depend on which judge is assigned the case. [167]As one attorney from California explained, "qualified immunity is an issue everywhere, but it has more to do with what judge you get than the facts of the particular case." [168]Likewise, an attorney from Florida observed:

> It's almost sort of a luck of the draw. If you get a certain judge, you think, "All right, I'm going to survive summary judgment." Other judges you get, you think, "All right, I know . . . I'm going to have a summary judgment against me and I'm going to have to file at [the] Eleventh Circuit and get it reversed." [169]

Because these attorneys believe different judges apply qualified immunity differently, and attorneys cannot know which judge will hear their case until they file, they have concluded that it is too difficult to predict the threat of qualified immunity to a particular case before filing. The costs and risks of qualified immunity may affect these attorneys' litigation strategies and settlement calculations, but they reported it does not influence their

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151 E-mail from S.D. Tex. Attorney F to author (June 9, 2018, 7:53 AM).

152 E-mail from S.D. Tex. Attorney F to author (June 9, 2018, 7:29 AM).

153 *See* Appendix Table 7 (setting out interviewed attorneys' observations about whether and how qualified immunity influences their case-selection decisions).

154 *See* Appendix Table 7.

155 Alexander Reinert's interviews with plaintiffs' attorneys who bring *Bivens* cases revealed a similar perspective. *See* Reinert, *supra* note 48, at 493 ("[M]ultiple respondents indicated that they only accepted the most egregious cases for representation, which made it unlikely that qualified immunity would play a role.").

156 *See supra* notes 126-137 and accompanying text.

157 E.D. Pa. Attorney B.

158 E.D. Pa. Attorney G.

159 N.D. Ohio Attorney E.

160 *See, e.g.*, N.D. Cal. Attorney B (reporting that qualified immunity is not "where my decision point is . . . because it's all--I see it as so similar to whether you would win at trial"); N.D. Ohio Attorney C ("[I]t's kind of hard to argue that the officer has qualified immunity if the victim says the officer beat the crap out of the person. I don't see how I can argue qualified immunity for that . . . that's another reason why I'm looking for more those types of cases."); N.D. Ohio Attorney F (agreeing that qualified immunity is a consideration "but that doesn't scare me as much as what the case looks like if you're going to trial . . . . [I]f we feel that the case is actually good in terms of what happened, and there are disputed facts, then we don't worry, we know [the qualified immunity motion is] going to come most likely. But we factor that in, I mean, it's just part of the litigation."); M.D. Fla. Attorney A (explaining that qualified immunity "really doesn't even come in as the factor" when selecting cases because he only takes cases with "clear . . . civil rights violation[s]").

161 *Accord* Reinert, *supra* note 48, at 493 (observing that some civil rights attorneys avoid qualified immunity by filing cases in state court).

162 *See, e.g.*, E.D. Pa. Attorney G (explaining that he might not bring a damages claim regarding a right that is not clearly established, but might pursue a claim seeking injunctive relief); S.D. Tex. Attorney E (explaining that he can avoid qualified immunity by suing the municipality); N.D. Ohio Attorney G (describing a case his organization brought against a sergeant who organized a SWAT raid instead of the individual officers in the raid because they "didn't want to get distracted by their qualified immunity, which they thought they probably had").

163 M.D. Fla. Attorney C.

164 *Id.*

assessments about whether to file any given case.

4. Lawyers Willingly Accept Cases Vulnerable to Dismissal on Qualified Immunity

Several attorneys reported that they accept some cases, knowing they might be dismissed on qualified immunity grounds, because they hope the cases will have other types of benefits--they might clearly establish the law for future cases, reveal facts in discovery that could be used in future cases, **[*1142]** or reveal facts that would be meaningful to the plaintiff. [170]Other attorneys report filing cases they know are vulnerable to dismissal on qualified immunity grounds simply because the cases are too important not to bring. [171]As one lawyer explained:

> [W]e are constantly bringing cases where we contend that the officer either had a person in custody and increased the risk of harm to the person or through some affirmative act dramatically increased the risk of harm . . . . [T]hose are gut cases that we feel we have to pursue because in our book the officer conduct is terrible and we need to--if we can come up with a theory, we're going to pursue it. But those are going to be out there as high-risk cases. [172]

An attorney from the Middle District of Florida offered a similar perspective:

> I don't think [qualified immunity] plays that much [of a role in case selection]. I don't think much at all. I mean, I get excited if I find an Eleventh Circuit case[] that says that [the right is] "clearly established" . . . . But I don't shy away from [cases] because I'm afraid I'm going to lose, because I think there's some value in bringing these cases. I really do. [173]

Relatedly, attorneys explained that qualified immunity does not dissuade them from bringing cases because civil rights litigation is inherently risky, and qualified immunity is one of many risks in these cases. An attorney from the Northern District of California reported that qualified immunity was a challenge he signed up for by deciding to litigate civil rights cases.

> [Qualified immunity] comes with [the] territory and you have to just be prepared to go up to the Ninth Circuit because there's going to be many cases, if you win on qualified immunity, they're going to appeal, and if you lose, you're going to appeal, so . . . that's just part of the equation. If you aren't ready for that,

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165 E.D. Pa. Attorney C.

166 M.D. Fla. Attorney D.

167 *See, e.g.*, N.D. Cal. Attorney B ("[M]y feeling is it depends on the judge you get more than the case law that's out there."); N.D. Cal. Attorney E (explaining that qualified immunity does not play a role in case selection in part because "it depends on the judge. And then it depends on, you know, your panel in the Ninth Circuit. . . . A case [that] looks cool today on qualified immunity in two weeks might look pretty bad. So, I don't even think about it."); M.D. Fla. Attorney C (explaining that qualified immunity does not influence his case filing decisions because "it . . . depends on which judge you get . . . and you're not going to know who the judge is until you file the case"); *see also infra* notes 168-169 and accompanying text.

168 N.D. Cal. Attorney C.

169 M.D. Fla. Attorney A.

170 *See, e.g.*, S.D. Tex. Attorney C ("[I]f someone comes in and they got the crap beat out of them, or something happened to their spouse or kid or whatever I'll still take [their case] to just create a paper trail about the particular agency or about the particular officer so that if something happens again, then at least there will be something there for someone else."); *see also* Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191 (2014) (describing the ways meritless--as opposed to frivolous--litigation can reveal valuable facts or help advance future changes in the law).

171 *See, e.g.*, M.D. Fla. Attorney G (reporting that he does not "shy away" from cases that might be dismissed on qualified immunity "because I think there's some value in bringing these cases. I really do. I'm not in the majority I can promise you."); N.D. Ohio Attorney F ("[T]here are areas where we feel that the case is important enough to take the risk of losing on qualified immunity, just litigating it [is important]."); *see also infra* notes 172-173 and accompanying text.

172 N.D. Ohio Attorney G.

173 M.D. Fla. Attorney G.

you shouldn't be doing these cases. [174]

[*1143] Indeed, many attorneys described civil rights litigation as a very financially risky line of work and reported that attorneys who litigate these cases are generally willing to work at a discount or loss because they believe in the underlying principles. [175]

Models of case selection assume that attorneys and plaintiffs are rational economic actors and so will not file a case in which the financial risks outweigh the potential benefits. Scholars regularly recognize that these models do not capture noneconomic motivations for filing suit, but nevertheless rely on the model to predict filing decisions. [176]Yet, for many attorneys I interviewed, decisions about which police misconduct cases to take--and decisions to pursue this line of work more generally--are not guided exclusively or primarily by economic calculations. Many of these same attorneys reported that they are not dissuaded from taking cases by the risk of dismissal on qualified immunity grounds.

C. The Cases Some Lawyers Decline Because of Qualified Immunity

Although all attorneys I interviewed reported that qualified immunity increases the costs and risks of Section 1983 litigation, and twenty-two attorneys I interviewed agreed that qualified immunity is among their considerations when selecting cases, just eleven agreed that concerns about **[*1144]** qualified immunity cause them to decline cases with any regularity. [177]These attorneys described three types of cases that they are inclined to reject because of concerns about qualified

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[174] N.D. Cal. Attorney C.

[175] *See, e.g.*, E.D. Pa. Attorney B (explaining that he is "glad that [his] practice doesn't just depend on civil rights cases because that's a very tough way to make a living"); E.D. Pa. Attorney D ("Personally, I enjoy [constitutional litigation] but [qualified immunity is] why a lot of attorneys won't do it. You're not going to make a lot of money from it. You can, but you have to stick with it and it is . . . sometimes tough-going, and, as I said, it's not for the faint-hearted. You have got to be dedicated to it."); N.D. Cal. Attorney B ("[T]hese cases don't pay, you know . . . I basically had to be ready to retire before I could financially take these cases . . . ."); N.D. Cal. Attorney C (observing that some people in the Northern District of California have made money bringing civil rights cases, but "you don't do [this work] because you become a lawyer and you want to get rich. It's, you know, you do it because it's a calling."); N.D. Cal. Attorney D ("[Civil rights litigation is] not lucrative, and it has to be a labor of love, because anyone who is doing it simply to carve out a niche to make money, simply is not making money as effectively as they could be, and is going to be disappointed by it."); N.D. Ohio Attorney D ("I get that people don't want to do [police misconduct litigation] because there's easier ways to make money. You know you could be a candy salesman, selling M&Ms or Snickers, and have a route and you'll have a more consistent income than some civil rights lawyers."); M.D. Fla. Attorney A (describing civil rights cases as "a long upward battle that's not financially rewarding"); M.D. Fla. Attorney C ("[L]ooking back on [my decision to take civil rights cases] from the financial perspective, obviously it's not the best decision."); M.D. Fla. Attorney D ("[B]asically anything else will make you more money."); M.D. Fla. Attorney F (reporting that he takes civil rights cases out of "public interest . . . I don't rely on those cases like, 'Oh, wow. That's going to be--as a private practitioner, a big hit.' I look at it more like . . . holding them accountable, a real wrong took place, and I think there's exposure.").

[176] *See, e.g.*, FARHANG, *supra* note 34, at 22 (recognizing that "the choice of whether or not to sue may be influenced by forms of utility or disutility distinct from and not reducible to money"); Hubbard, *supra* note 37, at 712-13 (describing the possibility that some lawyers are not motivated by financial calculations of risk and reward).

[177] *See, e.g.*, E.D. Pa. Attorney A ("[W]e don't take a case [when it] seems pretty clear to us it's going to run into serious immunity issues."); E.D. Pa. Attorney D ("[T]he false arrests--if I think they are going to ultimately get qualified immunity, then that claim is very difficult to prove. If I think that the individual officers are going to get out on qualified immunity, I will decline it."); N.D.

immunity.

First, several attorneys explained that qualified immunity makes them less likely to accept a case if there is not a prior decision holding similar facts to be unconstitutional. [178]Presumably, the existence of helpful precedent will always militate in favor of accepting a case. But the Supreme Court's qualified immunity doctrine creates a particularly forceful pressure to find a prior case on point. The Court has repeatedly stated that government officials violate clearly established law only when "'[t]he contours of [a] right [are] sufficiently clear' that *every* 'reasonable official would [have understood] that what he is doing violates that right." [179]Although attorneys reported they are more inclined to decline cases when they cannot find factually similar precedent because of concerns about qualified immunity, [180]one attorney made clear that he would be willing to take a case involving a "de minimis violation" if there was a prior case on point. [181]

[*1145] Second, several attorneys reported that qualified immunity doctrine discourages them from taking cases where they interpret the qualified immunity standard to require intentional misconduct. [182]Attorneys repeatedly used false arrest cases as an example: although an officer has violated the Fourth Amendment if he made an arrest without probable cause, he is entitled to qualified immunity if he had "arguable probable cause"--meaning he reasonably, though mistakenly, thought there was probable cause to arrest. [183]In one attorney's view, plaintiffs have to show that defendants "were fabricating evidence" to defeat a qualified immunity motion in a false arrest case. [184]Several attorneys offered examples of false arrest cases that they had declined because the plaintiff could not show that the officers engaged in intentional wrongdoing. [185]These same lawyers were less concerned about qualified immunity in other types of cases--repeatedly noting that qualified immunity plays little role in their decisions about whether to accept excessive force

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Cal. Attorney A ("I have to determine what the story is going to be at trial . . . so I can determine whether or not we're actually going to get by summary judgment on a qualified immunity issue."); N.D. Ohio Attorney A ("The immunity doctrines are everything in . . . real world litigations."); M.D. Fla. Attorney E ("I married a lot of bad brides over the years . . . . And that has resulted in some painful losses over the years. Where QI gets granted, and you're just shaking your head like, how. So now, I'm--I would [say]--I'm definitely not gun shy. I'm just more cautious before I get involved . . . .").

178 *See, e.g.*, N.D. Cal. Attorney D ("[I]t seems like if there is not a case directly on point indicating that the law was clearly established to constitute a violation . . . then you risk being dumped on summary judgment because of qualified immunity."); S.D. Tex. Attorney A (explaining that when deciding whether to accept a case he will assess whether the violation was "clearly established"); S.D. Tex. Attorney B ("[Q]ualified immunity [plays a role in case selection] and whether or not there was any established law that would support the position that the officer knew that the conduct was unconstitutional at the time."). A few attorneys observed that the challenge of finding prior precedent is more difficult in false arrest cases than in excessive force cases. *See* E.D. Pa. Attorney G (explaining that concerns about qualified immunity play a limited role in case selection for excessive force cases, but that in some false arrest cases his firm will conclude there was a constitutional violation but expect that a court will find that facts are unique and the officer acted in good faith, and grant qualified immunity); N.D. Cal. Attorney G (explaining that in excessive force cases "there are a lot more cases and even though you may not have a case on all fours, it's easier to make the argument that the officer should have known that what he was doing violated the Constitution when he struck that person while he was on the ground in handcuffs or with one handcuff on with his face down, right? . . . You don't need another case that says that. You can just argue generally.").

179 Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (alteration in original and emphasis added) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

180 *See supra* note 178.

181 N.D. Cal. Attorney D.

182 Presumably, any claim requiring proof of intent will be more difficult to prove. *See generally* Aziz Z. Huq, *What is Discriminatory Intent*?, 103 CORNELL L. REV. 1211 (2018) (describing the challenges of proving intent). In false arrest cases, the constitutional violation does not require proof of intentional misconduct, but attorneys believe defeating a qualified immunity motion does.

183 *See, e.g.*, Lawrence v. Gwinnett Cty., 557 F. App'x 864, 870-72 (11th Cir. 2014) (describing and applying the "arguable probable cause" standard).

cases. [186]

[*1146] Third, attorneys explained that the costs of defending against qualified immunity inform their assessment of whether a case makes financial sense to accept. As an attorney from the Northern District of California explained:

> [T]hey're going to appeal every single time that their qualified immunity motion is denied and that adds two years minimum to the litigation and, I mean, this case I'm about to try in February was up on appeal for three years at least. So, that's something that goes into the decision. Whereas you used to think okay if I go through the discovery I get what I want, we go through mediation, this case could be over in two years. Now you have to figure minimum five years before you get to trial . . . . [W]e're trial lawyers and we don't want to be appellate lawyers. We want to win a trial and now you have to factor in the appeal . . . . It just makes the case that more difficult. [187]

Attorneys sharing this view are presumably more likely to decline low damages cases because their expected recovery will be smaller than the expected cost of litigating the qualified immunity defense. [188]

Attorneys I surveyed agreed that qualified immunity makes them reluctant to accept false arrest cases and cases with low damages. In the survey, I described a scenario in which police handcuffed an African American woman for thirty minutes on the mistaken belief that she was driving a stolen car, and asked whether the respondent would accept the case and, if not, why. [189]Forty-two of the ninety-two attorneys who answered this question reported that they would not accept the case. [190]Of those who offered **[*1147]** explanations for their decisions to decline the case, many wrote that the case would likely be dismissed on qualified immunity grounds because the officers did not engage in intentional misconduct, and that the expenses of litigation--including litigating qualified immunity--would be

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184 E.D. Pa. Attorney D.

185 *See, e.g.*, E.D. Pa. Attorney A ("[T]here's not a day that goes by that I don't get a call from somebody who was just acquitted because it turns out that the person who said that they robbed them or stole from them or assaulted them had made it all up and the police arrested them anyway. And you know, these kinds of cases have qualified immunity written all over them. The police rely on a report. They have no reason to suspect that the person's making it up . . . . [W]e don't take a case that seems pretty clear to us it's going to run into serious immunity issues."); E.D. Pa. Attorney C ("[T]he issue of qualified immunity for us usually goes to false arrest type situations."); E.D. Pa. Attorney D ("[T]he cases that I primarily decline are those dealing with just strictly false arrests. If I decline them at all--and I would say there is a small percentage of those that I decline--but the ones that I do decline, the false arrests if I think they are going to ultimately get qualified immunity, then that claim is very difficult to prove."); E.D. Pa. Attorney G (describing false arrest cases he has reviewed where he believed there was a Fourth Amendment violation, but the judge was likely to find "arguable probable cause"); N.D. Cal. Attorney G ("In the false arrest arena, that is more problematic than in the excessive force arena."); M.D. Fla. Attorney E ("I just spent this morning on the phone on a DUI case with the ex-cop in New York that got arrested for DUI. And he's got so much righteous indignation. And a lot of it is properly placed . . . . But at the end of the day . . . he's probably going to have to pay me hourly to litigate that case, because I don't see a happy ending under QI, because DUI is an opinion-based crime for the large part."); S.D. Tex. Attorney F (explaining the challenges of proving "arguable probable cause" in false arrest cases).

186 *See, e.g.*, E.D. Pa. Attorney A (explaining that he is "certainly less concerned" about qualified immunity in excessive force cases); E.D. Pa. Attorney D (explaining that there is "no qualified immunity" in excessive force cases); E.D. Pa. Attorney G (explaining that his analysis of excessive force cases would be no different in a world without qualified immunity, but that in cases involving probable cause there might be "somewhat [of] an uptick in the cases we would bring"); N.D. Cal. Attorney G ("[T]here are a lot more cases [in the excessive force area than in the false arrest area] and even though you might not have a case on all fours, it's easier to make the argument that the officer should have known that what he was doing violated the Constitution.").

187 N.D. Cal. Attorney B. Note, though, that this attorney concluded that qualified immunity is not where her "decision point" is. *Id.*; *see also* N.D. Ohio Attorney C (describing his concern about cases going up on interlocutory appeal but also reporting that qualified immunity has more to do with what judge you get than the facts of the particular case).

188 *See, e.g.*, E-mail from N.D. Ohio Attorney B to author (Jan. 8, 2018, 11:14 AM) (explaining that, because he "work[s] for

greater than the recoverable damages. [191]

D. Does Qualified Immunity Screen Out Lawyers?

Qualified immunity may also cause lawyers to reduce the number of civil rights cases they bring and discourage some attorneys from filing civil rights cases altogether. One attorney I interviewed reported that concerns about qualified immunity had caused him to stop taking Section 1983 cases. [192]This attorney has a diverse civil practice which at one point included a few civil rights cases. He filed one Section 1983 case in the Southern District of Texas during the study period with a colleague from Dallas. [193]Whenever he has co-counseled a civil rights case with that colleague, they "brief and brief" the cases on qualified immunity, but the cases "get pitched at summary judgment." [194]He has not filed any police misconduct cases since **[*1148]** 2012; in fact, he reports that he is "out of the business for the most part of suing the government. Simply because of all the immunities it is too difficult to be successful against them." [195]

I do not know how often lawyers stop bringing Section 1983 cases because of the challenges and burdens associated with qualified immunity. My study almost certainly underrepresents attorneys so discouraged by qualified immunity that they have decided not to bring additional cases--attorneys no longer practicing in this area are less likely to be captured in the docket dataset, and those that are may be less likely to volunteer to participate in a survey or interview about civil rights litigation. But I found a great deal of evidence to suggest that the challenges of civil rights litigation--including qualified immunity--may have caused lawyers to decrease the number of civil rights cases they take or stop taking these cases at all.

Several attorneys I interviewed reported that they knew of personal injury and criminal defense attorneys who took one or two Section 1983 cases and then decided to stop bringing the cases because

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an unrestricted legal services program and receive[s] a salary . . . [he] can take cases that private lawyers won't take because they're not financially rewarding enough to justify the work. . . . [He] imagine[s] private lawyers trying to make a living have to make some hard decisions about whether to bring a case and whether to assert claims that might end up with qualified immunity fights.").

189 The full question read as follows: "Client A comes to your office. She is an African-American woman. She has no prior arrests. She tells you that, six months prior, she drove home from work and parked her car next to her apartment building. As she exited the vehicle she was stopped by two police officers. The officers told her that the vehicle she was driving was reported stolen and demanded to know what she was doing with the car. The officer had put the wrong license number into the police department computer system. The woman explained to the officer that she had her title and registration in the car, but the officer refused to check. The woman says that the officer handcuffed her hands very tightly for about one-half hour, at which point she was released. She reports continuing pain, tingling, and numbness in her wrist, continuing emotional distress, and $ 8750 in medical bills." Joanna C. Schwartz, Police Misconduct Attorney Survey (UCLA, IRB No. 16-000470).

190 *See* Schwartz, *supra* note 36.

191 *See, e.g.*, N.D. Cal. Survey 6 ("Her damages are too low[,] and the police made an 'honest' mistake which could be dismissed on summary judgment."); N.D. Cal. Survey 10 ("Court would probably dismiss case based on qualified immunity. Also, damages not high enough to warrant the time and money needed to prosecute this case."); N.D. Cal. Survey 14 ("The expenses of litigation, unfortunately, would be greater than any expected recovery (including attorney's fees.)"); M.D. Fla. Survey 13 ("The expense, cost, and burden of litigation in a case like this does not make economic sense for the law firm . . . . Claims against the officers could be dismissed under qualified immunity, and any *Monell* claim against the agency may be dismissed unless there is a policy or custom of this activity."); M.D. Fla. Survey 14 ("An affidavit from the police officer saying that he [or] she believed they had probable cause despite the error police made, given the fact that the error was not evident and known to the arresting officer, will suffice for qualified immunity purposes."); N.D. Ohio Survey 2 ("There's not enough damages. The cost of taking these cases to trial is routinely higher than the amount she is likely to recover."); N.D. Ohio Survey 15 ("May not get past immunity. Client hasn't sustained sever[e] injuries."); N.D. Ohio Survey 16 ("Fees incurred in litigation (time spent) will be wished away by the defense and the federal courts . . . . Qualified immunity is a nightmare because federal district courts will grant it even where not warranted. The potential damages therefore must be much higher."); E.D. Pa. Survey 19 ("[I]mmunity."); S.D. Tex. Survey 13 ("I don't think qualified immunity can be defeated and *Monell* almost impossible without

they were simply too challenging. [196]As an attorney from Texas explained:

> [A] lot of lawyers bring one case and then when they're confronted with what the rules and the laws are, they don't do it, because the cases are very attractive to a personal injury lawyer who doesn't know better. He goes, "Look, there's a dead guy! What's that worth, $ 10, $ 20 million? I'm going to retire!" Then they **[*1149]** run into the civil rights laws. They spend $ 25,000 on their case and they lose it. And that's the last one they bring. [197]

An attorney from Florida similarly observed, "I think there's a lot of . . . one and two and out . . . . [T]here's only so much money you can lose before you figure out that it's not the right way to go." [198]

Other attorneys reported that they have reduced the number of civil rights cases they accept because the cases are expensive to litigate and difficult to win. [199]For example, one attorney from Pennsylvania explained that he now spends the bulk of his time on personal injury and medical malpractice cases, which he considers "easier work that pays a lot more money." [200]Another attorney from Florida used to bring only police misconduct cases but now litigates dental malpractice cases as well with the hopes that "the dental stuff perhaps will pay some bills." [201]Even attorneys who have been bringing police misconduct cases for decades and are experts in the field report that these cases are often money losers. [202]

Responses from surveyed attorneys tell a similar story. Although the ninety-four attorneys I surveyed filed more cases, on average, than the

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some prior racist incidents involving the same officers."). Other attorneys raised concerns related to other factors that increase the costs and risks of a case, including judge and jury bias against plaintiffs and facts that were not sufficiently egregious. *See, e.g.*, M.D. Fla. Survey 9 ("Injuries have to be substantial in the jurisdiction where I practice to have any real chance of recovery."); N.D. Ohio Survey 16 ("Unwarranted hostility to such claims . . . . [W]e would like to take these cases, if federal courts were not so hostile."); S.D. Tex. Survey 2 ("Jurors (and judges in my circuit) forgive an 'honest mistake.'"); S.D. Tex. Survey 5 ("Not an aggregious [sic] scenario for Texas."); S.D. Tex. Survey 7 ("[B]etween difficult [j]udges and [j]uries, acceptable outcomes on similar cases are rare.").

192 *See* S.D. Tex. Attorney G.

193 *Id.*

194 *Id.*

195 *Id.*

196 *See, e.g.*, E.D. Pa. Attorney D (explaining that qualified immunity is "certainly a high burden and that's why a lot of attorneys don't like to do" civil rights work); N.D. Cal. Attorney C ("I've seen a lot of lawyers who were successful personal injury attorneys and thought that, 'oh, wow, well, I'm a good, successful PI attorney, I can take this police case and turn it into a nice settlement, a nice verdict,'" and then are unprepared to litigate police misconduct cases because they are in federal court and juries are less able to relate to the plaintiffs); N.D. Cal. Attorney F (explaining that some attorneys "like the idea of the work but then when you start doing it and you realize that you're not going to be the big hero that you may have thought you were going to be . . . [s]ome people get a little gun shy or they feel like, well, I'm not going to take a case unless I have a guaranteed payment. That's happening."); M.D. Fla. Attorney A ("Not many people take these cases because you really don't make any money on them."); M.D. Fla. Attorney D ("I think it's important work so I keep doing it but the colleagues I know that used to do it have dropped out, because they don't find it to be lucrative enough."); M.D. Fla. Attorney F (explaining that there are "very few [lawyers] who can make a living just doing these claims"); M.D. Fla. Attorney G (suggesting that eliminating qualified immunity "would encourage other lawyers to take these cases"); S.D. Tex. Attorney A ("[T]here are people that I hear of occasionally filing one [civil rights case], but they're the same people that eventually decide they never want to file one again, and usually call me at the end of the day saying, 'oh my god this case is screwed up, can you help me?'"); *see also infra* notes 197-198 and accompanying text.

197 S.D. Tex. Attorney F.

198 M.D. Fla. Attorney C.

199 *See, e.g.*, E.D. Pa. Attorney D (explaining that he has brought police misconduct cases for twenty-four years but that, in recent years, he "transitioned into . . . easier work that pays a lot more money, which is personal injury and medical malpractice"); M.D. Fla. Attorney E ("I'd say that I probably went from 50%, maybe 60% [civil rights cases] to 20 to 25% over the years . . . as I commonly say if you like to have your teeth in your hand after a fight, then do civil rights litigation. You'll enjoy going to the dentist after most of the battles. And so, you know, I've decreased the number that I [pick]."); *see also infra* notes 200-201 and

1,022 attorneys who entered appearances in the cases in my docket dataset, the majority of surveyed attorneys from each of the five districts spend 25% or less of their time on police misconduct cases. Twenty-five (27.7%) of the ninety-four attorneys I surveyed reported that the percentage of time they spent on police misconduct cases was greater than the percentage of fees they received from police misconduct litigation--only two of the ninety-four attorneys I surveyed reported the converse. [203]

Attorney appearances in the 1,183 cases in my five-district docket dataset offer additional circumstantial evidence to suggest that many lawyers may bring few civil rights cases--or stop bringing civil rights cases **[*1150]** altogether--because of qualified immunity and other barriers to relief. More than three-quarters of the 1,022 attorneys who entered appearances in the Section 1983 cases in my docket dataset entered just one such appearance over the two-year period of my study. [204]Just 3% of the attorneys entered six or more appearances in Section 1983 cases involving law enforcement during the study period. [205]There is significant regional variation in attorneys' filing practices--just one attorney entered six or more appearances in Section 1983 cases in the Southern District of Texas during the two-year study period, whereas fifteen attorneys entered six or more appearances in Section 1983 cases in the Eastern District of Pennsylvania during the same period. [206]This regional variation tracks variation in the challenges associated with qualified immunity: In the Southern District of Texas, qualified immunity is far more often raised and granted than in the Eastern District of Pennsylvania. [207]

It is difficult to parse out the extent to which qualified immunity--as opposed to other challenges associated with Section 1983 litigation--might be discouraging lawyers from bringing civil rights cases. As I explore in other work, multiple aspects of civil rights litigation--including jury bias, procedural hurdles, and limitations on state law claims--may make it more difficult to practice civil rights law in Texas than in Pennsylvania. [208]But, assuming others share the views of the attorney from the Southern District of Texas I interviewed, qualified immunity not only screens out some cases, but also screens out some lawyers.

V. IMPLICATIONS

In this Part, I consider the implications of my study for our understanding of the role qualified immunity plays in constitutional litigation and the extent to which qualified immunity fulfills its intended policy goals. I then explore how doctrinal adjustments would better align qualified immunity, and Section 1983 doctrine more generally, with the realities of constitutional litigation.

[*1151] *A. Understanding the Role of Qualified Immunity in Constitutional Litigation*

In a prior study I found that courts dismiss only a small percentage of police misconduct cases on

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accompanying text.

200 E.D. Pa. Attorney E.

201 M.D. Fla. Attorney C.

202 *See supra* note 175.

203 *See* Appendix Tables 4-5. Appendix Table 4 sets out the percentage of time surveyed attorneys reported spending on police misconduct cases, and Appendix Table 5 sets out the percentage of their fees surveyed attorneys reported collecting from police misconduct cases.

204 *See* Appendix Table 1. Note, though, that some of these attorneys may have filed civil rights cases in federal districts that are not the focus of my study, or in state courts.

205 *See* Appendix Table 1 (setting out attorney appearances during the study period).

206 *See* Appendix Table 1.

207 *See supra* notes 95-97 and accompanying text.

208 *See generally* Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. (forthcoming 2020) (describing these various factors and the ways in which they combine to create dramatically different environments for civil rights litigation).

qualified immunity grounds. [209]This study makes clear that formal dismissals only tell part of the story of qualified immunity's role in constitutional litigation. Qualified immunity motions had to be researched, briefed, and decided in almost one-third of the Section 1983 cases in my dataset. Stays while motions in the district court and on interlocutory appeal were pending increased delay. [210]Although the absolute risk of dismissal on qualified immunity grounds is low, my surveys and interviews make clear that the risk of dismissal weighs heavily on the minds of attorneys who file these cases--particularly because qualified immunity is most often raised and successful at summary judgment, after counsel, often representing plaintiffs on contingency, have invested in discovery.

Apart from the costs and challenges associated with litigating qualified immunity in individual cases, qualified immunity doctrine increases the difficulty of engaging in the practice of civil rights litigation. Attorneys I interviewed echoed what judges and scholars have long said--qualified immunity is exceedingly complex, and it takes time to understand and stay abreast of changes in the doctrine. [211]In addition, the pervasive threat of interlocutory appeals means attorneys must be comfortable litigating in both trial and appellate court. The costs and risks associated with qualified immunity are greater in some districts than in others. But lawyers around the country agree that the doctrine makes it more costly to bring these cases and more difficult to recover. [212]

Models of attorney decision-making behavior suggest that attorneys would decline cases vulnerable to motion practice and dismissal on qualified immunity grounds because of these costs and risks. But my study demonstrates that the relationship between these costs and risks and attorneys' case-selection decisions is not so straightforward. Twenty-four of the thirty-five attorneys I interviewed reported that qualified immunity rarely or never causes them to decline cases; another ten attorneys reported that the doctrine plays a more significant role in their decision-making process; and one attorney reported having stopped bringing Section 1983 cases because **[*1152]** of the doctrine. Attorneys so discouraged by qualified immunity that they abandon their civil rights practice are likely underrepresented by my study. [213]But I cannot otherwise estimate the extent to which my data reflect attorney perceptions and practices in the five districts I studied or around the country.

What does seem clear is that qualified immunity plays a range of roles in attorneys' case-selection decisions, and its power as a prefiling filter is highly dependent on which attorney is considering the case. [214]The lawyers I interviewed and surveyed appear to agree that qualified immunity increases the costs and risks of bringing civil rights cases. Returning to the language of standard models of case selection, qualified immunity increases the cost of litigation (C), decreases the probability of

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209 Schwartz, *supra* note 5.

210 *See supra* notes 86-89 and accompanying text; *see also* Reinert, *supra* note 71, at 2080 (finding cases in which qualified immunity was raised took longer, on average, than the median of all federal civil rights cases filed during the same period).

211 *See supra* notes 81-85 and accompanying text.

212 *See supra* Part III.

213 *See supra* notes 192-208.

214 Although my top-line conclusion appears to contrast with that of Reinert, *supra* note 48, at 494, who concluded that: "Most attorneys seem to select cases to avoid any possible qualified immunity issues arising in the litigation[;]" our observations from our interviews are largely consistent. Reinert and I both find that attorneys believe qualified immunity doctrine increases the costs and risks of constitutional tort litigation. *See id.* We also both find that some attorneys report qualified immunity plays a limited role in case selection because "they only accept[] the most egregious cases for representation, which ma[kes] it unlikely that qualified immunity would play a role," that some attorneys limit the impact of qualified immunity by filing in state court, that some attorneys do not consider qualified immunity because cases vulnerable to dismissal advance other interests, and that attorneys who do consider qualified immunity when selecting cases may decline cases alleging novel or ill-defined constitutional violations. *See id.* at 493-94.

success (*p*), and can reduce the size of possible judgments (J). But the lawyers I interviewed held different views about the extent to which these costs and risks duplicate other considerations at case selection, the magnitude of these costs and risks, the predictability of these costs and risks, the attorneys' ability to mitigate these costs and risks through creative litigation strategy, and their willingness to accept cases despite these costs and risks. [215]

To some lawyers, the challenges associated with qualified immunity appear insurmountable; others view qualified immunity as one of many challenges lawyers are trained to get around. Some lawyers shy away from false arrest cases because they must show an officer knowingly arrested their client without probable cause in order to defeat a qualified immunity motion. Others willingly accept these same types of false arrest cases, bringing state law claims in state court where qualified immunity cannot be raised as a defense. Some lawyers file cases they consider likely to be dismissed on qualified immunity grounds because they advance important interests--the cases may clearly establish a constitutional right for future cases, develop evidence of unconstitutional conduct by the officer or department that can be **[*1153]** used in future cases, or reveal information important to the plaintiff or her loved ones. Other lawyers view civil rights cases as sensible to bring only if they are likely to be financially remunerative. Lawyers, new to civil rights litigation, may lose their first few cases on qualified immunity grounds. [216]Following these defeats, some lawyers may decide to dedicate the time necessary to learn how to avoid or defeat future motions raising the defense; others may decide never to bring another civil rights case again.

How an attorney views and weighs the costs and risks associated with qualified immunity at case selection may be a product of any number of things, including that attorney's prior experience bringing civil rights cases, the percentage of their legal practice dedicated to these cases, or their motivations for entering into this line of work. Attorneys' approaches to qualified immunity at case selection may also be influenced by the jurisdiction in which they practice. My research shows that qualified immunity imposes more risks and costs in some parts of the country than in others. Other challenges associated with Section 1983 litigation--including unsympathetic juries and judges, and other substantive and procedural barriers--may also be particularly difficult to overcome in those same jurisdictions. [217]In a related project, I explore how these various factors combine to create what I call civil rights ecosystems around the country. [218]For now, it is worth noting that the costs and risks of litigating Section 1983 cases--including the costs and risks of qualified immunity--do not fall evenly across the country, and that that variation may well lead to region specific case-selection decisions.

B. Evaluating the Purposes Served by Qualified Immunity

My study also reveals insights critically important to ongoing debate about whether qualified immunity doctrine achieves its intended policy goals. Although the Supreme Court has repeatedly described qualified immunity doctrine as drawn from common law defenses in existence when Section 1983 became law, [219]it acknowledged

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[215] Variation in attorneys' weights and measurements of these factors complicates standard models of case-selection decisions. *See supra* note 34 and accompanying text.

[216] *See supra* notes 196-198 and accompanying text (describing examples of this type of loss by novice civil rights attorneys).

[217] *See* Schwartz, *supra* note 208.

[218] *See id.*

[219] *See, e.g.*, Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993) (asking whether immunities "were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them" (quoting Pierson v. Ray, 386 U.S. 547, 554-55 (1967))); Malley v. Briggs, 475 U.S. 335, 342 (1986) ("[O]ur role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling

over thirty years ago that it **[*1154]** "completely reformulated qualified immunity along principles not at all embodied in the common law." [220]The Court restructured qualified immunity doctrine to balance "two important interests--the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." [221]Scholars, advocates, and courts have criticized qualified immunity doctrine for failing to properly balance these interests. [222]These critics contend that qualified immunity is unnecessary and ill-suited to shield officers from the costs and burdens of being sued, and undermines interests in government accountability. [223]My findings about qualified immunity's selection effects support each of these criticisms.

1. Qualified Immunity Is Unnecessary and Ill-Suited to Shield Government Officials from "Insubstantial" Cases

The Supreme Court imagines that qualified immunity is important to "society as a whole" [224]because it shields government officials who have acted reasonably from the "harassment, distraction, and liability" [225]associated with litigation. Specifically, the Court expects that qualified immunity shields government officials from financial liability and from the burdens of participating in discovery and trial in insubstantial cases, thereby encouraging government officials to vigorously enforce the law and members of the public to accept public office. For decades, the Court's assumptions about qualified immunity's role in constitutional litigation and the deterrent effect of litigation went unchallenged. [226]But, in recent years, **[*1155]** mounting evidence has shown that qualified immunity is neither necessary nor well-suited to perform its intended role. Police officers virtually never contribute to settlements and judgments entered against them, and there is no reason to believe that other types of government officials contribute more often. [227]Cases are rarely dismissed on qualified immunity grounds before discovery and trial. [228]And many other doctrines and procedural rules--including courts'

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policy choice, and that we are guided in interpreting Congress' intent by the common-law tradition.").

220 Anderson v. Creighton, 483 U.S. 635, 645 (1987).

221 Pearson v. Callahan, 555 U.S. 223, 231 (2009).

222 For courts' and advocacy groups' criticisms of qualified immunity, see *supra* notes 26-27 and accompanying text. Scholars also raise criticisms of qualified immunity. *See, e.g.*, Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887 (2018) (arguing that qualified immunity has prevented the development of the law, overprotected officers, created confusion about the applicable standards, and increased the cost and complexity of civil rights litigation); Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1 (1997) (arguing that qualified immunity is ill-suited to resolve cases at summary judgment); John C. Jeffries, Jr., *What's Wrong with Qualified Immunity*?, 62 FLA. L. REV. 851 (2010) (criticizing qualified immunity doctrine for overly focusing on prior factually similar precedent instead of whether an officer clearly violated the Constitution); Schwartz, *The Case Against*, *supra* note 2 (describing each of these criticisms of qualified immunity).

223 *See* sources cited *supra* note 222 (describing these criticisms).

224 White v. Pauly, 137 S. Ct. 548, 551 (2017) (quoting *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015)).

225 *Pearson*, 555 U.S. at 231.

226 *See* Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2094-95 (2018).

227 *See generally* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) (studying litigation payouts in forty-four of the largest law enforcement agencies and thirty-seven smaller agencies over a six-year period, and finding that officers paid approximately 0.2% of the dollars awarded to plaintiffs and never contributed to the payment of a punitive damages award); *see also* Michael L. Wells, *Qualified Immunity After* Ziglar v. Abbasi: *The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 406 (2018) (concluding that my indemnification findings, *see* Schwartz, *supra* note 227, likely "are valid across the whole field of constitutional tort litigation").

228 *See* Schwartz, *supra* note 5 (finding that 0.6% of 1,183 cases filed in five federal districts over a two-year period were dismissed at the motion to dismiss stage and 2.6% were dismissed at summary judgment on qualified immunity grounds).

power to dismiss pro se cases sua sponte at the outset of a case, pleading rules that require plaintiffs to allege "plausible" claims, summary judgment requirements, and substantive constitutional requirements--are available to weed out cases before discovery and trial. [229]One of the only remaining ways qualified immunity might serve its intended goal is by screening out insubstantial cases before filing, thereby sparing government officials the burdens and distractions of litigation. This study offers two important reasons to conclude that qualified immunity cannot be justified on this ground.

First, qualified immunity does not reliably cause lawyers to screen out cases vulnerable to the defense. Two-thirds of the attorneys I interviewed stated that they rarely or never decline cases because of concerns about qualified immunity. Some attorneys reported that qualified immunity plays little role in their case-selection decisions because other considerations cause them to select only the most egregious cases, which are not vulnerable to dismissal on qualified immunity grounds. These responses suggest that qualified immunity is unnecessary to screen out weaker cases; other concerns already dissuade attorneys from bringing them.

Other attorneys' explanations for their inattention to qualified immunity make clear that the doctrine is in many ways ill-suited to screen out cases before filing. Because the application of qualified immunity is judge-dependent, **[*1156]** some attorneys conclude that it does not make sense to decline a case because of the doctrine; instead, they file the case, see which judge is assigned, and then decide how to proceed. Because qualified immunity applies to Section 1983 damages actions against individual officers--but not municipal liability claims, claims for injunctive relief, or state law claims--attorneys report including claims invulnerable to dismissal on qualified immunity grounds to minimize the effects of the doctrine. And some attorneys are willing to accept the risk of dismissal on qualified immunity grounds as a means of developing the law, gathering evidence for future claims, or uncovering information valuable to the plaintiff about the case.

Second, to the extent that concerns about qualified immunity cause attorneys to decline cases, the doctrine does not appear to do a good job of screening out "insubstantial" cases. Although the Court has not clarified what makes a case insubstantial, it has repeatedly suggested that insubstantial claims are "baseless" and "frivolous," brought against "innocent" government officials who acted "reasonably." [230]However, the cases attorneys report declining because of qualified immunity do not appear baseless or frivolous. Attorneys report declining false arrest cases because they believe they must show intentional wrongdoing in order to defeat qualified immunity. But such cases are not necessarily baseless or frivolous--a plaintiff may be able to show a Fourth Amendment violation, which requires a showing of unreasonable behavior, without being able to establish a knowing violation. Other attorneys report declining cases with factual scenarios that a court has not previously held unconstitutional. But, as the Court has recognized, novelty is not a good proxy for merit. [231]Attorneys also report declining cases that do not make economic sense to bring given the costs and

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[229] *See id.*; David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2023 (2018) (describing the many barriers to relief in prison litigation that amount to "practical immunity" that "insulates prison defendants from liability at least as much as qualified immunity"); *accord* Brief of Cross-Ideological Groups for Official Accountability, *Almighty Supreme Born Allah, supra* note 27, at 20 ("Generally applicable rules governing pleading and proof are more than up to the task of weeding out frivolous Section 1983 litigation--just as they do in all others.").

[230] *See supra* notes 44-46 and accompanying text.

[231] *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 741 (2002) (explaining that "officials can still be on notice that their conduct violates established law even in novel factual circumstances" and observing that the Court had previously "rejected a requirement that previous cases be 'fundamentally similar'" (quoting United States v. Lanier, 520 U.S. 259, 263 (1997))).

delays associated with qualified immunity. And some attorneys decline all civil rights cases because of the costs and risks of qualified immunity. None of these responses suggest that concerns about qualified immunity cause attorneys to decline cases that are baseless or frivolous.

Perhaps, though, the Supreme Court intends qualified immunity to have a broader reach. The Court has repeatedly stated that qualified immunity should protect "all but the plainly incompetent or those who knowingly **[*1157]** violate the law," [232]and may intend for qualified immunity to discourage lawyers from filing any case that does not meet that exacting standard. To the extent that qualified immunity discourages some lawyers from filing false arrest cases in which an officer has not knowingly arrested someone without probable cause, the doctrine arguably furthers this goal. [233]Some attorneys report declining cases without factually similar precedent on point unless the case is so egregious that it could amount to an obvious constitutional violation. [234]To the extent that qualified immunity encourages attorneys only to file egregious constitutional claims, the doctrine also, arguably, furthers this goal.

But because plaintiffs' attorneys can defeat a qualified immunity motion by pointing to a prior decision holding factually similar conduct unconstitutional, the doctrine does not actually encourage attorneys to screen based on the egregiousness of an officer's behavior. Instead, it encourages attorneys to screen cases based the existence of prior precedent. An attorney may reject a case alleging serious misconduct because no court has held similar conduct unconstitutional, but accept a case involving a "de minimis" constitutional violation if there is a prior case on point. [235]Moreover, to the extent that concerns about qualified immunity discourage some attorneys from taking any constitutional claims, the doctrine may prevent the filing of cases where defendants were plainly incompetent or knowingly violated the law.

Qualified immunity has already been shown to be unnecessary and ill-suited to shield government officials from the burdens of litigation in filed cases because of the prevalence of indemnification and the infrequency with which cases are dismissed on qualified immunity grounds before discovery and trial. [236]This study suggests that qualified immunity also fails to serve its intended goals by screening out insubstantial cases before they are filed. Qualified immunity does not reliably cause lawyers to decline cases, and the cases that attorneys do report declining because of concerns about qualified immunity are not reliably insubstantial under any plausible meaning of the term.

[*1158] *2. Qualified Immunity Inhibits Government Accountability*

This study offers further reasons to conclude that qualified immunity harms interests in government accountability. Although the Supreme Court has stated that qualified immunity doctrine is intended to allow plaintiffs to "hold public officials accountable when they exercise power irresponsibly," [237]courts and commentators have observed that qualified immunity doctrine undermines government accountability in several ways--by fostering uncertainty about the contours of constitutional law, [238]shielding from

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232 Malley v. Briggs, 475 U.S. 335, 341 (1986).

233 *See supra* notes 183-185 and accompanying text.

234 *See supra* notes 178-181 and accompanying text.

235 *See* N.D. Cal. Attorney D; *see also infra* note 251 and accompanying text.

236 *See* Schwartz, *The Case Against*, *supra* note 2, at 1803-11 (describing this evidence).

237 Pearson v. Callahan, 555 U.S. 223, 231 (2009).

238 *See, e.g.*, Zadeh v. Robinson, 902 F.3d 483, 499 (5th Cir. 2018) (Willet, J., concurring dubitante) ("If courts leapfrog the underlying constitutional merits in cases raising novel issues like digital privacy, then constitutional clarity--matter-of-fact guidance about what the Constitution requires--remains exasperatingly elusive."), *opinion withdrawn on reh'g*, 928 F.3d 457 (5th Cir.

liability officers who intentionally engage in misconduct, [239]and "send[ing] an alarming signal to law enforcement officers . . . that they can shoot first and think later." [240]This study suggests that qualified immunity may compromise government accountability in two additional ways.

First, qualified immunity makes it more difficult and less reliably remunerative to bring civil rights cases. Researching, briefing, and arguing qualified immunity motions and appeals takes time and money. Stays while motions and appeals are pending can delay litigation and weaken plaintiffs' evidence. Qualified immunity can reduce the monetary value of a case, either by dismissing higher value claims or limiting recovery to state law claims that may have damages caps and attorneys' fees limitations. Qualified immunity carries with it the risk that cases will be dismissed--often after contingency fee attorneys have dedicated significant resources to the case. And, in order effectively to oppose qualified immunity motions, attorneys need to understand and keep up to date with changes in a very complex and dynamic doctrinal terrain and be prepared to litigate in both trial and appellate courts. Some lawyers accept these costs, burdens, and risks as among the many challenges associated with bringing civil rights cases. But it should come as no surprise that other attorneys, faced with these challenges, limit the number of civil rights cases they bring or get out of the business of civil rights litigation altogether.

[*1159] By reducing the number of lawyers willing to bring civil rights cases, as well as reducing the number of cases civil rights lawyers are willing to bring, qualified immunity undermines the government accountability goals reflected in both Sections 1983 and 1988. As Congress recognized when it passed the Civil Rights Attorneys' Fees Awards Act of 1976, "civil rights laws depend heavily upon private enforcement." [241]And, as Pamela Karlan has noted, "[a]ttorney's fees are the fuel that drives the private attorney general engine." [242]Commentators have criticized the Supreme Court for limiting the circumstances in which plaintiffs' attorneys can recover fees under Section 1988 because these decisions reduce the number of attorneys willing to take civil rights cases and skew the types of cases they select. [243]To the extent that qualified immunity doctrine makes it more difficult for lawyers to make a living bringing civil rights cases and discourages lawyers from entering into this line of work, the doctrine likewise undermines longstanding interests in creating a market for private attorneys general.

Second, qualified immunity doctrine inhibits the development of constitutional law in

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239 *See* John F. Preis, *Qualified Immunity and Fault*, 93 NOTRE DAME L. REV. 1969, 1974-75 (2018) (describing *Mullenix v. Luna*, in which the defendant was shielded from liability on qualified immunity grounds despite acting in violation of an order, and *Robles v. Prince George's County*, in which defendants were shielded from liability despite acting in violation of police regulations and state law).

240 Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting); *see also* Schwartz, *The Case Against*, *supra* note 2, at 1814-20 (describing these and other arguments that qualified immunity impairs government accountability).

241 S. REP. NO. 1011, at 2 (1976).

242 Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 205.

243 *See, e.g.*, Bagenstos, *supra* note 36, at 185-86 (describing Supreme Court decisions that limit what it means to be a "prevailing party" (Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001)), eliminate fee enhancements for risky cases (City of Burlington v. Dague, 505 U.S. 557 (1992)), and allow defendants to offer settlements conditioned on waivers of attorneys' fees (Evans v. Jeff D., 475 U.S. 717 (1986)), and arguing that all three limitations on attorneys' fees "limit the effectiveness of the private attorney general system"); Karlan, *supra* note 242, at 207-08 (explaining that the Court's decision in *Buckhannon* skews attorneys' case-selection decisions, pushing them to "choose lawsuits in which damages are available over lawsuits that involve only injunctive relief, even if the latter lawsuits are more socially valuable"); Reingold, *supra* note 36, at 12-20 (arguing that the Court's decision in *Evans* discourages lawyers from taking cases with modest damages and those seeking solely injunctive relief).

underappreciated ways. Commentators have already observed that the Court's qualified immunity jurisprudence--which allows courts to grant qualified immunity without ruling on the underlying merits of plaintiffs' constitutional claims--leads to constitutional stagnation.[244] This study suggests that qualified immunity may also inhibit the development of constitutional law by discouraging lawyers from filing cases involving novel claims. Attorneys believe that cases are more likely to be dismissed on qualified immunity grounds if they cannot point to factually similar precedent, and some report they are more likely to decline cases if they cannot find a prior case on point. The inclination not to file these types of novel cases creates a vicious cycle--if lack of precedent makes a certain **[*1160]** type of case difficult to bring, then fewer lawyers will bring those types of cases, and those rights are even less likely to become clearly established.[245]

Some have defended qualified immunity on the ground that it encourages the development of constitutional law by allowing a court to announce a new constitutional right while shielding the government officials sued in the case from financial liability.[246] I have previously expressed skepticism about this argument in favor of qualified immunity, both because courts infrequently decide cases in this manner and because those decisions infrequently do much to expand the contours of constitutional rights.[247] This study offers another reason to be skeptical of this defense of qualified immunity. When a court announces a new constitutional right but grants qualified immunity to the defendants in the case, the plaintiff does not recover and the plaintiff's attorney--who likely will have brought the case on contingency--will not be paid. Lawyers willing to bear this risk of financial loss will continue to file cases vulnerable to dismissal on qualified immunity grounds as a means of developing the law. But it is far from clear that we should expect plaintiffs' attorneys to bankroll efforts to clarify the scope of constitutional rights. And few attorneys may be willing or able to bear the risk of these financial losses with any regularity.

C. Moving Forward

The Supreme Court has said that evidence about the realities of constitutional litigation might "justify reconsideration of the balance struck" in its qualified immunity decisions.[248] In previous work, I have shown that government defendants rarely bear financial liability in civil rights cases, and that qualified immunity rarely leads to the dismissal of cases before discovery and trial.[249] Here, I show that qualified immunity imposes previously unappreciated costs and burdens on attorneys bringing these cases, and is unnecessary and ill-suited to screen out insubstantial cases before filing. This evidence, taken together, makes clear that the Court should adjust the balance it has struck with qualified immunity. My findings **[*1161]** about qualified immunity's role in case selection support several possible adjustments to the doctrine that I and other commentators have proposed.

For example, John Jeffries has argued that an officer's entitlement to qualified immunity should turn not on whether the law is clearly established by prior decisions, but on whether the conduct was

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244 *See* Nielson & Walker, *supra* note 50, at 34.

245 *Accord* Reinert, *supra* note 48, at 494 (suggesting that attorneys' case-selection decisions, geared to avoid qualified immunity dismissals, may mean that "the vast majority of *Bivens* cases never test the limits of existing law, because the attorneys who file them select cases that are within the 'clearly established' zone that will defeat a qualified immunity defense").

246 *See, e.g.*, John C. Jeffries, Jr., Essay, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 99-100 (1999); Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 484 (2011).

247 *See* Schwartz, *The Case Against*, *supra* note 2, at 1826-30.

248 Anderson v. Creighton, 483 U.S. 635, 641 n.3 (1987).

249 *See* Schwartz, *supra* note 5, at 65-70; Schwartz, *supra* note 227, at 938-43.

"clearly unconstitutional." [250]In Jeffries's view, the current standard's focus on whether a prior case has held the conduct unconstitutional fails to punish behavior that is clearly unconstitutional, yet novel. [251]The "clearly established" standard also makes unfounded assumptions about the ways in which government officials learn about the law. As Judge Browning has explained:

> The Supreme Court's obsession with the clearly established prong assumes that officers are routinely reading Supreme Court and Tenth Circuit opinions in their spare time, carefully comparing the facts in these qualified immunity cases with the circumstances they confront in their day-to-day police work. It is hard enough for the federal judiciary to embark on such an exercise, let alone likely that police officers are endeavoring to parse opinions. It is far more likely that, in their training and continuing education, police officers are taught general principles, and, in the intense atmosphere of an arrest, police officers rely on these general principles, rather than engaging in a detailed comparison of their situation with a previous Supreme Court or published Tenth Circuit case. [252]

Moreover, as Fred Smith has argued, if qualified immunity turned on whether the defendant's conduct was clearly unconstitutional, the standard would be better aligned with common law principles that are the ostensible basis for the doctrine. [253]

[*1162] This study offers additional reasons to prefer the "clearly unconstitutional" standard. Just as the "clearly established" standard can cause courts to dismiss meritorious yet novel claims, [254]it can also lead attorneys to decline meritorious cases simply because a prior decision has not held similar conduct to be unconstitutional. During litigation, the "clearly established" standard can increase the time and cost associated with motion practice, as plaintiff's counsel must search for cases in which factually similar conduct was held unconstitutional in order to defeat qualified immunity. And, in order to maintain a successful civil rights practice, lawyers must stay abreast of complicated, confusing, and perpetually changing rules about how similar the facts of prior cases must be and which courts can clearly establish the law--a challenge that appears to cause some attorneys to stop bringing civil rights cases altogether.

My findings also support calls to eliminate interlocutory appeals of qualified immunity denials. [255]The Supreme Court allows defendants

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[250] Jeffries, *supra* note 81, at 867-68.

[251] *See* John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 256 (2013). For illustrations of this concern, see Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, *Baxter*, *supra* note 27, at 14-16, 16 n.16, which describes several cases in which courts have found constitutional violations but granted qualified immunity, including cases against "deputy sheriffs who conducted an 'early-morning, SWAT style raid' in which a family with young children was detained for two-and-a-half hours in their house after a warrant-based search turned up empty"; an officer who lied in an affidavit supporting a teacher's arrest for falsifying student grades; a child-protective-services caseworker "whose false statements in support of a removal order resulted in minor children being taken from their families, separated, and denied visitation"; a police officer who "during a routine traffic stop, directed the vehicle's driver to sit on the officer's cruiser, pointed a gun at the driver's head, and threatened to kill him if he declined to surrender on weapons charges when the officer discovered a gun in the back seat"; police officers who stole personal property seized as evidence; and a police officer who "unlawfully detain[ed], handcuff[ed], interrogate[d], and book[ed] and charge[d] [a] seventh-grader in the hallway during class as permitted by his disability accommodation".

[252] Manzanares v. Roosevelt Cty. Adult Det. Ctr., 331 F. Supp. 3d 1260, 1293 (D.N.M. 2018).

[253] *See* Smith, *supra* note 226, at 2110-11 (arguing that nineteenth century American courts applied something akin to a negligence or fault standard for government actors, which "arguably comes closer to Jeffries's 'clearly unconstitutional' or 'clearly unlawful' standard than the Court's 'clearly established' standard").

[254] Jeffries, *supra* note 251, at 256.

[255] For other arguments that qualified immunity is unlawful, and other suggested fixes, see Michael E. Solimine, *Are Interlocutory Qualified Immunity Appeals Lawful?*, 94 NOTRE DAME L. REV. 169 (2019), which argues that the collateral order doctrine does not support allowing interlocutory appeals of qualified immunity denials,

immediately to appeal denials of qualified immunity motions because it believes interlocutory appeals further the doctrine's goal of shielding government officials from the costs and burdens of litigation. [256]Yet, as Judge Gwin of the Northern District of Ohio has observed, interlocutory appeals often have the opposite effect, "increas[ing] the burden and expense of litigation both for government officers and for plaintiffs" because they take time and money to brief and decide. [257]Moreover, because lower court decisions are usually affirmed, interlocutory appeals often do not even save parties and judges the time needed to be spent on trial. [258]The plaintiffs' attorneys I interviewed and surveyed shared Judge Gwin's concerns about the cost and time necessary to litigate qualified immunity. In addition, attorneys reported that the possibility of interlocutory appeal increases the difficulty of bringing civil rights cases for several reasons: because attorneys must be prepared to litigate in both trial and appeals courts; because the delay **[*1163]** can make it more costly to prepare for trial; and because witnesses' recollections may fade in the year or more that a case is stayed on appeal. These costs, delays, and challenges make it more taxing to bring civil rights cases and may discourage some lawyers from pursuing this line of work. Eliminating interlocutory appeals would reduce these barriers for plaintiffs' attorneys, and would further the Court's interest in reducing the cost, time, and complexity of civil rights litigation.

Finally, the results of my study support calls to eliminate qualified immunity or return the defense to the scope of common law defenses in existence at the time Section 1983 became law. The original justification for qualified immunity--that it serves as an extension of common law principles in effect when Section 1983 became law--has been called into serious doubt. [259]For more than thirty-five years, the Supreme Court has defended qualified immunity doctrine as a means of balancing interests in government accountability with interests in shielding government officials from the costs and burdens of insubstantial litigation. [260]But this study, and my research more generally, makes clear that qualified immunity fails to achieve this balance. The doctrine undermines government accountability in multiple ways and has proven ill-suited and unnecessary to screen out insubstantial cases both before and after cases are filed. If qualified immunity is not serving its intended policy goals, we should do away with qualified immunity or, at the very least, reverse the expansions to the doctrine made with the intent of achieving these goals. [261]

CONCLUSION

The Court has long asserted that qualified immunity benefits society by shielding government

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and recommends that appeals be prohibited or limited, and that courts more frequently sanction frivolous appeals.

256 Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985).

257 Wheatt v. City of East Cleveland, Nos. 1:17-cv-377 and 1:17-cv-611, 2017 WL 6031816, at *4 (N.D. Ohio Dec. 6, 2017). For another discussion of the complexities of deciding interlocutory appeals, see Bryan Lammon, *Blatant Contradictions in Qualified-Immunity Appeals*, 55 GA. L. REV. (forthcoming 2020).

258 *See Wheatt*, 2017 WL 6031816, at *4.

259 *See generally* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018) (arguing that there was no common law defense comparable to qualified immunity in existence in 1871, when § 1983 became law); *see also supra* note 27 (briefs raising this concern).

260 *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (describing qualified immunity as balancing "the importance of a damages remedy to protect the rights of citizens" and "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority").

261 The Court may be reluctant to do away with qualified immunity for fear that doing so would harm government and society in a variety of ways. Commentators have predicted that eliminating qualified immunity would cause plaintiffs to file many more frivolous suits and recover more money against government defendants in these cases, would cause government officials to be overly timid on the street, and would make it more difficult to hire people for government jobs. For further discussion of these concerns, and my alternative predictions about how constitutional litigation would function in a world without qualified immunity, see Schwartz, *supra* note 42.

officials from the costs and burdens of litigation. But a growing body of empirical research makes clear that qualified immunity doctrine is not achieving its intended policy goals. This Article explores a **[*1164]** previously untested justification for qualified immunity suggested by its defenders--that the doctrine discourages plaintiffs from filing insubstantial cases. Based on a study of almost 1,200 federal court dockets, and surveys and interviews of plaintiffs' attorneys who entered appearances in these cases, I find that qualified immunity doctrine amplifies the burdens and risks of constitutional litigation on plaintiffs' attorneys and likely dampens attorneys' willingness to bring these types of cases, but does not effectively weed out insubstantial cases at the prefiling stage.

The Supreme Court will undoubtedly have multiple opportunities to reconsider qualified immunity in the near future. When the Court does grant certiorari in a qualified immunity case, advocates across the political spectrum will likely argue that qualified immunity should be abolished or greatly limited because the doctrine bears little resemblance to common law defenses in 1871, and because the doctrine fails to achieve its intended policy goals. This study offers additional reasons to conclude that qualified immunity fails to achieve these policy goals and undermines interests in government accountability.

[*1165] APPENDIX

Tables 1-3 reflect the total number of appearances by all of the 1,022 attorneys who entered appearances in 2011-2012 in my docket dataset (Table 1); the appearances of attorneys I interviewed during the two-year period in my docket dataset (Table 2); and the appearances surveyed attorneys reported over a five-year period in police misconduct cases (Table 3). Because the attorney surveys were confidential, I cannot verify the accuracy of Table 3. Appendix Table 4 sets out the percentage of time surveyed attorneys reported spending on police misconduct cases, and Appendix Table 5 sets out the percentage of their fees surveyed attorneys reported collecting from police misconduct cases. Appendix Table 6 sets out survey respondents' answers regarding the "biggest obstacle to bringing police misconduct cases" in the jurisdiction they sue most frequently. Appendix Table 7 sets out general information about the attorneys I interviewed.

TABLE 1: APPEARANCES BY ALL ATTORNEYS IN 2011-2012

Go to table1

TABLE 2: APPEARANCES BY INTERVIEWED ATTORNEYS IN 2011-2012

Go to table2

[*1166] TABLE 3: APPEARANCES REPORTED BY SURVEYED ATTORNEYS FROM 2012-2017

Go to table3

TABLE 4: AVERAGE PERCENTAGE OF TIME CURRENTLY SPENT ON POLICE MISCONDUCT CASES, REPORTED BY SURVEYED ATTORNEYS

Go to table4

[*1167] TABLE 5: PERCENTAGE OF FEES CURRENTLY EARNED FROM POLICE MISCONDUCT CASES, REPORTED BY SURVEYED ATTORNEYS

Go to table5

Go to table6

[*1168] TABLE 6: SURVEYED ATTORNEYS' REPORTED "BIGGEST OBSTACLE TO BRINGING POLICE MISCONDUCT CASES"

A question in my online survey asked: "What is the biggest obstacle to bringing police misconduct cases in the jurisdiction you sue most frequently?" Attorneys had a blank space that they could fill in.

Eighty-five of the ninety-four attorneys who took the survey answered this question and offered a total of 114 responses.

Go to table7

Go to table8

[*1169] TABLE 7: OVERVIEW OF INTERVIEWED ATTORNEYS' RESPONSES

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Table1 (*Return to related document text*)

Appearances	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	All
1	120	140	136	216	184	796
	(87.0%)	(76.1%)	(78.2%)	(81.2%)	(70.7%)	(77.9%)
2	14	26	17	30	37	124
	(10.1%)	(14.1%)	(9.8%)	(11.3%)	(14.2%)	(12.1%)
3-5	3	14	19	11	24	71
	(2.2%)	(7.6%)	(10.9%)	(4.1%)	(9.2%)	(6.9%)
6+	1	4	2	9	15	31
	(0.7%)	(2.2%)	(1.1%)	(3.3%)	(5.8%)	(3.0%)
N (Attorneys)	138	184	174	266	260	1022

Table1 (*Return to related document text*)

Table2 (*Return to related document text*)

Appearances	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	All
1	5	2	3	1	2	13
	(71.4%)	(28.6%)	(42.9%)	(14.3%)	(28.6%)	(37.1%)
2	0	2	0	2	0	4
		(28.6%)		(28.6%)		(11.4%)
3-5	1	1	3	1	4	10
	(14.3%)	(14.3%)	(42.9%)	(14.3%)	(57.1%)	(28.6%)
6+	1	2	1	3	1	8
	(14.3%)	(28.6%)	(14.3%)	(42.9%)	(14.3%)	(22.9%)
N (Interviews)	7	7	7	7	7	35

Table2 (*Return to related document text*)

Table3 (*Return to related document text*)

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	All
0-5	12	10	9	15	13	59
	(66.7%)	(66.7%)	(56.3%)	(68.2%)	(56.5%)	(62.8%)
6-10	3	6-1	6	4	6-1	15
	(16.7%)	(6.7%)	(37.5%)	(18.2%)	(4.3%)	(15.9%)
11-20	1	1	-20	1-2	-20	4
	(5.6%)	(6.7%)		(9.1%)		(4.3%)
21-30	21	21	-30	21	2	5
	(5.6%)	(6.7%)		(4.5%)	(8.7%)	(5.3%)
30+	1	2	1	30	7	11
	(5.6%)	(13.3%)	(6.25%)		(30.4%)	(11.7%)
All	18	15	16	22	23	94

Table3 (*Return to related document text*)

Table4 (*Return to related document text*)

% Time Spent	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	All
No response	0	0	0	0	1 (4.35%)	0
0	2 (11.1%)	0	0	0	0	2 (2.1%)
25% or less	13 (72.2%)	11 (73.3%)	10 (62.5%)	13 (59.1%)	14 (60.9%)	62 (65.9%)
26%-50%	2 (11.1%)	2 (13.3%)	5 (31.3%)	5 (22.7%)	1 (4.3%)	15 (15.9%)
51%-75%	1 (5.6%)	0	1 (6.25%)	3 (13.6%)	5 (21.7%)	10 (10.6%)
More than 75%	0	2 (13.3%)	0	1 (4.5%)	2 (8.7%)	5 (5.3%)
All	18	15	16	22	23	94

Table4 (*Return to related document text*)

Table5 (*Return to related document text*)

% Fees Earned	S.D. TX	M.D. FL	N.D. OH
0	7 (38.9%)	2 (13.3%)	1 (6.25%)
1%-25%	8 (44.4%)	10 (66.7%)	12 (75%)
26%-50%	2 (11.1%)	1 (6.7%)	2 (12.5%)
51%-75%	1 (5.6%)	0	1 (6.25%)
More than 75%	0	2 (13.3%)	0
All	18	15	16

Table5 (*Return to related document text*)

Table6 (*Return to related document text*)

% Fees Earned	N.D. CA	E.D. PA	All
0	3 (13.6%)	3 (8.7%)	16 (17.0%)
1%-25%	15 (68.2%)	13 (60.9%)	58 (61.7%)
26%-50%	1 (4.5%)	2 (8.7%)	8 (8.5%)
51%-75%	2 (9.1%)	3 (13.0%)	7 (7.4%)
More than 75%	1 (4.5%)	2 (8.7%)	5 (5.3%)

% Fees Earned	N.D. CA	E.D. PA	All
All	22	23	94

Table6 (*Return to related document text*)

Table7 (*Return to related document text*)

	S.D. TX	M.D. FL	N.D. OH
Juries/community	6 (26.1%)	3 (15%)	2 (13.3%)
Judges	4 (17.4%)	5 (25%)	5 (33.3%)
Qualified Immunity	5 (21.7%)	5 (25%)	3 (20%)
Other laws	8 (34.7%)	4 (20%)	2 (13.3%)
Defense counsel	0	1 (5%)	0
Evidence	0	1 (5%)	0
Cost of litigation	0	0	2 (13.3%)
Plaintiffs	0	0	0
Damages	0	1 (5%)	0
Police	0	0	1 (6.7%)
Unclear	0	0	0
Total	23 (100%)	20 (100%)	15 (100%)

Table7 (*Return to related document text*)

Table8 (*Return to related document text*)

	N.D. CA	E.D. PA	Total
Juries/community	5 (16.1%)	11 (44%)	27 (23.7%)
Judges	4 (12.9%)	4 (16%)	22 (19.3%)
Qualified Immunity	4 (12.9%)	4 (16%)	21 (18.4%)
Other laws	3 (9.7%)	3 (12%)	20 (17.5%)
Defense counsel	4 (12.9%)	0	5 (4.4%)
Evidence	3 (9.7%)	1 (4%)	5 (4.4%)
Cost of litigation	3 (9.7%)	0	5 (4.4%)
Plaintiffs	2 (6.5%)	1 (4%)	3 (2.6%)
Damages	1 (3.2%)	0	2 (1.8%)
Police	1 (3.2%)	0	2 (1.8%)
Unclear	1 (3.2%)	1 (4%)	2 (1.8%)
Total	31 (100%)	25 (100%)	114 (100%)

Table8 (*Return to related document text*)

Table9 (*Return to related document text*)

	Years bringing	Estimated police	Cases declined (%)

		police misconduct cases	misconduct cases filed over past 5 years	
	A	25 years	50+	90%-95%
E.D. PA Attorneys	B	10 years	1-5	"I'm certain [I've declined cases]. But I can't remember the individual cases because we didn't take them on."
	C	20 years	50+	93% ("I would say we bring one out of fifteen")

Table9 (*Return to related document text*)

Table10 (*Return to related document text*)

	Portion of business (%)

			Portion of business (%)
E.D. PA Attorneys		A	51%-75%
		B	25% or less
		C	51%-75%

Table10 (*Return to related document text*)

Table11 (*Return to related document text*)

		Other legal work
	A	Prisoner medical treatment, homelessness, and First Amendment

		Other legal work cases
E.D. PA Attorneys	B	Trusts and estates, legal malpractice, personal injury cases
	C	Criminal defense, employment discrimination cases

Table11 (*Return to related document text*)

Table12 (*Return to related document text*)

		Police misconduct case fee structure
	A	80% contingency fee; 20% pro bono (with ability to seek fees pursuant to § 1988)

		Police misconduct case fee structure
E.D. PA Attorneys		
	B	100% contingency fee
	C	100% contingency fee

Table12 (*Return to related document text*)

Table13 (*Return to related document text*)

		Practice setting
	A	Small firm (2-10 attorneys)
E.D. PA Attorneys		

		Practice setting
	B	Small firm (2-10 attorneys)
	C	Small firm (2-10 attorneys)

Table13 (*Return to related document text*)

Table14 (*Return to related document text*)

		Consider QI at case selection?
E.D. PA Attorneys	A	Yes. "[W]e don't take a case that seems pretty clear to us it's going to run into serious immunity issues."
	B	No. "[I]n the intake of the case I want to know that--qualified immunity or not--that if I tell the story of what happened here the person who is sitting on the other side hearing that story is going to go, "Really? They did that?" If I don't get that reaction that's going to be a difficult case . . . And that usually--and that usually means, by the way, that you can overcome qualified immunity. That reaction means that you can overcome it."
		Yes, but "[qualified immunity] has a big

		Consider QI at case selection?
	C	influence in terms of where we file. When we have a Philadelphia police case, we routinely will file in state court alleging only state torts, where we don't have to run up against the doctrine."

Table14 (*Return to related document text*)

Table15 (*Return to related document text*)

		Years bringing police misconduct cases	Estimated police misconduct cases filed over past 5 years	Cases declined (%)
	D	16 years	50+	10%-20%
E.D. PA Attorneys	E	25 years	H25	Reports getting requests "probably a dozen to two dozen times a year" and "reject[ing] the majority"
	F	8 years	20-30	96%-98%
	G	40+ years	50+	90+%

Table15 (*Return to related document text*)

Table16 (*Return to related document text*)

		Portion of business (%)
	D	51%-75%
E.D. PA Attorneys	E	25%
	F	25%
	G	51%- 75%

Table16 (*Return to related document text*)

Table17 (*Return to related document text*)

Other legal work
Personal injury, First

		Other legal work
	D	Amendment, criminal cases
E.D. PA Attorneys	E	Personal injury and medical malpractice cases
	F	Employment discrimination cases
	G	Prisoner medical treatment, homelessness, and First Amendment cases

Table17 (*Return to related document text*)

Table18 (*Return to related document text*)

		Police misconduct case fee structure
	D	70% contingency fee, 30% retainer plus contingency
		100%

		Police misconduct case fee structure
E.D. PA Attorneys	E	contingency fee
	F	100% contingency fee
	G	100% contingency fee

Table18 (*Return to related document text*)

Table19 (*Return to related document text*)

		Practice setting
	D	Solo
E.D. PA Attorneys	E	Small firm (2-10 attorneys)
	F	Small firm (2-10

		Practice setting
		attorneys)
	G	Small firm (2-10 attorneys)

Table19 (*Return to related document text*)

Table20 (*Return to related document text*)

		Consider QI at case selection?
E.D. PA Attorneys	D	Yes. "The cases that I primarily decline are those dealing with just strictly false arrests . . . . If I think that the individual officers are going to get out on qualified immunity, I will decline it."
	E	No. "[Q]ualified immunity exists and they're able to make the argument, but those are not going to be meritorious cases, I'm just really selective in the ways I choose my cases . . . . [I]f there's a conditional violation, you're going to get over [qualified immunity], if there's not, you're not."
	F	No. "[I]n my experience . . . qualified immunity [is] much less of a factor [than] whether there is just general liability under Section 1983."
	G	Yes, but "I don't have a sense of a significant number [of cases] we don't bring because of--literally just a qualified immunity defense as opposed to - there was no qualified immunity, we'd bring it. I think it's a fairly small number."

Table20 (*Return to related document text*)

Table21 (*Return to related document text*)

		Years bringing police misconduct cases	Estimated police misconduct cases filed over past 5 years	Cases declined (%)
N.D. CA Attorneys	A	25 years	21-30	75%
	B	22 years	5-10	75%
	C	40+ years	11-20	95%

Table21 (*Return to related document text*)

Table22 (*Return to related document text*)

		Portion of business (%)
	A	26%-50%

		Portion of business (%)
N.D. CA Attorneys	B	More than 75%
	C	51%-75%

Table22 (*Return to related document text*)

Table23 (*Return to related document text*)

		Other legal work
N.D. CA Attorneys	A	Personal injury, business litigation, consumer litigation, and First Amendment cases
	B	Only civil rights cases
	C	Employment discrimination, patient rights litigation, prison

	Other legal work

Table23 (*Return to related document text*)

Table24 (*Return to related document text*)

		Police misconduct case fee structure
N.D. CA Attorneys	A	100% contingency fee
	B	100% contingency fee
	C	70% contingency;15% hourly; 10% retainer plus contingency; 5% 20% pro bono (with ability to seek fees pursuant to § 1988)

Table24 (*Return to related document text*)

Table25 (*Return to related document text*)

	Practice setting

		Practice setting
N.D. CA Attorneys	A	Solo
	B	Solo
	C	Small firm (2-10 attorneys)

Table25 (*Return to related document text*)

Table26 (*Return to related document text*)

		Consider QI at case selection?
N.D. CA Attorneys	A	Yes. "I have to determine what the story is going to be at trial and what--where the evidence is so I can determine whether or not we're actually going to get by summary judgment on a qualified immunity issue."
	B	Yes, but "I wouldn't say [qualified immunity is] where my decision point is. I guess because . . . I see it as so similar to whether you would win at trial."
	C	No. Qualified immunity "is an issue everywhere, but it has more to do with what judge you get than the facts of the particular case."

	Consider QI at case selection?
	particular case."

Table26 (*Return to related document text*)

Table27 (*Return to related document text*)

		Years bringing police misconduct cases	**Estimated police misconduct cases filed over past 5 years**	**Cases declined (%)**
	D	7 years	7-9	93%-95%
N.D. CA Attorneys	E	26 years	25-50	90+%
	F	14 years	50+	85%-88%
	G	9 years	20-30	90%

Table27 (*Return to related document text*)

Table28 (*Return to related document text*)

	Portion of business (%)

		Portion of business (%)
	D	25% or less
N.D. CA Attorneys	E	51%-75%
	F	51%-75%
	G	More than 75%

Table28 (*Return to related document text*)

Table29 (*Return to related document text*)

		Other legal work
	D	Criminal defense, personal injury, and employment cases
N.D. CA Attorneys	E	Criminal defense cases
		Personal injury

		Other legal work
	F	and criminal defense cases
	G	Personal injury cases

Table29 (*Return to related document text*)

Table30 (*Return to related document text*)

		Police misconduct case fee structure
N.D. CA Attorneys	D	100% retainer plus contingency
	E	100% contingency fee
	F	100% contingency fee
	G	100% contingency fee

Table30 (*Return to related document text*)

Table31 (*Return to related document text*)

		Practice setting

	D	Solo
N.D. CA Attorneys	E	Solo
	F	Small firm (2-10 attorneys)
	G	Solo

Table31 (*Return to related document text*)

Table32 (*Return to related document text*)

		Consider QI at case selection?
	D	Yes. "[I]f there is no case on point then the behavior has to be more egregious for me to be comfortable taking it."
N.D. CA Attorneys	E	No. "[I]t depends on the judge . . . . [A] case that looks cool today on qualified immunity in two weeks might look pretty bad. So, I don't even think about it."
	F	Yes, but "I'm not sitting here looking at a case, running it through the qualified immunity hurdle, but that's probably a good idea to start doing it."
	G	Yes, but he "can't think of one" case he hasn't taken because of qualified immunity.

Table32 (*Return to related document text*)

Table33 (*Return to related document text*)

		Years bringing police misconduct cases	Estimated police misconduct cases filed over past 5 years	Cases declined (%)
N.D. OH Attorneys	H A	13 years	10	94%-99%
	B	9 years	1-5	Declines few cases
	C	28 years	1-5	"I'm sort of picky what I take."

Table33 (*Return to related document text*)

Table34 (*Return to related document text*)

		Portion of business (%)
N.D. OH Attorneys	H A	51%-75%

		Portion of business (%)
	B	26%-50%
	C	25% or less

Table34 (*Return to related document text*)

Table35 (*Return to related document text*)

		Other legal work
N.D. OH Attorneys	H A	Personal injury cases
	B	Cases on behalf of immigrants and farm workers.
	C	Employment, land and water rights, and education

		Other legal work cases

Table35 (*Return to related document text*)

Table36 (*Return to related document text*)

		Police misconduct case fee structure
N.D. OH Attorneys	H A	100% contingency fee
	B	100% pro bono (with ability to seek fees pursuant to § 1988)
	C	75% retainer plus contingency; 25% pro bono (with ability to seek fees pursuant to § 1988)

Table36 (*Return to related document text*)

Table37 (*Return to related document text*)

		Practice setting
N.D. OH Attorneys	H A	Small firm (2-10 attorneys)

		Practice setting
	B	Medium nonprofit (10-30 attorneys)
	C	Solo

Table37 (*Return to related document text*)

Table38 (*Return to related document text*)

		Consider QI at case selection?
N.D. OH Attorneys	H A	Yes. Qualified immunity "is the consideration." "There were thousands more cases that were never filed" because of qualified immunity.
	B	Yes, but "I and other attorneys here have not decided to turn down cases because of qualified immunity, but we have not made certain claims in cases because of it."
	C	Yes, but there are additional reasons he declines cases asserting "a technical violation" and favors cases with serious damages.

Table38 (*Return to related document text*)

Table39 (*Return to related document text*)

		Years bringing police misconduct cases	Estimated police misconduct cases filed over past 5 years	Cases declined(%)
N.D. OH Attorneys	N.D	30 years	50+	92%
	E	40 years	50+	"Hundreds"
	F	20 years	25-50	"We do turn down a lot of cases. I don't know what the percentage is."
	G	35 years	50+	90%

Table39 (*Return to related document text*)

Table40 (*Return to related document text*)

	Portion of business (%)

			Portion of business (%)
N.D. OH Attorneys	N.D		More than 75%
		E	"Most"
		F	65%
		G	51%-75%

Table40 (*Return to related document text*)

Table41 (*Return to related document text*)

			Other legal work
N.D. OH Attorneys	N.D		Jail and prison conditions cases and other civil rights cases
		E	Commercial, prison, First Amendment and

		Other legal work
		whistleblower cases
	F	Criminal cases
	G	Employment discrimination, prisoner abuse, reproductive freedom, civil rights

Table41 (*Return to related document text*)

Table42 (*Return to related document text*)

		Police misconduct case fee structure
N.D. OH Attorneys	N.D	100% contingency fee
	E	100% contingency fee
	F	"Virtually all contingency or fee

		Police misconduct case fee structure
		shifting"
	G	100% contingency fee

Table42 (*Return to related document text*)

Table43 (*Return to related document text*)

		Practice setting
N.D. OH Attorneys	N.D	Small firm (2-10 attorneys)
	E	Small firm (2-10 attorneys)
	F	Small firm (2-10 attorneys)
	G	Small firm (2-10 attorneys)

		Practice setting

Table43 (*Return to related document text*)

Table44 (*Return to related document text*)

		Consider QI at case selection?
N.D. OH Attorneys	N.D	No. "I don't pay much attention to qualified immunity in taking a case."
	E	No. "[W]e're always evaluating can we win? If we think we can win, then we're not worried about the situation where it's close . . . . I don't think qualified immunity affects our case selection."
	F	Yes, but "there are areas where we feel that the case is important to take the risk of losing on qualified immunity . . . ."
	G	No. "I've played the game . . . . I don't turn down the case just because I was going to lose on qualified immunity. I just work harder."

Table44 (*Return to related document text*)

Table45 (*Return to related document text*)

	Years bringing police	Estimated police misconduct	Cases declined

		misconduct cases	**cases filed over past 5 years**	**(%)**
	A	16 years	11-20	"I have pretty high standard for a case that I'll take."
M.D. FL Attorneys	B	20 years	50+	99%
	C	22 years	50+	90+%
	D	10 years	21-30	99%

Table45 (*Return to related document text*)

Table46 (*Return to related document text*)

		Portion of business (%)
	A	25% or less

		Portion of business (%)
M.D. FL Attorneys	B	More than 75%
	C	More than 75%
	D	26%-50%

Table46 (*Return to related document text*)

Table47 (*Return to related document text*)

		Other legal work
	A	Personal injury and medical malpractice cases
M.D. FL Attorneys	B	Prison abuse cases and "pro bono kids"
	C	Dental malpractice

		Other legal work
	D	Criminal defense and government transparency litigation

Table47 (*Return to related document text*)

Table48 (*Return to related document text*)

		Police misconduct case fee structure
	A	100% contingency fee
M.D. FL Attorneys	B	100% contingency fee
	C	99% contingency fee; 1% contingency fee plus retainer
	D	95% contingency fee; 5% pro bono (with ability to seek fees pursuant to Section 1988)

Table48 (*Return to related document text*)

Table49 (*Return to related document text*)

			Practice setting
M.D. FL Attorneys		A	Small firm (2-10 attorneys)
		B	Solo
		C	Solo
		D	Solo

Table49 (*Return to related document text*)

Table50 (*Return to related document text*)

		Consider QI at case selection?
M.D. FL Attorneys	A	No. "[N]ow, the way I look at cases, it really doesn't even come in as a factor. I just look to see how clear is the civil rights violation."
	B	No. "I don't think I'm that sophisticated [to think about qualified immunity before filing]. I worry about qualified immunity towards the end of the case although I have to say that of all my cases I haven't

	Consider QI at case selection?
C	lost very many on that basis." Yes, but "it may or may not deter me from accepting the case . . . . [M]ore commonly I'll try to find a way to work around it."
D	No. "[I]t's a barrier but it's a barrier to go around and if you're in litigation that's all you do every day all day anyway. . . maybe it's happened but I can't think of a case that's chased me out because of qualified immunity."

Table50 (*Return to related document text*)

Table51 (*Return to related document text*)

		Years bringing police misconduct cases	Estimated police misconduct cases filed over past 5 years	Cases declined (%)
	E	12 years	50+	75%-80%
	F	28 years	6-10	80%
M.D. FL Attorneys				
	G	40+ years	15	"Definitely" agrees that there's many, many more people who come to [him] seeking representation

	Years bringing police misconduct cases	Estimated police misconduct cases filed over past 5 years	Cases declined (%)
			than [he] can possibly represent."

Table51 (*Return to related document text*)

Table52 (*Return to related document text*)

			Portion of business (%)
M.D. FL Attorneys		E	More than 75%
		F	25% or less
		G	More than 75%

Table52 (*Return to related document text*)

Table53 (Return to related document text)

		Other legal work
M.D. FL Attorneys	E	Criminal cases
	F	Commercial, employment, products liability cases
	G	Criminal defense

Table53 (Return to related document text)

Table54 (Return to related document text)

		Police misconduct case fee structure
M.D. FL Attorneys	E	95% contingency fee; 5% retainer with contingency
	F	95% contingency fee; 5% pro bono (with ability to seek fees pursuant to Section 1988)

		Police misconduct case fee structure
	G	100% contingency fee

Table54 (*Return to related document text*)

Table55 (*Return to related document text*)

		Practice setting
M.D. FL Attorneys	E	Solo
	F	Small firm (2-10 attorneys)
	G	Small firm (2-10 attorneys)

		Practice setting

Table55 (*Return to related document text*)

Table56 (*Return to related document text*)

		Consider QI at case selection?
M.D. FL Attorneys	E	Yes. "[T]hat's a huge factor, and I mean we just rejected cases today, because I think, even though they're interesting . . . QI is going to kick it."
	F	Yes. "This is my qualified immunity issue, that I'm not getting bounced up front because I'll never get a resolution or even the opportunity to get a resolution if I get tossed on--in the beginning stage of the case."
	G	No. "I don't think [qualified immunity] plays that much [of a role in case selection]. I don't think much at all. I mean, I get excited if I find an Eleventh Circuit case that said . . . 'it is clearly established.' . . . But I don't shy away from [cases] because I'm afraid I'm going to lose, because I think there's some value in bringing these cases."

Table56 (*Return to related document text*)

Table57 (*Return to related document text*)

	Years bringing police	**Estimated police misconduct cases filed**	**Cases declined**

		misconduct cases	over past 5 years	(%)
S.D. TX Attorneys	A	21 years	50+	80%-85%
	B	20 years	11-20	99%
	C	18 years	6-10	50%

Table57 (*Return to related document text*)

Table58 (*Return to related document text*)

		Portion of business (%)
	A	26%-50%

		Portion of business (%)
S.D. TX Attorneys	B	25% or less
	C	26%-50%

Table58 (*Return to related document text*)

Table59 (*Return to related document text*)

		Other legal work
S.D. TX Attorneys	A	Employment and criminal defense
	B	Employment discriminatio cases

		Other legal work
	C	Labor, criminal defense, and personal injury

Table59 (*Return to related document text*)

Table60 (*Return to related document text*)

		Police misconduct case fee structure
S.D. TX Attorneys	A	95% contingency fee; 5% retainer plus contingency
	B	100% contingency fee
	C	100% contingency fee

Table60 (*Return to related document text*)

Table61 (*Return to related document text*)

		Practice setting
S.D. TX Attorneys	A	Small firm (2-10 attorneys)
	B	Small firm (2-10 attorneys)
	C	Solo

Table61 (*Return to related document text*)

Table62 (*Return to related document text*)

	Consider QI at case selection?
A	Yes. "I think you really have to concentrate more on the law [when selecting cases] and make sure you're at least abreast of what's going on in regard to qualified immunity issues. Is it clearly established, are there facts to support it, things of that nature."
	Yes. "Qualified immunity [plays a role in case selection] and whether or not there

		Consider QI at case selection?
S.D. TX Attorneys	B	was any established law that would support the position that the officer knew that the conduct was unconstitutional at the time."
	C	Yes, but "I'll probably still take [a case that doesn't seem like it will get past qualified immunity] . . . I'll still take it to just create a paper trail about the particular agency or about the particular officer so that if something happens again, then there will be something more for someone else."

Table62 (*Return to related document text*)

Table63 (*Return to related document text*)

		Years bringing police misconduct cases	Estimated police misconduct cases filed over past 5 years	Cases declined (%)
S.D. TX Attorneys	D	6 years	15	99%
	E	15 years	15	None (if they will pay)

		Years bringing police misconduct cases	Estimated police misconduct cases filed over past 5 years	Cases declined (%)
	F	15-20 years	2130	99%
	G	13 years	15	All

Table63 (*Return to related document text*)

Table64 (*Return to related document text*)

			Portion of business (%)
		D	25% or less
		E	25% or less
S.D. TX Attorneys			

		Portion of business (%)
	F	51%-75%
	G	25% or less

Table64 (*Return to related document text*)

Table65 (*Return to related document text*)

		Other legal work
S.D. TX Attorneys	D	Premises liability cases
	E	Employment and criminal defense
		Other civil rights cases,

		Other legal work
	F	personal injury, criminal cases
	G	Business disputes

Table65 (*Return to related document text*)

Table66 (*Return to related document text*)

		Police misconduct case fee structure
	D	50% contingency fee; 50% retainer plus contingency
	E	100% hourly fee
S.D. TX Attorneys		
	F	80% retainer plus contingency; 15% contingency fee; 5% hourly fee

		Police misconduct case fee structure
	G	100% contingency fee

Table66 (*Return to related document text*)

Table67 (*Return to related document text*)

		Practice setting
S.D. TX Attorneys	D	Small firm (2-10 attorneys)
	E	Solo
	F	Solo
		Small firm (2-10

		Practice setting
	G	attorneys)

Table67 (*Return to related document text*)

Table68 (*Return to related document text*)

		Consider QI at case selection?
S.D. TX Attorneys	D	Yes. "[I]t's a very high standard, which I understand--I mean, I understand there needs to be protections but it's very--it's very much subject to abuse."
	E	No. "[W]hen we go to federal court, we style the lawsuit in the officer's individual as well as official capacity . . . . [M]ore often than not, you will have the courts being able to get the officer . . . a successful argument of qualified immunity--that, though, does not get him out of the lawsuit if you also sue the person in their official capacity."
	F	Yes, but "I consider a cornucopia of factors in deciding whether to take a case. QI is always a negative weighing against taking a case."
	G	Yes. "I am out of the business for the most part of suing government simply because of all the immunities it is too difficult to be successful against them."

Table68 (*Return to related document text*)

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SYMPOSIUM: QUALIFIED IMMUNITY AT TRIAL

May, 2018

Reporter
93 Notre Dame L. Rev. 2065 *

Length: 12669 words

Author: Alexander A. Reinert*

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Highlight

Qualified immunity doctrine is complex and important, and for many years it was assumed to have an outsize impact on civil rights cases by imposing significant barriers to success for plaintiffs. Recent empirical work has cast that assumption into doubt, at least as to the impact qualified immunity has at pretrial stages of litigation. This Essay adds to this empirical work by evaluating the impact of qualified immunity at trial, a subject that to date has not been empirically tested. The results reported here suggest that juries are rarely asked to answer questions that bear on the qualified immunity defense. At the same time, the data illustrate that qualified immunity can be a powerful barrier to plaintiffs' success in the rare instances in which it is presented to a jury.

Text

[*2065]

Qualified immunity is a powerful doctrine that can, in certain contexts, operate to displace a damages remedy even where a plaintiff can establish **[*2066]** that her constitutional rights were violated. Academic literature has focused on many different aspects of the immunity defense, from broad views such as whether the current doctrine is faithful to its common-law roots to concrete consideration of how to resolve some of the intricacies in the doctrine's application. [1] In the backdrop, however, is the longstanding assumption that qualified immunity has a significant impact on the resolution of litigated cases. [2] For many years, however, that assumption was not subjected to empirical scrutiny. [3]

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[1] A comprehensive discussion of qualified immunity scholarship would test the patience of even the most devoted reader. By way of illustration, Westlaw reports that as of February 28, 2018, since 1980 there are 334 law review articles with the words "qualified immunity" in the title. This is surely an underestimate of the articles devoting substantial discussion to the doctrine - Westlaw reports that there are at least 1395 law review articles in which the phrase "qualified immunity" is used ten times or more over the same time period.

[2] For a discussion of this literature, see generally Joanna C. Schwartz, How Qualified Immunity Fails, 127 Yale L.J. 2, 6-7 (2017). I have also written about how the doctrine might impact whether a case is even filed in court, Alexander A. Reinert, Does Qualified Immunity Matter?, 8 U. St. Thomas L.J. 477 (2011), but this has not been the focus of other scholars' attention.

[3] See Schwartz, supra note 2, at 8.

Recent empirical work has undermined some of these assumptions. In the area of Bivens litigation, [4] for example, I have presented data that suggest that qualified immunity rarely, if ever, has an impact on litigated Bivens cases. [5] And Joanna Schwartz's recent work suggests that the same may be said for the parallel area of Section 1983 litigation, at least in cases brought for alleged Fourth Amendment violations. [6]

Even as recent scholarship has raised questions about the perceived wisdom concerning the impact of the qualified immunity defense overall, the recent empirical literature has not addressed an important area: the relevance that the qualified immunity defense plays at trial. Indeed, until this Essay, there has been no systematic empirical study of how qualified immunity is raised and resolved at trial.

Although the number of trials in both state and federal courts has significantly declined over the past several decades, [7] studying the role of qualified **[*2067]** immunity at trial is important for many reasons. First, as with the role of qualified immunity in general, the literature abounds with untested assumptions about the work done by qualified immunity at trial. For some scholars, it is obvious that the defense should rarely if ever play a role at trial, [8] whereas for others it is assumed that it will have a powerful impact on jury deliberations. [9] Second, Supreme Court doctrine regarding qualified immunity assumes that there will be a role for qualified immunity at trial, but has not elaborated on when and how that should happen. [10] Examining how and when trial courts instruct juries on qualified immunity helps to understand how ambiguous Supreme Court doctrine operates at the trial court level. Third, examining trials is perhaps the best way of understanding how lower courts have resolved the disputed status of qualified immunity as an affirmative defense. [11] Upon

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[4] In Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court held that federal agents acting under color of federal law may be found liable for monetary damages for violations of the Fourth Amendment. Id. at 389. Bivens claims are similar to Section 1983 claims against state officials, but much more limited in scope. See 42 U.S.C. § 1983 (2012). See generally Alexander A. Reinert & Lumen N. Mulligan, Asking the First Question: Reframing Bivens After Minneci, 90 Wash. U. L. Rev. 1473 (2013).

[5] Alexander A. Reinert, Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model, 62 Stan. L. Rev. 809, 843 (2010) (reporting that qualified immunity was the basis for dismissal in five out of 244 Bivens complaints identified).

[6] See Schwartz, supra note 2, at 10 (reporting that "just 3.9% of the cases in which qualified immunity could be raised were dismissed on qualified immunity grounds").

[7] See, e.g., Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. Empirical Legal Stud. 459, 464 fig.1 (2004) (showing that the number of civil trials across all U.S. district courts dropped from more than 12,000 in the 1980s to fewer than 5000 in 2002); Gillian K. Hadfield, Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases, 1 J. Empirical Legal Stud. 705, 713 tbl.1 (2004) (presenting trial statistics from 1970 through 2000).

[8] See, e.g., Catherine T. Struve, Constitutional Decision Rules for Juries, 37 Colum. Hum. Rts. L. Rev. 659, 712-13 (2006) (taking position that jury should not decide qualified immunity, but leaving open role for jury in deciding issues of fact relevant to immunity); Kathryn R. Urbonya, Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force, 62 Temp. L. Rev. 61, 68 (1989) (arguing, pre-Saucier, that the reasonableness inquiry in excessive force cases overlaps with qualified immunity inquiry, making qualified immunity inapplicable and raising concerns about jury confusion otherwise).

[9] See, e.g., Kenneth Duvall, Burdens of Proof and Qualified Immunity, 37 S. Ill. U. L.J. 135, 158 (2012) (noting that "many, if not most, qualified immunity claims have to go to trial because of fact-intensive issues," but providing no data); Martin A. Schwartz, Fundamentals of Section 1983 Litigation, 17 Touro L. Rev. 525, 547 (2001) (describing qualified immunity as "potent" defense at trial).

[10] Indeed, as discussed below, the Supreme Court has rarely taken cases to address trial-related issues related to qualified immunity. See infra Section I.B.

[11] Several articles have addressed how burdens should be allocated in resolving qualified immunity, but most have not specifically focused on how burdens should be allocated at trial. See, e.g., Alan K. Chen, The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law, 47 Am. U. L. Rev. 1, 68-98 (1997) (addressing burdens of production, proof, and persuasion at summary judgment stage); Duvall, supra note 9, at 166 (arguing that defendant should bear burden at all stages, including trial); Kit Kinports, Qualified Immunity in Section 1983 Cases: The Unanswered Questions, 23 Ga. L. Rev. 597, 634-42 (1989) (reviewing Supreme Court and lower court decisions regarding

whom, and for what issues, have courts placed the burdens of production, proof, and persuasion? Finally, if, as many observers **[*2068]** assume, qualified immunity puts a substantial burden on plaintiffs seeking to remedy their rights, looking to trial outcomes is one means to test this hypothesis.

In this Essay, I present data reflecting how qualified immunity functioned at trials that took place during a three-and-a-half-year period in all federal district courts (beginning in mid-2012 through the end of 2015). The data may be surprising to some. First, they show that juries are rarely instructed on qualified immunity, nor are they routinely asked to resolve disputed factual questions that might bear on application of the defense. In more than eighty-five percent of civil rights trials in which qualified immunity had been raised at some point in the case, district courts gave no instruction on qualified immunity. Second, when they do instruct on qualified immunity or ask jurors to resolve disputed factual questions that bear on the immunity defense, lower courts are not attentive to issues related to the burdens of proof, production, and persuasion. Where lower courts allocate burdens, they are more likely to allocate it to the plaintiff, but in general lower courts neglect to even address burdens when they instruct juries on issues related to qualified immunity. Third, when juries are instructed on qualified immunity, plaintiffs are much less likely to prevail at trial. Indeed, plaintiffs' win rate nearly tripled in cases that went to verdict where the jury was not given a qualified immunity instruction, as compared to cases in which the jury was given such an instruction. This is the case even though there is little evidence that juries ever reach qualified immunity issues in deliberation.

These findings have significant implications, which I discuss toward the end of this Essay. Do jury trials rarely address qualified immunity because, despite the abstract guidance provided by the Supreme Court in cases like Saucier v. Katz, [12] parties and district courts simply cannot discern a line between an officer who violates the Constitution and an officer who acts reasonably in so doing? Are courts treating qualified immunity solely as an immunity from suit and not also a defense to liability, again despite contrary language from the Supreme Court? Or are most cases in which qualified immunity is raised ones in which the principal dispute between the parties consists of the meaning of "clearly established" law and not the reasonableness of the defendant's conduct? These are just some of the questions raised by these findings.

The Essay proceeds as follows. In Part I, I review the basic outlines of qualified immunity doctrine, with which I assume most readers of this volume will be familiar, pausing to focus more directly on two issues that have confounded lower courts: (1) when and how qualified immunity may be raised at trial; and (2) upon whom burdens of production, proof, and persuasion should rest. In Part II, I briefly describe my empirical methodology, and in Part III I present the results of my study. In Part IV, I discuss the implications of these results and avenues for future research. I then offer a brief conclusion.

[*2069]

I. Qualified Immunity at Trial: Doctrinal Guidance

A. Qualified Immunity Policy and Procedure

The qualified immunity defense was first refined by the Supreme Court in the Bivens context [13] to

burdens of proof for qualified immunity in general); cf. Struve, supra note 8, at 710-13 (suggesting that juries should only resolve factual issues that bear on qualified immunity, but not addressing burden of persuasion on those issues). One exception in the literature focuses more specifically on burdens at trial and argues that where questions of fact are relevant to the outcome of qualified immunity determinations, allocating the burdens of proof and persuasion to the defendant at trial is the fairest outcome. See Teressa E. Ravenell, Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving § 1983 Qualified Immunity Disputes, 52 Vill. L. Rev. 135, 167-84 (2007).

[12] 533 U.S. 194 (2001).

[13] See supra note 4 and accompanying text.

permit public officials to escape liability for unconstitutional conduct where the law governing their conduct was unclear at the time of the violation or where they behaved objectively reasonably, even if unconstitutionally, in light of the clearly established law. [14] If an official can establish either of these elements, [15] then she is immune from damages liability. The Court has crafted the immunity defense to balance the tension between providing citizens with a remedy for constitutional violations, while recognizing that "claims frequently run against the innocent as well as the guilty--at a cost not only to the defendant officials, but to society as a whole." [16]

The goal of modern qualified immunity doctrine is to provide courts with a means for dismissing claims early on in the life cycle of a case, thus shielding defendants from the burdens of discovery, let alone trial. This is reflected in several aspects of the doctrine. First, in the seminal decision Harlow v. Fitzgerald, the Court instructed lower courts to base resolution of the defense on the "objective reasonableness" of the defendant's conduct in light of clearly established law, not the then-prevailing good-faith standard. [17] The Court viewed the latter standard, with its emphasis on the subjective intentions of the defendant, as insufficiently protective because of the abilities of "ingenious plaintiff's counsel" to create material issues of fact based on little evidence. [18] Thus, moving to an "objective reasonableness" standard was viewed as necessary to "permit the resolution of many insubstantial claims on summary judgment." [19]

Second, because qualified immunity is an immunity from suit and not just a defense to liability, defendants who assert the defense are entitled to many procedural protections. Qualified immunity can be raised at any time: at the motion to dismiss stage, after limited or full discovery through summary judgment, or at trial. [20] A defendant need not raise it at any particular **[*2070]** time to preserve it for trial and may raise it as many times as she wishes. [21] Defendants may be able to seek protection from discovery until the threshold legal question of qualified immunity is resolved. [22] They may pursue multiple interlocutory appeals of otherwise unappealable denials of motions to dismiss or summary judgment, so long as their appeal is confined to law-based qualified immunity arguments. [23] This exception to the final judgment rule is justified as one more tool for public officials to terminate insubstantial suits promptly. [24]

B. Qualified Immunity Burdens: The Doctrinal Void

The Court thus has directed lower court judges to resolve qualified immunity, if possible, prior to trial, for the value of the immunity is "effectively lost if a case is erroneously permitted to go to trial." [25] As such, we should not be surprised that the Court has focused on qualified immunity decisions made at the motion to dismiss and summary judgment stage, and not on how the immunity defense is resolved at trial. Of the scores of qualified immunity cases that the Supreme Court

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[14] See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see also Malley v. Briggs, 475 U.S. 335, 341 (1986).

[15] Qualified immunity has been described as an affirmative defense, see Gomez v. Toledo, 446 U.S. 635, 640 (1980), but as discussed below, not every circuit consistently allocates to the defendant the burdens of establishing the defense.

[16] Harlow, 457 U.S. at 814.

[17] Id. at 818.

[18] Id. at 817 n.29 (quoting Halperin v. Kissinger, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring)).

[19] Id. at 818.

[20] See Behrens v. Pelletier, 516 U.S. 299, 306-07 (1996); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

[21] This is the implication of Behrens and Mitchell, which permit interlocutory appeal of denials of qualified immunity at the motion to dismiss and summary judgment stages without regard for how many times a defendant has raised the defense.

[22] See Siegert v. Gilley, 500 U.S. 226, 232 (1991).

[23] See Behrens, 516 U.S. at 307-09; Mitchell, 472 U.S. at 526-27.

[24] See Behrens, 516 U.S. at 306.

[25] Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Mitchell, 472 U.S. at 526).

has decided [26] since it created the modern version of the defense in Harlow v. Fitzgerald, only a handful of opinions reviewed a case at which a jury trial transpired - every other case reviewed a decision on a motion for summary judgment or to dismiss. [27] Two of the cases that reviewed a jury trial did not address trial-related issues, but rather the relevant law that governed application of the defense. [28] The third case - Ortiz v. Jordan - addressed whether a defendant who unsuccessfully moved for summary judgment on qualified immunity grounds could appeal that denial after a jury trial had concluded. The Court held that such an **[*2071]** appeal was not available, because once trial had occurred any entitlement to qualified immunity had to be resolved by reference to the trial record. [29]

Because the Court has highlighted the need to resolve qualified immunity early and often, it has provided very little guidance for how trial courts should, if at all, involve the jury in decisions regarding qualified immunity decisionmaking. It has not, for instance, clarified the burdens of production, proof, or persuasion for establishing the defense, although it has referred to it as an affirmative defense and allocated to the defense the burden of pleading. [30] Lower courts, accordingly, have taken varied approaches to what qualified immunity's status as an affirmative defense means.

Understanding how lower courts have treated the burdens of establishing qualified immunity is a challenge, in part because some courts have at times announced conflicting standards. [31] In addition, it is worth noting that the caselaw I discuss in this section, like the Supreme Court caselaw, does not usually arise in the context of a trial, but rather in appeals of district court decisions on motions to dismiss or motions for summary judgment. With that caveat, at one extreme are the Seventh and Tenth Circuits, which have stated that the plaintiff has the burden of proof in qualified immunity cases. [32] On the other end are the First, Second, Third, Fourth, and Ninth Circuits, which place the burden of both pleading and proving an entitlement to qualified immunity on the defendant. [33]

In between these extremes are the circuits that have adopted burden-shifting frameworks. In the Sixth Circuit, once the defendant raises qualified immunity as a defense, the plaintiff must show that

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[26] See William Baude, Is Qualified Immunity Unlawful?, 106 Calif. L. Rev. 45, 82 (2018) (identifying thirty cases that addressed the substance of the immunity rather than procedural issues).

[27] See Carroll v. Carman, 135 S. Ct. 348, 350 (2014) (reviewing judgment on jury verdict); Ortiz v. Jordan, 562 U.S. 180, 183 (2011) (addressing appealability of summary judgment denial after conclusion of jury trial); Malley v. Briggs, 475 U.S. 335, 339 (1986) (reviewing First Circuit's reversal of directed verdict). In one case heard by the Court, the plaintiff had been granted relief after a bench trial. See Scherer v. Davis, 543 F. Supp. 4 (N.D. Fla. 1981), aff'd sub nom. Scherer v. Graham, 710 F.2d 838 (11th Cir. 1983), rev'd sub nom. Davis v. Scherer, 468 U.S. 183 (1984).

[28] See Carroll, 135 S. Ct. at 350 (concluding that there was no "clearly established" law that put the defendant on notice that his actions violated the Fourth Amendment); Malley, 475 U.S. at 346 (holding that officer was not entitled to qualified immunity simply because a judge found probable cause supported warrant application).

[29] Ortiz, 562 U.S. at 190-91.

[30] See Gomez v. Toledo, 446 U.S. 635, 640 (1980).

[31] See, e.g., Henry v. Purnell, 501 F.3d 374, 378 n.4 (4th Cir. 2007) (noting division within Fourth Circuit as to burden of persuasion); Duvall, supra note 9, at 144 n.48, 145 n.50 (noting intracircuit conflicts on issue in Fourth and Ninth Circuits).

[32] See, e.g., Reeves v. Churchich, 484 F.3d 1244, 1250 (10th Cir. 2007) ("Once a defendant has raised qualified immunity as an affirmative defense, the plaintiff bears the heavy two-part burden of demonstrating that (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established at the time of the alleged conduct."); Mannoia v. Farrow, 476 F.3d 453, 457 (7th Cir. 2007) ("Although the privilege of qualified immunity is a defense, the plaintiff carries the burden of defeating it."); see also Estate of Booker v. Gomez, 745 F.3d 405, 411 (10th Cir. 2014) (stating that at trial, the plaintiff bears the burden of persuasion "to overcome qualified immunity by showing a violation of clearly established federal law"); Poolaw v. Marcantel, 565 F.3d 721, 728 (10th Cir. 2009).

[33] See, e.g., Burns v. Pa. Dep't of Corr., 642 F.3d 163, 176 (3d Cir. 2011); Henry v. Purnell, 501 F.3d 374, 377-78 (4th Cir. 2007); Moreno v. Baca, 431 F.3d 633, 638 (9th Cir. 2005); DiMarco-Zappa v. Cabanillas, 238 F.3d 25, 35 (1st Cir. 2001); Blissett v. Coughlin, 66 F.3d 531, 539 (2d Cir. 1995).

the relevant right is clearly established, although the defendant carries the burden of showing that the challenged act was objectively reasonable in light of the law existing **[*2072]** at the time. [34] In the Fifth and Eleventh Circuits, once the defendant shows he was acting within his discretionary authority at the time of the alleged unlawful conduct or that he acted in good faith, the burden of proof "shifts … to the plaintiff to show that the defendant is not entitled to qualified immunity." [35] In the Eighth Circuit, the defendant bears the burden of proof on all elements of the defense, except the plaintiff must show that the relevant law was clearly established. [36] Other commentators have come to similar conclusions regarding this split of authority. [37]

On the concrete issue of burdens of proof and qualified immunity, then, the Supreme Court has left a doctrinal void that lower courts have struggled to fill. The confusion does not abate when one considers the related question of whether, and how, qualified immunity should be raised at trial, a subject I take up next.

C. Qualified Immunity at Trial: Unanswered Questions

As discussed above, courts of appeals have paid some attention to how to allocate burdens of production, proof, and persuasion in resolving qualified immunity issues in general, but they have devoted less attention to the issue at trial. Many courts have, for example, referenced the availability of special interrogatories to resolve factual disputes relevant to qualified immunity, but have not necessarily done so while attentive to burdens of proof or persuasion. [38] These courts have also suggested that the issue of qualified immunity **[*2073]** should be ultimately decided by the court, with juries limited to resolving disputed factual issues. [39] At least one circuit has expressed openness to instructing the jury on the defense and

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[34] Everson v. Leis, 556 F.3d 484, 494 (6th Cir. 2009) (citing Baker v. City of Hamilton, 471 F.3d 601, 605 (6th Cir. 2006); Barrett v. Steubenville City Sch., 388 F.3d 967, 970 (6th Cir. 2004); Tucker v. City of Richmond, 388 F.3d 216, 219 (6th Cir. 2004)).

[35] Lanman v. Hinson, 529 F.3d 673, 683 (6th Cir. 2008); see, e.g., Bates v. Harvey, 518 F.3d 1233, 1242 (11th Cir. 2008) (explaining that after defendant establishes that he was acting pursuant to authority, plaintiff must show that qualified immunity is not appropriate because "under the facts and circumstances known to the officer at the time, his actions violated clearly established law"); Breen v. Tex. A&M Univ., 485 F.3d 325, 331 (5th Cir. 2007) ("When a defendant invokes qualified immunity … the burden shifts to the plaintiff to rebut the applicability of the defense."); see also Bazan ex rel. Bazan v. Hidalgo Cty., 246 F.3d 481, 489 (5th Cir. 2001); Reinert, supra note 2, at 487 n.65.

[36] See Monroe v. Ark. State Univ., 495 F.3d 591, 594 (8th Cir. 2007).

[37] Duvall, supra note 9, at 142-45 ("To sum up the qualified immunity tally: on the one side are the First, Second, Third, Fourth, Ninth, and D.C. Circuits, placing the burdens of proof for both major steps on the defendant; on the other side are the Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits, placing the burdens of proof for both major steps on the plaintiff; and in between are the Fourth and Eighth Circuits, splitting the burdens by step, but differently from each other.").

[38] See Smith v. City of Hemet, 394 F.3d 689, 704 n.7 (9th Cir. 2005) (en banc) ("Whether the officers are entitled to qualified immunity may depend in large part on factual determinations the jury will be required to make."); Littrell v. Franklin, 388 F.3d 578, 585 (8th Cir. 2004) ("Where, as in this case, factual questions prevent a district court from ruling on the issue of qualified immunity, it is appropriate to tailor special interrogatories specific to the facts of the case. This practice allows the jury to make any requisite factual findings that the district court may then rely upon to make its own qualified immunity ruling."); Kerman v. City of New York, 374 F.3d 93, 120 (2d Cir. 2004) (noting that, because it is an affirmative defense, defendant had burden of requesting that the jury be charged on particular questions relevant to qualified immunity, but not addressing burdens of proof or persuasion on the issue); Johnson v. Breeden, 280 F.3d 1308, 1318 (11th Cir. 2002) ("A tool used to apportion the jury and court functions relating to qualified immunity issues in cases that go to trial is special interrogatories to the jury."); Rakovich v. Wade, 850 F.2d 1180, 1202 n.15 (7th Cir. 1988) ("In the unusual circumstance where an immunity inquiry remains unresolved at the time the case goes to the jury, the district court may consider the use of special interrogatories to allow the jury to resolve disputed facts … ."), overruled on other grounds by Spiegla v. Hull, 371 F.3d 928, 941-42 (7th Cir. 2004).

permitting the jury to resolve it at trial. [40]

But courts have generally neglected to attend to the question - if qualified immunity is to be decided by the jury, either through application of clearly established law or by resolving disputed factual questions - upon whom burdens of proof and persuasion lie. For example, if the defendant contends that certain facts entitled her to qualified immunity, must she establish the existence of those facts by a preponderance of the evidence or must the plaintiff establish that the facts did not exist?

Guidance from the circuit courts regarding jury instructions does not clarify matters. Many circuits provide model jury instructions, but these do not generally address burdens of proof or persuasion on qualified immunity issues. The First Circuit does not provide pattern instructions for qualified immunity, but notes that it recognizes that courts might ask a jury to resolve factual questions relevant to the immunity defense. [41] The Second Circuit does not have pattern jury instructions, but has approved of courts using special interrogatories to resolve disputed factual questions for qualified immunity. [42] The Third Circuit's model instructions do not approve of instructing **[*2074]** on qualified immunity, but like the First and Second Circuits, notes that where historical facts are in dispute the jury should resolve those questions so as to assist the court in making the legal determination as to whether qualified immunity is appropriate. [43] The Fourth Circuit, like the Second, does not create pattern instructions, but has suggested that juries are not to decide the legal question of qualified immunity but are limited to resolving disputes of historical fact that bear on the defense. [44]

The Sixth Circuit has been less than clear about what role qualified immunity can play at trial, but one recent district court decision, after thoughtfully reviewing Sixth Circuit precedent, concluded that at most a jury might be asked to resolve factual questions that bear on the defense. [45] The Seventh Circuit's current pattern instructions contain no reference to qualified immunity. [46] Courts in the circuit have, however, approved of allowing the jury to resolve disputed issues of fact that would permit the court to resolve the legal entitlement to

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[39] See, e.g., Curley v. Klem, 499 F.3d 199, 208-11 & 211 n.12 (3d Cir. 2007) (holding that "whether an officer made a reasonable mistake of law and is thus entitled to qualified immunity is a question of law that is properly answered by the court, not a jury"); Willingham v. Crooke, 412 F.3d 553, 560 (4th Cir. 2005) (holding that "the district court should submit factual questions to the jury and reserve for itself the legal question of whether the defendant is entitled to qualified immunity on the facts found by the jury"); accord Int'l Ground Transp., Inc. v. Mayor & City Council of Ocean City, 475 F.3d 214, 220 n.3 (4th Cir. 2007); see also Acevedo-Garcia v. Monroig, 351 F.3d 547, 563 (1st Cir. 2003) ("The judge is certainly not obliged to submit the ultimate issue [of qualified immunity] to the jury."); Johnson, 280 F.3d at 1318 ("The jury does not apply the law relating to qualified immunity to those historical facts it finds; that is the court's duty.").

[40] See McCoy v. Hernandez, 203 F.3d 371, 376 (5th Cir. 2000) (rejecting argument that the trial judge erred in submitting qualified immunity issue to the jury, and explaining that, "while qualified immunity ordinarily should be decided by the court long before trial, if the issue is not decided until trial the defense goes to the jury").

[41] See Chambers of the Hon. D. Brock Hornby, First Circuit Pattern Jury Instructions for Cases of Excessive Force in Violation of the Fourth, Eighth, and Fourteenth Amendments 5, 7 n.8 (2011).

[42] See, e.g., Kerman, 374 F.3d at 109.

[43] Comm. on Model Civil Jury Instructions Within the Third Circuit, Model Civil Jury Instructions for the District Courts of the Third Circuit 4.7.2 (2017) [hereinafter Third Circuit Model Jury Instructions].

[44] See Willingham, 412 F.3d at 560. At the same time, the court appears to contemplate that juries can be instructed on the legal issue of qualified immunity. See, e.g., Int'l Ground Transp., 475 F.3d at 219-20 (reviewing a case in which the jury was instructed on qualified immunity, rendered a general verdict in favor of individual defendants but also found municipality liable for constitutional violations; the court construed the verdict as finding the individual defendants entitled to qualified immunity).

[45] Wesley v. Rigney, No. 10-51, 2016 WL 853505, at 7 (E.D. Ky. Mar. 3, 2016), aff'd sub nom. Wesley v. Campbell, 864 F.3d 433 (6th Cir. 2017). On appeal of the district court's decision, the court found no abuse of discretion in the district court's refusal to instruct on qualified immunity and seemed to approve of the line drawn between questions of fact and questions of law. Campbell, 864 F.3d at 441-42.

[46] See Comm. on Pattern Civil Jury Instructions of the Seventh Circuit, Federal Civil Jury Instructions of the Seventh Circuit (2017).

the defense. [47]

The Eighth Circuit has no specific instruction on qualified immunity, but in the Eighth Amendment excessive force context specifically, the circuit recommends that no instruction be given, on the theory that if the plaintiff can establish facts that the defendant used force "maliciously and sadistically for the very purpose of causing harm," [48] then the qualified immunity defense is irrelevant. [49] And Eighth Circuit caselaw directs lower courts to limit juries to considering disputed facts that might be relevant to the immunity defense. [50]

[*2075] The Ninth Circuit's pattern instructions direct lower courts to only ask juries to resolve disputed issues of fact relevant to qualified immunity, but also make clear that not every case will require this of the jury. [51] For example, where, to find for the plaintiff, the jury would be required to believe facts that would eliminate qualified immunity as a defense, a district court does not abuse its discretion by declining to give special interrogatories. [52]

The Tenth Circuit does not have pattern instructions, but has approved of instructing the jury on the qualified immunity defense, along these lines:

> You are instructed that Defendant … cannot be held liable to Plaintiff in the event that you determine he is entitled to qualified immunity for his actions. If you find, after considering all the evidence before you, that the actions of defendant … were such that a reasonable person would have believed them to be lawful and not violative of some established statutory or constitutional right, which a reasonable person would have known, Defendant… is entitled to qualified immunity. [53]

In general, however, the Tenth Circuit has held that it is inappropriate to ask the jury to resolve the legal question of qualified immunity; instead, the proper course is to ask the jury special interrogatories to determine the existence of facts that bear on the qualified immunity defense. [54] The court also acknowledged that in rare circumstances a court could define the clearly established law and then instruct the jury "to determine what the defendant actually did and whether it was reasonable in light of the clearly established law defined by the judge." [55] The Eleventh Circuit also has approved of using special interrogatories where necessary to resolve factual issues relevant to qualified immunity. [56]

Among all of these courts, however, little attention has been paid to allocating burdens of proof and persuasion at trial. The Third Circuit has placed on defendants the burden of requesting and justifying the need for special **[*2076]** interrogatories, but

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[47] See, e.g., Castillo v. City of Chicago, No. 11 C 7359, 2012 WL 1658350, at 5 (N.D. Ill. May 11, 2012).

[48] This is the standard for establishing an Eighth Amendment excessive force claim. See Wilson v. Seiter, 501 U.S. 294, 302 (1991) (quoting Whitley v. Albers, 475 U.S. 312, 320-21 (1986)).

[49] Comm. on Model Jury Instructions, Eighth Circuit, Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit 4.42 Committee Comments (2017).

[50] See Littrell v. Franklin, 388 F.3d 578, 585 (8th Cir. 2004).

[51] Ninth Circuit Jury Instructions Comm., Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit 9.34 (2018); see also Morales v. Fry, 873 F.3d 817, 819-26 (9th Cir. 2017) (collecting cases and summarizing Ninth Circuit's approach).

[52] See, e.g., Hung Lam v. City of San Jose, 869 F.3d 1077, 1086 (9th Cir. 2017) (finding that the district court did not abuse its discretion by declining to give special interrogatories where the trial court reasoned that if the jury believed the plaintiff's version of the facts, the defendant would not be entitled to qualified immunity).

[53] Bass v. Pottawatomie Cty. Pub. Safety Ctr., 425 F. App'x 713, 718 (10th Cir. 2011).

[54] See Gonzales v. Duran, 590 F.3d 855, 859-60 (10th Cir. 2009) ("Thus, the predicate for submitting a qualified immunity question to the jury is the existence of disputed issues of material fact - that is, the question of what actually happened.").

[55] Id. at 859.

[56] See Judicial Council of the U.S. Eleventh Judicial Circuit, Eleventh Circuit Pattern Jury Instructions, Civil Cases 5.0 (2018); see also Johnson v. Breeden, 280 F.3d 1308, 1318 (11th Cir. 2002) ("A tool used to apportion the jury and court functions relating to qualified immunity issues in cases that go to trial is special interrogatories to the jury.").

has not addressed the burden of proof. [57] The Second Circuit has assigned the burden of proof on qualified immunity to the defendant. [58] The Sixth Circuit has rejected the idea that interposition of a qualified immunity defense imposes on a plaintiff the need to prove more than she otherwise would have to prove to establish her constitutional claim, but has not clarified what that means in terms of instructions as to burdens of proof. [59]

The Fifth Circuit has, by contrast, indicated its acceptance of juries deciding entitlement to qualified immunity beyond simply resolving facts, and places on the plaintiff the burden of disproving the applicability of the immunity. [60] The Fifth Circuit's pattern instruction provides as follows:

> As to each claim for which Plaintiff [name] has proved each essential element, you must consider whether Defendant [name] is entitled to what the law calls "qualified immunity." Qualified immunity bars a defendant's liability even if [he/she] violated a plaintiff's constitutional rights. Qualified immunity exists to give government officials breathing room to make reasonable but mistaken judgments about open legal questions. Qualified immunity provides protection from liability for all but the plainly incompetent government [officers/officials], or those who knowingly violate the law. It is Plaintiff [name]'s burden to prove by a preponderance of the evidence that qualified immunity does not apply in this case.
>
> Qualified immunity applies if a reasonable [officer/official] could have believed that [specify the disputed act, such as the arrest or the search] was lawful in light of clearly established law and the information Defendant [name] possessed. But Defendant [name] is not entitled to qualified immunity if, at the time of [specify the disputed act], a reasonable [officer/official] with the same information could not have believed that [his/her] actions were lawful. [Law enforcement officers/government officials] are presumed to know the clearly established constitutional rights of individuals they encounter.
>
> In this case, the clearly established law at the time was that [specify what constitutes the clearly established law.]
>
> If, after considering the scope of discretion and responsibility generally given to [specify type of officers/officials] in performing their duties and **[*2077]** after considering all of the circumstances of this case as they would have reasonably appeared to Defendant [name] at the time of the [specify disputed act], you find that Plaintiff [name] failed to prove that no reasonable [officer/official] could have believed that the [specify disputed act] was lawful, then Defendant [name] is entitled to qualified immunity, and your verdict must be for Defendant [name] on those claims. But if you find that Defendant [name] violated Plaintiff [name]'s constitutional rights and that Defendant [name] is not entitled to qualified immunity as to that claim, then your verdict must be for Plaintiff [name] on that claim. [61]

Thus, for the most part, lower courts have little guidance, outside of the Fifth Circuit, as to how to

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[57] See Velius v. Twp. of Hamilton, 466 F. App'x 133, 137 (3d Cir. 2012). Although the Third Circuit's pattern jury instructions do not address the burden of proof on issues related to qualified immunity, they do refer to qualified immunity as an affirmative defense and in general terms require that defendants bear the burden of proof on affirmative defenses. Third Circuit Model Jury Instructions, supra note 43, at 1.10, 4.7.2.

[58] See Johnson v. Perry, 859 F.3d 156, 170 (2d Cir. 2017) (stating that defendant has burden of proof on qualified immunity at trial); Lore v. City of Syracuse, 670 F.3d 127, 149 (2d Cir. 2012).

[59] See Crutcher v. Kentucky, 883 F.2d 502, 504 (6th Cir. 1989) (rejecting argument and terming it a "deformity in civil rights law").

[60] This is consistent with the Fifth Circuit's approach to qualified immunity when resolving motions to dismiss or for summary judgment. See Orr v. Copeland, 844 F.3d 484, 490 (5th Cir. 2016) (stating that at summary judgment a plaintiff must identify specific evidence that shows that the defense is not available and recognizing that qualified immunity alters the "usual" summary judgment allocations of burden).

[61] Comm. on Pattern Jury Instructions, District Judges Ass'n, Fifth Circuit, Pattern Jury Instructions (Civil Cases) 10.3 (2016) (footnotes omitted).

allocate burdens when instructing juries on issues related to qualified immunity. And in some circuits, it remains an open question whether juries can be instructed at all on qualified immunity. Of course, it is up for grabs how important of a role the burden of persuasion plays in civil cases. [62] But doctrinally, the failure to properly allocate burdens of proof in the civil context can be sufficient to justify reversal on appeal. [63] This presumably reflects some judgment about the value of getting it right. And for determinations of historical fact, one might surmise that allocating burdens of persuasion is particularly important.

D. Qualified Immunity at Trial: Academic Commentary

Alan Chen has identified the confusion that exists in qualified immunity regarding the appropriate role for the jury "in assessing factual disputes underlying the immunity inquiry." [64] Nonetheless, legal scholars have considered the role of qualified immunity at trial, identifying two principal ways it could be raised: (1) by charging the jury on disputed factual questions; or (2) by instructing the jury on the qualified immunity defense itself with a description of the clearly established law to be applied to the case. [65] Most commentators **[*2078]** take the view that of these two options, the first is preferable. [66] Karen Blum has argued forcefully in favor of only permitting juries to resolve qualified immunity through special interrogatories directed to disputed questions of fact. [67] Chen has argued that, to the extent that qualified immunity is a pure question of law, it does not belong in the jury's hands, even as he acknowledges that the Court has expressed ambivalence on this question. [68] But where a qualified immunity defense depends on disputed facts, allocating the burdens of proof and persuasion is necessary to resolve the defense. [69] And Catherine Struve has argued that juries should not be tasked with answering whether a defendant behaved reasonably while also unreasonably violating the Fourth Amendment, but instead should only be asked to determine questions of historical fact that might be relevant to determining whether qualified immunity is available to a

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[62] See Ravenell, supra note 11, at 179-84 (reviewing arguments but concluding that allocating the burden of persuasion is important in the qualified immunity context).

[63] See, e.g., In re Magnum Oil Tools Int'l, Ltd., 829 F.3d 1364, 1378-79 (Fed. Cir. 2016) (reversing for failure to properly allocate burden of persuasion); Jeff D. v. Otter, 643 F.3d 278, 287 (9th Cir. 2011) (reversing for using improper burden and standard of proof); cf. Berger v. Compaq Comput. Corp., 257 F.3d 475, 484 (5th Cir. 2001) (reversing for improper shift from plaintiff to defendant of burden of proof regarding element of Rule 23).

[64] Chen, supra note 11, at 9.

[65] See David J. Ignall, Making Sense of Qualified Immunity: Summary Judgment and Issues for the Trier of Fact, 30 Cal. W. L. Rev. 201, 217 (1994) (proposing bifurcating trial with jury determining factual issues relevant to qualified immunity first); David Rudovsky, The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights, 138 U. Pa. L. Rev. 23, 72-73 (1989) (arguing that instructing the jury to apply clearly established law is fraught and instead arguing that juries should be limited to making findings of fact through special interrogatories); Schwartz, supra note 9, at 546-47 (2001) (discussing first two options); Struve, supra note 8, at 712-13 (2006) (discussing special interrogatories); Henk J. Brands, Note, Qualified Immunity and the Allocation of Decision-Making Functions Between Judge and Jury, 90 Colum. L. Rev. 1045, 1065 (1990) (arguing that judges should consider identifying "clearly established" law, instructing juries as to its content, and asking juries to resolve whether qualified immunity is appropriate).

[66] The risk of instructing the jury on the full qualified immunity defense was identified by Second Circuit Judge Jon Newman: jurors will tend to give the benefit of the doubt to officers because of their presumption that the officer subjectively believed he was following the law, even though jurors may be instructed that they are not to consider an officer's subjective state of mind when resolving the defense. Federal Response to Police Misconduct: Hearing Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary, 102d Cong. 34 (1992) (statement of Jon O. Newman, J., United States Court of Appeals for the Second Circuit). Along similar lines, Sheldon Nahmod has expressed concern about how qualified immunity creates empathy among judges for defendants, marginalizing the plaintiff's counternarrative. Sheldon Nahmod, The Restructuring of Narrative and Empathy in Section 1983 Cases, 72 Chi.-Kent L. Rev. 819, 821 (1997).

[67] See Karen M. Blum, Qualified Immunity: A User's Manual, 26

defendant. [70] But neither Struve, Chen, nor Blum dig deep into the issue of instructing a jury on qualified immunity, how to do it, or how to allocate burdens in such a case.

As Teresa Ravenell has argued, assigning evidentiary burdens in the context of law-based qualified immunity claims may make little sense, and has been at least implicitly disapproved by the Supreme Court in Elder v. Holloway. [71] But by the time the case reaches trial, law-based qualified immunity **[*2079]** claims should be resolved, except to the extent they depend on disputed facts. Indeed, the Supreme Court's focus has been almost exclusively on how lower courts resolve qualified immunity prior to trial. [72] For fact-based qualified immunity defenses, however, assigning evidentiary burdens may be sensible - after all, the defense depends on the defendant's reasonable perception of the facts available to him at the time of the alleged constitutional violation, a question that can be resolved at least in part through fact-finding. [73] And there are compelling arguments for assigning those burdens to the defendant.

First, as others have noted, the burden of proof generally is allocated according to who has the burden of pleading. [74] And the Supreme Court has made clear that plaintiffs do not bear any burden to anticipate qualified immunity by seeking to overcome it through pleading. [75] But this is tempered by the fact that the Court has routinely spoken of the plaintiff's burden to "overcome" the defense of qualified immunity. [76] But putting aside the general rule regarding allocation of burdens, because the fact-based qualified immunity defense depends on facts known to the defendant at the time of the alleged violation, establishing those facts would seem to lie most naturally at the feet of the defendant. [77] And finally, as Alan Chen has argued, placing the burden on plaintiffs would amount to adding an additional element to a plaintiff's Section 1983 claim, beyond which the Court has said are the required elements a plaintiff must prove. [78]

Of course, one must be cautious about allocating the burden to the defendant - if the defendant has the burden of proving a set of facts that overlaps entirely with the plaintiff's case-in-chief, then one might reasonably worry that instructing that the defendant has the burden of proof would functionally put the burden on the defendant to convince a jury that the plaintiff's story is not true. [79] Indeed, no matter what regime one chooses, it might be a recipe for jury confusion. [80]

Ind. L. Rev. 187, 209 (1993); Karen Blum, Qualified Immunity in the Fourth Amendment: A Practical Application of § 1983 as It Applies to Fourth Amendment Excessive Force Cases, 21 Touro L. Rev. 571, 589 (2005); Karen M. Blum, Section 1983 Litigation: The Maze, the Mud, and the Madness, 23 Wm. & Mary Bill Rts. J. 913, 940-41 (2015) (arguing in favor of special interrogatories and against judges resolving disputed factual questions on qualified immunity through summary judgment). Blum has even gone so far as to argue that the Supreme Court's decision in Scott v. Harris, 550 U.S. 372 (2007), might make jury instruction on excessive force unnecessary, with juries only required to decide factual questions that would then enable a court to decide the question of qualified immunity. Karen M. Blum, Scott v. Harris: Death Knell for Deadly Force Policies and Garner Jury Instructions?, 58 Syracuse L. Rev. 45, 72 (2007).

[68] See Chen, supra note 11, at 75.

[69] See id. at 95.

[70] Struve, supra note 8, at 712-13.

[71] Ravenell, supra note 11, at 167-84 (citing Elder v. Holloway, 510 U.S. 510, 515 (1994)).

[72] See supra Section I.B.

[73] Ravenell, supra note 11, at 171-72.

[74] Id. at 173.

[75] See Gomez v. Toledo, 446 U.S. 635, 640-41 (1980). It is noteworthy that Justice Rehnquist stated that he read the majority opinion as addressing only the burden of pleading and not the burden of proof. Id. at 642 (Rehnquist, J.).

[76] Ravenell, supra note 11, at 175 (discussing cases).

[77] Id. at 177-79.

[78] See Chen, supra note 11, at 96-97 ("Assignment of the burden of persuasion to the plaintiff would have serious legal ramifications. It is at least clear that assigning the burden to the plaintiff would mean that she must prove more than she would in order to prevail on the merits.").

[79] Id. at 97.

[80] Id. at 98. Rachel Harmon has suggested that jury instructions in qualified immunity excessive force cases provide "little help in

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II. Methodology

It has long been assumed that qualified immunity plays a substantial role in the inability of many civil rights plaintiffs to prevail against government officials, but there is little empirical support for that proposition. [81] To the extent that the assumption has been grounded in empirics, studies have focused on data from decisions reported on electronic databases such as Westlaw, [82] which may not provide a representative sample of relevant cases. [83] But data from a wider range of cases have not suggested that qualified immunity plays a substantial role in the resolution of civil rights claims. [84]

This study is devoted to a related question: the role that qualified immunity plays in resolving cases tried to a jury. Arguably, the jury has a particularly important role in civil rights cases, given its historical role as serving as a bulwark against governmental overreaching. [85] But, as with scholarly commentary on qualified immunity in general, many academics assume that juries will be hesitant to award damages against governmental officials, in part because of defenses like qualified immunity. [86] This is despite the absence of any reliable empirical data on the question. Notably, Joanna Schwartz's study of the role of qualified immunity in cases involving law enforcement officers, while comprehensive and informative, did not study the role qualified immunity played at trial or in jury instructions. [87]

[*2081] To determine how qualified immunity is raised and resolved at trial, I sought to identify federal civil rights cases that met the following conditions: (1) qualified immunity was raised at some point during the proceedings; (2) jury instructions were proposed or adopted; and (3) a jury trial occurred. [88] I limited my search to civil rights cases litigated over a three-year period between January 1, 2013, and December 31, 2015. [89]

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shaping a determination about excessiveness," but her claim does not seem rooted in empirical study. Rather, it reviews model jury instructions for the courts of appeals. Rachel A. Harmon, When Is Police Violence Justified?, 102 Nw. U. L. Rev. 1119, 1144-45 (2008).

[81] See, e.g., Peter H. Schuck, Suing Government: Citizen Remedies for Official Wrongs, at xx, 100 (1983) (arguing for expanded governmental liability in lieu of individual liability, because the immunity doctrine is unpredictable, does not deter, and often leaves victims without compensation).

[82] See, e.g., Diana Hassel, Living a Lie: The Cost of Qualified Immunity, 64 Mo. L. Rev. 123, 136 n.65, 145 n.106 (1999) (finding that qualified immunity defenses were denied in only twenty percent of federal cases over a two-year period, but citing only reported cases).

[83] See Alexander A. Reinert, Measuring the Impact of Plausibility Pleading, 101 Va. L. Rev. 2117, 2121 n.20 (2015) (discussing potential selection bias in Westlaw-and LEXIS-based studies and reviewing literature).

[84] Reinert, supra note 5; Schwartz, supra note 2.

[85] Struve, supra note 8, at 706-07 (arguing that "a jury finding of liability in a civil rights case serves as a more effective pronouncement than a judge's disposition would, because it can be seen as embodying the judgment of representatives of the community"); Michael L. Wells, Scott v. Harris and the Role of the Jury in Constitutional Litigation, 29 Rev. Litig. 65, 87-88 (2009) (reviewing literature supporting "democratic value of jury decision making" in § 1983 litigation).

[86] Diana Hassel, A Missed Opportunity: The Federal Tort Claims Act and Civil Rights Actions, 49 Okla. L. Rev. 455, 475 (1996) (describing resistance of courts and jurors to awarding damages against individual federal employees); Schwartz, supra note 9, at 546-47 (describing defense as "potent" and claiming that "[a] very large percentage of Section 1983 cases get resolved in favor of the defendants based upon qualified immunity"); Christopher Slobogin, Why Liberals Should Chuck the Exclusionary Rule, 1999 U. Ill. L. Rev. 363, 385 (identifying fear of reprisals, expense of litigation, effectiveness of good faith defenses, "unsympathetic nature of many plaintiffs," and juries' biases as reasons that civil enforcement of Fourth Amendment in general is unsuccessful).

[87] Schwartz, supra note 2, at 30 n.85.

[88] I identified cases through Bloomberg Law, conducting a broad docket search for cases that included the following terms in either documents or docket entry: "qualified immunity," "verdict," and "jury instructions." Bloomberg Law, unlike Westlaw or LEXIS, contains the full docket and decisions of all civil cases in the federal system.

[89] To limit the cohort to civil rights cases, I relied on case coding by the Administrative Office of the United States Courts, searching for cases that were coded as civil rights or prisoners' rights cases, including employment discrimination cases (AO Codes 440, 442, 550, and 555). Admin. Office of the U.S. Courts, Civil Nature of Suit

My initial search identified cases that settled shortly before or after trial, as well as cases resolved on summary judgment prior to trial. For the purposes of completeness, I included these cases in my initial data collection, but my analysis in this paper focuses on cases that went to trial in some form.

I coded each case for the following variables: (1) district of origin; (2) circuit of origin; (3) filing date; (4) termination date; (5) whether court-adopted jury instructions were available; (6) whether only party-proposed jury instructions were available; (7) whether a trial occurred; (8) case outcome; (9) jury award, if applicable; (10) whether proposed or adopted jury instructions included language regarding qualified immunity; [90] (11) whether special interrogatories were used at trial; and (12) whether the burden of persuasion on issues related to qualified immunity were addressed in the jury instructions. Where necessary, I consulted trial transcripts to establish the content of instructions provided to the jury.

Because this study is related to resolution of qualified immunity issues by juries, it does not include data on how post-trial motions as a matter of law were resolved, although my impression from the data is that judges generally denied those motions, whether brought by plaintiffs or defendants. Similarly, very few motions for new trial were granted, but where a new trial occurred, I coded the most recent trial.

III. Results

A. Fundamental Case Characteristics

I identified 287 unique cases in which qualified immunity was raised, jury instructions were proposed or adopted, and the case was resolved shortly prior to or through a jury trial. Of these cases, 211 proceeded to a jury trial **[*2082]** that resulted in a final judgment; the remainder were resolved through settlement, summary judgment, or remain unresolved. [91] The median time from filing to resolution of all cases was over two years (903 days); for cases that proceeded to trial, the median time for resolution was basically identical (900 days). [92] This was slightly longer than the median time from filing to trial in all federal civil cases over the same time period. [93] This is unsurprising, because one would assume that cases involving qualified immunity would take longer to resolve, given the opportunity for motion practice and interlocutory appeal. [94]

Of the cases that went to trial, the plaintiff prevailed in slightly over twenty-five percent of the cases, the defendant prevailed in almost seventy percent of the cases, and the remainder settled or were disposed of in other manners. This is comparable to success rates that have been reported in civil rights cases overall. [95]

Code Descriptions 3, 4 (June 2017), http://www.uscourts.gov/sites/default/files/js 044 code descrip tions.pdf.

[90] I also coded for instructions that used the term "arguable" probable cause, because it is a stand-in for qualified immunity in some Fourth Amendment contexts. See, e.g., Gates v. Khokhar, 884 F.3d 1290, 1298 (11th Cir. 2018); Dufort v. City of New York, 874 F.3d 338, 354 (2d Cir. 2017).

[91] In a handful of cases, there was no unanimous jury verdict, thus requiring a retrial.

[92] The average time from filing to resolution of all cases was almost two years (916 days). For cases that proceeded to trial, the average time for resolution was nearly identical (919 days).

[93] See Federal Court Management Statistics - Profiles, Admin. Office of the U.S. Courts (Dec. 31, 2017), http://www.uscourts.gov/sites/default/files/data tables/fcms na dist profile1231.2017.pdf (providing median disposition times for 2013, 2014, and 2015 of 26.5, 26.3, and 27.2 months, respectively).

[94] See supra note 92 and accompanying text.

[95] See, e.g., Kevin M. Clermont & Stewart J. Schwab, Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?, 3 Harv. L. & Pol'y Rev. 103, 129-30 (2009) (reporting 28.47% win rate for plaintiffs going to trial in employment discrimination cases, although rate rises to 37.63% in jury trials); Theodore Eisenberg, Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases, 77 Geo. L.J. 1567, 1578 n.57 (1989) (reporting plaintiff trial success rate of 27.4% in nonprisoner civil rights cases); Margo Schlanger, Inmate Litigation, 116 Harv. L. Rev. 1555, 1592 (2003) (reporting that plaintiffs prevailed in about 10% of trials in prisoners' rights claims).

The vast majority of cases in the cohort involved Fourth Amendment claims brought against law enforcement officers - claims of unreasonable searches and seizures and excessive force amounted to about sixty-five percent of the cohort. Approximately ten percent of the cases involved First Amendment claims, and another ten percent involved Eighth Amendment claims brought by people in prison. The remaining fifteen percent of the cohort was a mix of discrimination, procedural due process, and substantive due process claims.

Finally, there was a wide range of representation of the district courts, as reflected in their circuit of origin. The Second, Fifth, Seventh, Ninth, and Eleventh Circuits were overrepresented in the sample - cases from the Second Circuit accounted for a little more than twenty percent of the cohort, cases from the Fifth, Seventh and Eleventh Circuits each made up about ten percent, and the Ninth Circuit accounted for almost one quarter of the cases **[*2083]** in the cohort. This is likely consistent with the heavier caseload, and the civil rights caseload in particular, that characterizes these circuits. [96]

B. Overall Rates of Instruction on Qualified Immunity

Of the cases in the cohort, an instruction on qualified immunity was proposed or adopted in sixty cases, [97] with no instruction on the immunity proposed or adopted in 223 cases. Special interrogatories were proposed or adopted in thirty-two cases. In six cases, both special interrogatories and an instruction on qualified immunity were proposed or adopted. Table 1 summarizes these data:

Table 1. Overall Rates of Instruction, All Cases

As discussed, however, not all of these cases involved trials, nor were they all cases in which there is an available record of a court-approved instruction. [98] When one limits the dataset to the cases involving jury trials, there were 211 cases in which jury trials were held, 168 of which clearly identified court-approved instructions. In the remaining forty-three cases, the parties proposed instructions but the court's instructions were not in the record. Among all cases, there were nineteen cases in which qualified immunity instructions were approved by the court and an additional twelve cases in which they were proposed. Even assuming that instructions were given in every case in which they were proposed, this would amount to approximately fifteen percent of cases. Table 2 more fully explores these data.

[*2084]

Table 2. Instructions Proposed and Approved

In sum, whether limited to all cases or only those involving trials, in the vast majority of instances, courts rarely instructed on qualified immunity or on special interrogatories. Juries were typically not asked to make any findings that bear on qualified immunity.

C. Qualified Immunity by Case Type

As discussed above, the cohort of cases studied here consisted principally of Fourth Amendment challenges to law enforcement conduct. Case type appeared to have some correlation with rates of instruction on qualified immunity, as well as rates at which special interrogatories were requested or adopted. As Table 3 shows, among cases that went to trial, cases involving different kinds of constitutional claims were associated with different

[96] The Administrative Office of the United States Courts provides annual data that describes case filings by subject matter. District Courts in the Second, Fifth, Seventh, Ninth, and Eleventh Circuits consistently report high caseloads with a significant number of civil rights cases. See, e.g., Table C-3, U.S. District Courts - Civil Federal Judicial Caseload Statistics, Admin. Office of the U.S. Courts (Mar. 31, 2017), http://www.uscourts.gov/statistics/table/c-3/federal-judicial-caseload-statistics/2017/03/31.

[97] This includes three instances in which an arguable probable cause instruction was requested or provided.

[98] In some cases, although a qualified immunity instruction was proposed, the record does not indicate whether the instruction was given by the trial judge.

rates of instruction on qualified immunity. Interestingly, cases involving Fourth Amendment challenges were significantly more likely to involve requests for special interrogatories.

Table 3. Instructions Proposed and/or Approved, by Case Type (Cases Litigated to Trial)

The results do not change dramatically when one examines only cases in which a court-approved instruction could be located - the only significant **[*2085]** change is that the rate of instruction on qualified immunity in Eighth Amendment claims decreases to about 12.5% of the cohort. The significant variation in the use of special interrogatories remains, however, with special interrogatories much more likely to be requested and approved in cases involving Fourth Amendment claims.

D. Qualified Immunity Instruction by Circuit of Origin

Because each circuit has different approaches to qualified immunity, [100] understanding whether the prevalence of qualified immunity instructions is related to circuit of origin is important. One should expect, for example, that cases in the Fifth Circuit, where model jury instructions explicitly approve of qualified immunity instructions, [101] would be more likely to have trials in which instructions on qualified immunity are routinely provided. Table 4 provides these data for all circuits in the cohort:

Table 4. Proposed and Court-Adopted Instructions on Qualified Immunity, by Circuit, All Cases Litigated to Trial

When one limits the data to cases in which it could be confirmed that the court adopted qualified immunity instructions, the incidence rates reduce: in the Second, Third, Tenth, and Eleventh Circuits, each had only one such case; in the Fifth Circuit, there were thirteen cases identified; and the Ninth Circuit had two such cases. [102] These results are striking for at least **[*2086]** two reasons. First, although every circuit but the Fifth expresses doubt about instructing juries on the substance of the qualified immunity defense, [103] the Fifth Circuit is not the only jurisdiction in which qualified immunity instructions were proposed and adopted. Second, although most circuits express openness toward resolving disputed factual questions related to qualified immunity through special interrogatories, many circuits do not do so in practice.

E. Instructions on Burden of Proof/Persuasion

Among the cases in which the jury was instructed as to qualified immunity or the jury was asked to answer special interrogatories geared toward assisting the trial court in resolving qualified immunity, each instruction was coded for whether the burden of proof was placed on the plaintiff, the defendant, or unspecified. Given that the burden of proof generally falls upon the plaintiff, it might be assumed that where the jury instructions did not identify the party that bears the burden of proof, juries assumed that it fell on the plaintiff. [104] Table 5 describes how the burden of proof was allocated, if at all, in the fifty-three cases in which a qualified immunity instruction and/or special interrogatories were adopted or proposed.

Table 5. Burden of Proof, Instructions Adopted or Proposed

Once again, there also is a large variation among the circuits. The Fifth Circuit accounts for thirteen of the sixteen cases in which the burden was explicitly placed on the plaintiff. Yet the Second Circuit, which has explicitly held that the burden of

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[100] See supra Section I.C.

[101] See Comm. on Pattern Jury Instructions, supra note 61.

[102] In the remainder of the circuits, there were no cases in which a court-approved instruction on qualified immunity was confirmed.

[103] See supra Section I.C.

[104] Cf. Bradshaw v. Heckler, 810 F.2d 786, 789 (8th Cir. 1987) ("We have held consistently that where the Secretary fails to acknowledge the burden of proof one way or another, it must be assumed that the burden improperly remained on the claimant.").

proof for qualified immunity rests with defendants, [105] accounted for sixteen cases in which the burden of proof in the instructions was unspecified.

F. Outcome and Qualified Immunity Instructions

Finally, as there is a longstanding assumption in the literature that qualified immunity, when raised at trial, operates as a substantial barrier to success, **[*2087]** outcomes at trial were coded and sorted according to whether a qualified immunity instruction and/or special interrogatories were included in the jury instructions. Table 6 shows that, when considering all cases that went to trial, the presence of a qualified immunity instruction, but not a special interrogatory, is associated with a decreased plaintiff success rate.

Table 6. Case Outcome, by Jury Instruction

Table 7 focuses only on cases in which a court-approved instruction was confirmed, and suggests an even stronger association between a decreased plaintiff success rate and the presence of a qualified immunity instruction.

Table 7. Case Outcome, by Jury Instruction, Court-Approved Instructions Only

There is an even stronger association with success when one considers only the presence or absence of a qualified immunity instruction. Of the 162 cases in which there was a trial and in which the presence or absence of a qualified immunity instruction could be confirmed, the plaintiff prevailed in approximately eleven percent of cases in which a qualified immunity instruction was given, compared to thirty-one percent of cases in which a qualified immunity instruction was not provided. In other words, the presence of a qualified immunity instruction is associated with a plaintiff's success rate that is about one third that of cases in which no such instruction was given.

This relationship is even more suggestive when one considers only cases involving Fourth Amendment claims. In Fourth Amendment cases where no qualified immunity instruction was given, the plaintiff prevailed about thirty-three percent of the time (30 out of 89 trials). The plaintiff prevailed only about nine percent of the time (1 out of 11 trials) where a qualified immunity **[*2088]** instruction was given. There was no similar relationship in Fourth Amendment cases based on the presence or absence of special interrogatories - where no interrogatories were given, there was a plaintiff verdict about twenty-five percent of the time, as compared to a fifty-eight percent win rate for plaintiffs when special interrogatories were submitted.

Finally, if one focuses instead on cases in which court-adopted instructions allocate burdens of proof, the potential relationship with case outcome is stark. Table 8 shows that there were no cases in which plaintiffs succeeded at trial where a court-adopted instruction placed the burden of proof explicitly on the plaintiff to rebut qualified immunity. In other words, the only cases in which a plaintiff prevailed at trial where there were court-adopted instructions on qualified immunity or special interrogatories are those cases in which the court gave no instructions on who carried the burden of persuasion.

Table 8. Case Outcome by Allocation of Burden of Proof, Court-Approved Instructions

IV. Implications

The first major implication from these data is that, consistent with what empirical research has suggested about other aspects of qualified immunity, the impact of the defense at trial does not appear consistent with what has been the scholarly assumption. Qualified immunity has been described as a potent defense at trial, with many commentators assuming that the presence of the defense makes it that much harder for plaintiffs to achieve success at trial. [106] Moreover, commentators have also assumed that juries will

[105] See supra note 58 and accompanying text.

[106] See supra notes 86-87 and accompanying text.

play a significant role in assessing disputed issues of fact that relate to the qualified immunity defense.

The data presented here suggest that, in fact, qualified immunity rarely plays a significant role in jury trials. Instructions on qualified immunity and/or special interrogatories were proposed or adopted in fewer than a quarter of cases that resulted in a jury trial. If one looks to cases in which only a court-approved instruction could be confirmed, only about ten percent of cases were located with instructions on qualified immunity, with an additional approximately seven percent of cases found in which special interrogatories alone were given to the jury. [107]

The overall picture this paints is one in which qualified immunity rarely, if ever, plays a role in jury trials of civil rights claims. At the same time, it is **[*2089]** apparent that the role of qualified immunity varies significantly according to circuit of origin. The Fifth Circuit lies at one extreme, in which juries were instructed on qualified immunity (with and without special interrogatories) well over half of the time (in eleven out of sixteen trials for which court-approved instructions were available). In the Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits, by contrast, there were no trials in which juries were instructed on qualified immunity or special interrogatories. Qualified immunity instructions were extremely rare in the Second and Ninth Circuits as well - in the Second Circuit, instructions on qualified immunity were given in one out of twenty cases, while in the Ninth Circuit, qualified immunity instructions were provided in two out of forty-two cases. [108]

The distinct experience in the Fifth Circuit should not be surprising, given that the Fifth Circuit is the only court, with its model jury instructions, to explicitly approve of instructing the jury on the qualified immunity defense. [109] More surprising perhaps is that in other circuits, which disapprove of qualified immunity instructions but embrace the concept of special interrogatories, special interrogatories are rarely, if ever, used.

There are some possible explanations for this, all of which would require further research to evaluate. First, it may be that in the run of cases, trial judges consider the facts central to a plaintiff's claim to overlap so closely with the facts relevant to qualified immunity that submitting special interrogatories to juries is considered duplicative or potentially confusing. In these cases, judges may simply be disregarding the Supreme Court's admonition that there is such a thing as a "reasonably unreasonable" officer. [110] Indeed, it may be that lower courts are acting consistently with the views espoused by Justice Ginsburg, concurring in the judgment in Saucier, when she declared that, where summary judgment on qualified immunity is inappropriate, the jury's resolution of the merits of a Fourth Amendment violation will necessarily resolve any claim to qualified immunity. [111]

Second, it may be that lower courts are treating qualified immunity "solely" as an immunity from suit, and not as a defense to liability. On this theory, courts may conclude that, having rejected qualified immunity arguments at earlier stages of the case (summary judgment or in motions to

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[107] See supra Table 2.

[108] In both the Second and Ninth Circuits, juries were occasionally given special interrogatories but not qualified immunity instructions - in four out of twenty cases in the Second Circuit and in two out of forty-two trials in the Ninth Circuit.

[109] See supra note 101 and accompanying text.

[110] In Anderson v. Creighton, 483 U.S. 635, 643 (1987), for example, the Court rejected the argument that "it is not possible … to say that one 'reasonably' acted unreasonably." The Court confirmed this understanding in Saucier v. Katz, 533 U.S. 194, 203 (2001), rev'd on other grounds, Pearson v. Callahan, 555 U.S. 223 (2009). Even in the Eighth Amendment context, in which some appellate courts have suggested that Saucier may be less relevant, the Court has suggested that the qualified immunity inquiry may be different from the merits, because after the Court decided that the prisoner stated an Eighth Amendment claim, it proceeded to consider whether the defendants acted reasonably under the circumstances. See Hope v. Pelzer, 536 U.S. 730, 741-46 (2002).

[111] See Saucier, 533 U.S. at 216 (Ginsburg, J., concurring in judgment).

dismiss), **[*2090]** once trial has commenced, there is no role for the defense to play. Again, however, this would be inconsistent with the Supreme Court's guidance to lower courts. [112]

Third, lower courts may just conclude that it is simply too confusing to instruct juries on qualified immunity or special interrogatories. [113] Consider the following language from one of the rare cases in which a court approved a qualified immunity instruction:

> It is McFarland's burden to prove by a preponderance of the evidence that qualified immunity does not apply in this case… . If, after considering the scope of discretion and responsibility generally given to corrections officers in performing their duties and after considering all of the circumstances of this case as they would have reasonably appeared to the defendant at the time the defendant supervised McFarland at the poultry farm, you find that McFarland failed to prove that no reasonable officer could have believed that McFarland's work at the poultry farm was lawful, then the defendant is entitled to qualified immunity, and your verdict must be for the defendant on those claims. [114]

The jury found for the defendant in the case, although it did not appear to base its decision on a resolution of the qualified immunity defense. [115] Nonetheless, had the jury been required to decide whether the plaintiff "failed to prove that no reasonable officer could have believed" that defendant behaved lawfully, one might anticipate the likelihood of jury confusion.

Finally, it may be that defense counsel are simply making the strategic decision not to request instructions on qualified immunity or special interrogatories. There are examples in the dataset in which a court invites defendants to submit special interrogatories, and the defense counsel decline to propose them. Defense counsel may be concerned about jury confusion. In jurisdictions which would allocate the burden of proof to the defense, defense counsel may be leery of distracting the jury from what might be effective arguments about plaintiff's failure to prove her case. Or, defense counsel may adhere to an entrenched practice that has not been displaced by doctrinal openings. In the Second Circuit, for example, the City of New York routinely proposes that special interrogatories be given to the jury, but other institutional defendants do not appear to have that practice. [116]

In other words, despite the Supreme Court's enthusiasm for qualified immunity, other relevant actors who operationalize Supreme Court doctrine **[*2091]** may not share that enthusiasm, for a variety of reasons. This is not inconsistent with empirical observations that have been made about how qualified immunity operates outside of the trial context - it is more rarely invoked than one would expect given the trends in Supreme Court doctrine and the perceived strength of the defense. [117]

There is also something to be learned, however, from those cases in which the defense is raised at trial, either through instructions or special interrogatories. First, despite the attention that scholars and appellate courts have paid to the question of burdens of proof and persuasion, jury instructions on qualified immunity are far from uniform in allocating burdens. In most cases, no burden at all is specified. [118] And where a burden is

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[112] The Court has stated as far back as Mitchell v. Forsyth, 472 U.S. 511, 526 (1985), that qualified immunity "is an immunity from suit rather than a mere defense to liability," but it has never suggested that, as a result it, is unavailable at trial.

[113] Cf. supra Sections I.B, I.C.

[114] See Jury Instruction C-4, McFarland v. Brooks, No. 4:14-cv-00090, 2016 WL 1091096 (N.D. Miss. Jan. 18, 2017).

[115] The verdict form in McFarland indicates that the jury found that the plaintiff did not establish the defendant's deliberate indifference. Verdict Form at 1, McFarland, 2016 WL 1091096. The jury did not proceed to answer whether the defendant was entitled to qualified immunity. Id.

[116] See supra note 42 and accompanying text.

[117] See, e.g., Schwartz, supra note 2.

[118] See supra Table 4.

specified, it is usually placed on the plaintiff. Although there is good reason to believe that, to the extent fact-based qualified immunity defenses are being raised, the burden of proof and persuasion should be placed on the defendant, [119] this is rarely the case at trial. [120]

At the same time, when juries are instructed on qualified immunity (or given special interrogatories), plaintiffs are more likely to lose at trial. Indeed, plaintiffs never prevailed at trial in cases in which a qualified immunity instruction was given and the burden was explicitly placed on the plaintiff (though one should be cautious about drawing too much in conclusion from this, for the total number of cases is small). This would seem to suggest that the qualified immunity defense may have some impact on trial outcome, although caution is in order.

Most importantly, it is not obvious from reviewing verdicts that juries are ultimately resting their decision on qualified immunity. In many cases, they simply are finding no constitutional violation and therefore never even turning to questions of qualified immunity. Perhaps, as others have suggested, [121] just being instructed on the defense makes juries more likely to find defendant's conduct reasonable or lawful, but one would want to explore outcomes further to confirm this result.

Conclusion

This is the first empirical study to investigate the role that qualified immunity plays in jury trials. It shows that, on one hand, qualified immunity rarely is the subject of jury deliberations but that, on the other hand, when it **[*2092]** is, it appears to have an outward impact on outcomes. Both findings raise significant questions about how qualified immunity operates on the ground. The general infrequency with which the defense is raised suggests that courts and litigants do not see the defense as typically appropriate for jury resolution. The potential impact that it may have on outcomes, however, suggests that in those cases where it is deemed appropriate, it can be outcome determinative.

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[119] See supra notes 74-78 and accompanying text.

[120] The Supreme Court has recently given strong indications that, at least at trial, the burden of proving the defense rests on defendants. Notably, in Ortiz v. Jordan, one of the few cases in which the Court reviewed a qualified immunity trial, when discussing the officers' entitlement to immunity, the Court noted that the defendants "produced no evidence" for one of their factual contentions, suggesting that at least at trial, the burden of proof rests on defendants invoking the qualified immunity defense. 562 U.S. 180, 191 n.9 (2011).

[121] See supra note 66 and accompanying text.

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ARTICLE: How Qualified Immunity Fails

October, 2017

Reporter
127 Yale L.J. 2 *

Length: 10402 words

Author: JOANNA C. SCHWARTZ

Highlight

ABSTRACT. This Article reports the findings of the largest and most comprehensive study to date of the role qualified immunity plays in constitutional litigation. Qualified immunity shields government officials from constitutional claims for money damages so long as the officials did not violate clearly established law. The Supreme Court has described the doctrine as incredibly strong--protecting "all but the plainly incompetent or those who knowingly violate the law." Legal scholars and commentators describe qualified immunity in equally stark terms, often criticizing the doctrine for closing the courthouse doors to plaintiffs whose rights have been violated. The Court has repeatedly explained that qualified immunity must be as powerful as it is to protect government officials from burdens associated with participating in discovery and trial. Yet the Supreme Court has relied on no empirical evidence to support its assertion that qualified immunity doctrine shields government officials from these assumed burdens.

This Article is the first to test this foundational assumption underlying the Supreme Court's qualified immunity decisions. I reviewed the dockets of 1,183 Section 1983 cases filed against state and local law enforcement defendants in five federal court districts over a two-year period and measured the frequency with which qualified immunity motions were brought by defendants, granted by courts, and dispositive before discovery and trial. I found that qualified immunity rarely served its intended role as a shield from discovery and trial in these cases. Across the five districts in my study, just thirty-eight (3.9%) of the 979 cases in which qualified immunity could be raised were dismissed on qualified immunity grounds. And when one considers all the Section 1983 cases brought against law enforcement defendants--each of which could expose law enforcement officials to burdens associated with discovery and trial--just seven (0.6%) were dismissed at the motion to dismiss stage and thirty-one (2.6%) were dismissed at summary judgment on qualified immunity grounds. My findings enrich our understanding of qualified immunity's role in constitutional litigation, belie expectations about the policy interests served by qualified immunity, and show that qualified immunity doctrine should be modified to reflect its actual role in constitutional litigation.

Text

[*6] INTRODUCTION

The United States Supreme Court appears to be on a mission to curb civil rights lawsuits against law enforcement officers, and appears to believe qualified immunity is the means of achieving its

goal. The Supreme Court has long described qualified immunity doctrine as robust--protecting "all but the plainly incompetent or those who knowingly violate the law." [1] And the Court's most recent qualified immunity decisions have broadened the scope of the doctrine even further. [2] The Court has also granted a rash of petitions for certiorari in cases in which lower courts denied qualified immunity to law enforcement officers, reversing or vacating every one. [3] In these decisions, the Supreme Court has scolded lower courts for applying qualified immunity doctrine in a manner that is too favorable to plaintiffs and thus ignores the "importance of qualified immunity 'to society as a whole.'" [4] As Noah Feldman has observed, the Supreme Court's recent qualified immunity decisions have sent a clear message to lower courts: "The Supreme Court wants fewer lawsuits against police to go forward." [5] And the Court believes that qualified immunity doctrine is the way to keep the doors to the courthouse closed.

Among legal scholars and other commentators, there is a widespread belief that the Supreme Court is succeeding in its efforts. Scholars report that qualified immunity motions are raised frequently by defendants, are granted frequently **[*7]** by courts, and often result in the dismissal of cases. [6] As Ninth Circuit Judge Stephen Reinhardt has written, the Supreme Court's recent qualified immunity decisions have "created such powerful shields for law enforcement that people whose rights are violated, even in egregious ways, often lack any means of enforcing those rights." [7] Three of the foremost experts on Section 1983 litigation--Karen Blum, Erwin Chemerinsky, and Martin Schwartz--have concluded that recent developments in qualified immunity doctrine leave "not much *Hope* left for plaintiffs." [8]

The widespread assumption that qualified immunity provides powerful protection for

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[1] Malley v. Briggs, 475 U.S. 335, 341 (1986).

[2] *See* Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 64-65 (2016); *see also infra* note 183 and accompanying text.

[3] *See* Scott Michelman, Taylor v. Barkes: *Summary Reversal Is Part of a Qualified Immunity Trend*, SCOTUSBLOG (June 2, 2015, 11:17 AM), http://www.scotusblog.com/2015/06/taylor-v-barkes-summary-reversal-is-part-of-a-qualified-immunity-trend [http://perma.cc /86EN-KSLT];*see also* William Baude, *Is Qualified Immunity Unlawful*?, 106 CALIF. L. REV. (forthcoming 2018) (manuscript at 45), http://ssrn.com/abstract=2896508 [http://perma.cc/ZF4C-N3DR] (observing that the Supreme Court found officers violated clearly established law in just two of the twenty-nine qualified immunity cases decided by the Supreme Court since 1982). In one of its most recent qualified immunity decisions,*White v. Pauly*, the Supreme Court vacated the lower court's decision and remanded for further proceedings. But, in so doing, the Court explained that the defendant "did not violate clearly established law . . . [o]n the record described by the Court of Appeals." 137 S. Ct. 548, 552 (2017).

[4] City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982)).

[5] Noah Feldman, *Supreme Court Has Had Enough with Police Suits*, BLOOMBERG VIEW (Jan. 9, 2017, 3:08 PM), http://www.bloomberg.com/view/articles/2017-01-09/supreme-court-has-had-enough-with-police-suits [http://perma.cc/M88T-52VJ].

[6] *See* Martin A. Schwartz, *Section 1983 Litigation*, FED. JUD. CTR. 143 (2014), http://www.fjc.gov/sites/default/files/2014/Section-1983-Litigation-3D-FJC-Schwartz-2014.pdf [http://perma.cc/JMQ9-92XN] (describing qualified immunity as "the most important defense" in Section 1983 litigation, and stating that "courts decide a high percentage of Section 1983 personal-capacity claims for damages in favor of the defendant on the basis of qualified immunity" (footnote omitted));*see also* SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 8.5, Westlaw (database updated Aug. 2017) ("Under *Harlow*, defendants on summary judgment motion frequently will be dismissed without a consideration of the merits."); Susan Bendlin, *Qualified Immunity: Protecting "All but the Plainly Incompetent" (and Maybe Some of Them, Too)*, 45 J. MARSHALL L. REV. 1023, 1023 (2012) ("Public officials can be more certain than ever before that qualified immunity will shield them from suits for money damages even if their actions violate the constitutional rights of another."); John C. Jeffries, *What's Wrong with Qualified Immunity*?, 62 FLA. L. REV. 851, 852 (2010) ("The Supreme Court's effort to have more immunity determinations resolved on summary judgment or a motion to dismiss--in other words, to create immunity from *trial* as well as from *liability*--has been largely successful." (footnote omitted)).

[7] Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and*

government officials belies how little we know about the role qualified immunity plays in the litigation of constitutional claims. [9] The scant evidence available on this topic points in opposite directions. Studies of qualified **[*8]** immunity decisions have found that qualified immunity motions are infrequently denied, suggesting that the doctrine plays a controlling role in the resolution of many Section 1983 cases. [10] But when Alexander Reinert studied the dockets in *Bivens* actions--constitutional cases brought against federal actors--he found that grants of qualified immunity led to just 2% of case dismissals over a three-year period. [11] If qualified immunity protects all but the "plainly incompetent or those who knowingly violate the law," [12] and qualified immunity motions are infrequently denied, how can qualified immunity be the basis for dismissal of such a small percentage of cases?

More than descriptive accuracy is at stake in answering this question--it goes to a core justification for qualified immunity's existence. Although the concept of qualified immunity was drawn from defenses existing in the common law at the time 42 U.S.C. § 1983 was enacted, the Court has made clear that the contours of qualified immunity's protections are shaped not by the common law but instead by policy considerations. [13] In particular, the Court seeks to balance "two important interests--the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." [14] Since the doctrine's inception, the Court has repeatedly stated that financial liability is one of the burdens qualified immunity is intended to protect against. [15] Yet, as I showed in a prior study, law enforcement defendants are almost always indemnified and thus rarely pay anything towards settlements **[*9]** and judgments entered against them. [16] Near certain and universal indemnification drastically reduces the value of qualified immunity as a protection against the burden of financial liability.

In recent years, the Court has focused increasingly

Some Particularly Unfortunate Consequences, 113 MICH. L. REV. 1219, 1245 (2015); *see also* Caryn J. Ackerman, Comment, *Fairness or Fiction: Striking a Balance Between the Goals of § 1983 and the Policy Concerns Motivating Qualified Immunity*, 85 OR. L. REV. 1027, 1028 (2006) (describing qualified immunity doctrine as "arguably one of the most significant obstacles for § 1983 plaintiffs").

[8] Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633 (2013). *Hope* refers to *Hope v. Pelzer*, a 2002 Supreme Court decision denying qualified immunity to prison guards who had handcuffed the plaintiff to a hitching post. 536 U.S. 730 (2002). The decision is viewed as more "plaintiff friendly" than the Court's subsequent qualified immunity decisions. Blum, Chemerinsky & Schwartz, *supra*, at 654.

[9] *See infra* note 57 and accompanying text (describing the lack of empirical research concerning qualified immunity litigation practice and the justifications underlying the doctrine). For research regarding other aspects of qualified immunity doctrine, see *infra* notes 10, 180.

[10] *See* Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 145 n.106 (1999) (finding that qualified immunity was denied in 20% of federal cases over a two-year period); Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 691 (2009) (finding that qualified immunity was denied in 14% to 32% of district court decisions); Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of* Pearson v. Callahan, 62 STAN. L. REV. 523, 545 (2010) (finding that qualified immunity was denied in approximately 32% of appellate decisions).

[11] *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 845 (2010).

[12] Malley v. Briggs, 475 U.S. 335, 341 (1986).

[13] Justice Thomas has recently criticized this approach, arguing that qualified immunity doctrine should mirror historical common law defenses. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1870-72 (2017) (Thomas, J., concurring in part and concurring in the judgment). For a discussion of this argument, and the relevance of my findings to this argument, see *infra* note 203 and accompanying text.

[14] Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[15] *See infra* notes 33-36 and accompanying text.

[16] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014).

on a different justification for qualified immunity: the need to protect government officials from nonfinancial burdens associated with discovery and trial. [17] This desire has arguably shaped qualified immunity more than any other policy justification for the doctrine. [18] Yet we do not know to what extent discovery and trial burden government officials, or the extent to which qualified immunity doctrine protects against those assumed burdens. Although both questions demand critical investigation, this Article focuses on the latter. Assuming that discovery and trial do impose substantial burdens on government officials, and that shielding officials from discovery and trial is a legitimate aim of qualified immunity doctrine, to what extent does qualified immunity actually achieve its intended goal?

To answer these questions, I undertook the largest and most comprehensive study to date of the role qualified immunity plays in constitutional litigation. I reviewed the dockets of 1,183 lawsuits filed against state and local law enforcement defendants over a two-year period in five federal district courts--the Southern District of Texas, the Middle District of Florida, the Northern District of Ohio, the Eastern District of Pennsylvania, and the Northern District of California. [19] I tracked several characteristics of these cases including the frequency with which qualified immunity was raised, the stage of the litigation at which qualified immunity was raised, the courts' assessments of defendants' qualified immunity motions, the frequency and outcome of interlocutory and final appeals of qualified immunity decisions, and the cases' dispositions.

I found that, contrary to judicial and scholarly assumptions, qualified immunity is rarely the formal reason that civil rights damages actions against law enforcement end. Qualified immunity is raised infrequently before discovery begins: across the districts in my study, defendants raised qualified immunity in motions to dismiss in 13.9% of the cases in which they could raise the defense. [20] These motions were less frequently granted than one might expect: courts granted motions to dismiss in whole or part on qualified immunity **[*10]** grounds 13.6% of the time. [21] Qualified immunity was raised more often by defendants at summary judgment and was more often granted by courts at that stage. But even when courts granted motions to dismiss and summary judgment motions on qualified immunity grounds, those grants did not always result in the dismissal of the cases--additional claims or defendants regularly remained and continued to expose government officials to the possibility of discovery and trial. Across the five districts in my study, just 3.9% of the cases in which qualified immunity could be raised were dismissed on qualified immunity grounds. [22] And when one considers all the Section 1983 cases brought against law enforcement defendants--each of which could expose law enforcement officials to whatever burdens are associated with discovery and trial--just 0.6% of cases were dismissed at the motion to dismiss stage and 2.6% were dismissed at summary judgment on qualified immunity grounds. [23]

Although courts rarely dismiss Section 1983 suits against law enforcement on qualified immunity grounds, there is every reason to believe that qualified immunity doctrine influences the litigation of Section 1983 claims in other ways. The threat of a qualified immunity motion may cause a person never to file suit, or to settle or withdraw her

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[17] *See infra* notes 37-41 and accompanying text.

[18] *See infra* Section I.B.

[19] *See infra* Part II for a description of my study design and methodology.

[20] *See infra* Tables 2 & 3 and *infra* note 111 and accompanying text.

[21] *See infra* Table 7 (showing that qualified immunity was granted in whole in 9.1% of cases in which a qualified immunity motion was raised at the motion to dismiss stage, and was granted in part in 4.5% of such cases).

[22] *See infra* Table 11 and accompanying text.

[23] *See infra* Table 12 and accompanying text.

claims before discovery or trial. [24] Qualified immunity motion practice and interlocutory appeals of qualified immunity denials may increase the costs and delays associated with Section 1983 litigation. The challenges of qualified immunity doctrine may cause plaintiffs' attorneys to include claims in their cases that cannot be dismissed on qualified immunity grounds--claims against municipalities, claims seeking injunctive relief, and state law claims. Qualified immunity likely influences the litigation of cases against law enforcement in each of these ways. But, as my study makes clear, qualified immunity does not affect constitutional litigation against law enforcement in the way the Court expects and intends.

One should not conclude based on my findings that the Supreme Court simply needs to make qualified immunity stronger. As a preliminary matter, qualified immunity may not be well suited to weed out only insubstantial cases. [25] Moreover, my data suggest that qualified immunity is often fundamentally **[*11]** ill suited to dismiss filed cases, regardless of their underlying merits. [26] Although district courts recognize that they should dispose of cases as early as possible on qualified immunity grounds, plaintiffs can often plausibly plead clearly established constitutional violations and thus defeat motions to dismiss. Factual disputes regularly prevent dismissal at summary judgment. And even when courts grant qualified immunity motions, additional defendants or claims often remain that continue to expose government officials to the burdens of litigation. My data also suggest that qualified immunity is less essential than has been assumed to serve its intended protective function. The Supreme Court suggests in its opinions that qualified immunity is the only barrier standing between government officials and the burdens of discovery and trial. Instead, my study shows that litigants and courts have a wide range of tools at their disposal to resolve Section 1983 cases.

One also should not conclude based on my findings that qualified immunity is more benign than has been assumed. My findings do show that Section 1983 claims against the police are infrequently dismissed on qualified immunity grounds. But qualified immunity doctrine has been roundly criticized as incoherent, illogical, and overly protective of government officials who act unconstitutionally and in bad faith. [27] The fact that few cases are dismissed on qualified immunity grounds does not fundamentally undermine these critiques.

Qualified immunity doctrine is intended by the Court to balance "the need to hold government officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties responsibly." [28] Were qualified immunity reliably insulating government officials from the burdens of litigation in insubstantial cases, one could argue that the doctrine's incoherence, illogic, and overprotection of government officials were unfortunate but necessary to further government interests. Yet available evidence suggests that qualified immunity is not achieving its policy objectives; the doctrine is unnecessary to protect government officials from financial liability and ill suited to shield government officials from discovery and trial in most filed cases. Qualified immunity may, in fact, increase the costs and delays associated with constitutional litigation. Qualified immunity might benefit the government in other ways, and further **[*12]** research is necessary to explore this possibility. [29] But the evidence now available

[24] For further discussion of these possibilities, see *infra* notes 117-122 and accompanying text.

[25] *See infra* text accompanying notes 204-205.

[26] *See infra* notes 136-138 and accompanying text.

[27] For a discussion of these critiques, see *infra* notes 176-185 and accompanying text.

[28] Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[29] See *infra* notes 161-163 and accompanying text for a description of remaining questions about the way qualified immunity doctrine

weakens the Court's current justifications for the doctrine's structure and highly restrictive standards. The Supreme Court has written that evidence undermining its assumptions about the realities of constitutional litigation might "justify reconsideration of the balance struck" in its qualified immunity decisions. [30] Given my findings, it is high time for the Supreme Court to reconsider that balance.

The remainder of the Article proceeds as follows. Part I describes the Supreme Court's assumptions about the burdens of discovery and trial for government officials, and the ways in which these assumptions have shaped qualified immunity doctrine. In Part II, I describe the methodology of my study. In Part III, I set forth my findings about the frequency with which law enforcement defendants raise qualified immunity, the frequency with which courts grant qualified immunity, the frequency and outcome of qualified immunity interlocutory and final appeals, and the frequency with which qualified immunity disposes of plaintiffs' cases. In Part IV, I consider the implications of my findings for descriptive accounts of qualified immunity's role in constitutional litigation and expectations about the policy interests served by qualified immunity doctrine. I also suggest adjustments to qualified immunity that would create more consistency between the doctrine and its actual role in constitutional litigation.

I . QUALIFIED IMMUNITY'S EXPECTED ROLE IN CONSTITUTIONAL LITIGATION

The Supreme Court has long viewed qualified immunity as a means of protecting government officials from burdens associated with participating in discovery and trial in insubstantial cases. Indeed, the Supreme Court has justified several major developments in qualified immunity doctrine over the past thirty-five years as means of protecting government officials from these assumed burdens. In this Part, I describe the Court's stated assumptions about the purposes served by qualified immunity, the ways in which those assumptions have shaped qualified immunity doctrine, and the lack of evidence supporting the Court's concerns and interventions.

[*13] *A. The Court's Concerns About the Burdens of Litigation*

The Supreme Court has made clear that its qualified immunity jurisprudence reflects the Court's view about how best to balance "the importance of a damages remedy to protect the rights of citizens" against "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." [31] Yet the Court's descriptions of the ways in which qualified immunity protects government officials have shifted over time.

The Supreme Court's original rationale for qualified immunity was to shield officials from financial liability. The Court first announced that law enforcement officials were entitled to a qualified immunity from suits in the 1967 case of *Pierson v. Ray*. [32] That decision justified qualified immunity as a means of protecting government defendants from financial burdens when acting in good faith in legally murky areas. [33] Qualified immunity was necessary, according to the Court, because "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he had probable cause, and being mulcted in damages if he does."

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functions and the extent to which it achieves its intended goals.

[30] Anderson v. Creighton, 483 U.S. 635, 642 n.3 (1987).

[31] Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

[32] 386 U.S. 547 (1967).

[33] Id. at 555; *see also* Wood v. Strickland, 420 U.S. 308, 319 (1975) ("Liability for damages for every action which is found subsequently to have been violative of a student's constitutional rights and to have caused compensable injury would unfairly impose upon the school decisionmaker the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties.").

[34] The scope of the qualified immunity defense is in many ways consistent with an interest in protecting government officials from financial liability. For example, qualified immunity does not attach in claims against municipalities, claims against some private actors, and claims for injunctive or declaratory relief. [35] Indeed, the Court has been clear that municipalities and private prison guards are not entitled to qualified immunity in part because neither type of defendant is threatened by personal financial liability. [36]

[*14] The Supreme Court's decision in *Harlow v. Fitzgerald*, fifteen years after *Pierson*, expanded the policy goals animating qualified immunity. The Court explained in *Harlow* that qualified immunity was necessary not only to protect government officials from financial liability, but also to protect against "the diversion of official energy from pressing public issues," "the deterrence of able citizens from acceptance of public office," and "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" [37]

In subsequent cases, the Court has focused increasingly on the need to protect government officials from burdens associated with discovery and trial, with the expectation that qualified immunity can protect government officials from those burdens. In *Mitchell v. Forsyth*, the Court reaffirmed the *Harlow* Court's conclusion that qualified immunity was necessary to protect against the burdens associated with both trial and pretrial matters, like discovery, because "'[i]nquiries of this kind can be peculiarly disruptive of effective government.'" [38] In *Ashcroft v. Iqbal*, the Court again emphasized the value of qualified immunity in curtailing the time-intensive discovery process. As the Court explained:

> The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including "avoidance of disruptive discovery." There are serious and legitimate reasons for this. If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and **[*15]** resources that might otherwise be directed to the proper execution of the work of the Government. [39]

In recent years, the interest in shielding government officials from the burdens of discovery and trial has taken center stage in the Court's qualified immunity calculations. In 1997, the Supreme Court made clear that "the risk of 'distraction' alone cannot be sufficient grounds for an immunity." [40] Twelve years later, in 2009, the Court described protecting

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[34] Pierson, 386 U.S. at 555.

[35] *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 242 (2009) (observing that qualified immunity is not available in "criminal cases and § 1983 cases against a municipality, as well as § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages"); Richardson v. McKnight, 521 U.S. 399, 412 (1997) (holding that private prison guards are not entitled to qualified immunity); Wood, 420 U.S. at 315 n.6 ("[I]mmunity from damages does not ordinarily bar equitable relief as well.").

[36] *See* Richardson, 521 U.S. at 411 (finding that private actors' insurance "increases the likelihood of employee indemnification and to that extent reduces the employment-discouraging fear of unwarranted liability potential applicants face"); Owen v. City of Independence, 445 U.S. 622, 653 (1980) (concluding that municipalities should not be protected by qualified immunity in part because concerns about overdeterrence are "less compelling, if not wholly inapplicable, when the liability of the municipal entity is at stake"). The Court has offered little explanation why the qualified immunity defense is not available in claims for nonmonetary relief.

[37] Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

[38] Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (alteration in original) (quoting Harlow, 457 U.S. at 817).

[39] Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) (citation omitted).

[40] Richardson, 521 U.S. at 411.

government officials from burdens associated with discovery and trial as the "'driving force' behind [the] creation of the qualified immunity doctrine." [41]

The Court's interest in protecting government officers from burdens associated with discovery and trial extends not only to defendants but to other government officials who may be required to testify, respond to discovery, or otherwise participate in litigation. In *Filarsky v. Delia*, the Court held that a private actor retained by the government to carry out its work was entitled to qualified immunity in part because the "distraction of lawsuits . . . will also often affect any public employees with whom they work by embroiling those employees in litigation." [42]

B. Doctrinal Impact of the Court's Desire To Protect Defendants from Discovery and Trial

Over the past thirty-five years, the Court's interest in protecting government officials from discovery and trial has shaped qualified immunity in several important ways. Granted, some aspects of qualified immunity doctrine are inconsistent with the Court's interest in protecting government officials from discovery and trial. After all, government officials must participate in discovery and trial in claims against municipalities--as witnesses, if not as defendants. In addition, government officials must participate in discovery and trial in claims for declaratory and injunctive relief. Yet, in the years since *Pierson*, the Court's concerns about the burdens of discovery and trial have led the Court to remove the subjective prong of the qualified immunity defense, adjust the process by which lower courts assess qualified immunity motions, and allow interlocutory appeals of qualified immunity denials.

[*16] *1. Defendants' State of Mind*

The Court's interest in shielding government defendants from discovery and trial underlay its decision to eliminate the subjective prong of the qualified immunity defense. From 1967, when qualified immunity was first announced by the Supreme Court, until 1982, when *Harlow* was decided, a defendant seeking qualified immunity had to show both that his conduct was objectively reasonable and that he had a "good-faith" belief that his conduct was proper. [43] In *Harlow*, the Supreme Court concluded that the subjective prong of the defense was "incompatible" with the goals of qualified immunity because an official's subjective intent often could not be resolved before trial. [44] Moreover, during discovery, gathering evidence of an official's subjective motivation "may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues." [45] By eliminating the subjective prong of the qualified immunity analysis, the Court believed it could "avoid 'subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery' in cases where the legal norms the officials are alleged to have violated were not clearly established at the time." [46]

2. The Order of Battle

The Court's concerns about burdens associated with litigation also influenced its decisions regarding the manner in which courts should analyze qualified immunity. The Supreme Court believes that lower courts deciding qualified immunity motions are faced with two questions--whether a constitutional right was violated, and whether that right was clearly established. But the Court has wavered in its view regarding the order in which these questions must be answered--what is often referred to as "the

[41] Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987)).

[42] 566 U.S. 377, 391 (2012).

[43] Harlow, 457 U.S. at 815-16.

[44] *Id.*

[45] Id. at 817.

[46] Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (alteration in original) (quoting Harlow, 457 U.S. at 817-18).

order of battle." In 2001, the Supreme Court held in *Saucier v. Katz* that a court engaging in a qualified immunity analysis must first decide whether the defendant violated the plaintiff's constitutional rights and then decide whether the constitutional right was clearly established. [47] The Court insisted on this sequence because it would allow "the law's elaboration from case to case . . . . The law might be deprived of **[*17]** this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case." [48]

Eight years later, in *Pearson v. Callahan*, the Court reversed itself and concluded that *Saucier*'s two-step process was not mandatory. [49] In reaching this conclusion, Justice Alito, writing for the Court, relied heavily on the fact that courts considered the process mandated by *Saucier* to be unduly burdensome. [50] Justice Alito also explained that the process wasted the parties' resources, writing that "*Saucier*'s two-step protocol 'disserve[s] the purpose of qualified immunity' when it 'forces the parties to endure additional burdens of suit--such as the costs of litigating constitutional questions and delays attributable to resolving them--when the suit otherwise could be disposed of more readily.'" [51] Concerns about the burdens of litigation therefore led the Court to allow lower courts not to decide the first question--whether the conduct was unconstitutional--if they could grant the motion on the ground that the right was not clearly established.

3. Interlocutory Appeals

The Court's interest in protecting government officials from the burdens of discovery and trial also motivated its decision to allow interlocutory appeals of qualified immunity denials. [52] Generally speaking, litigants in federal court can only appeal final judgments; interlocutory appeals are not allowed unless a right "cannot be effectively vindicated after the trial has occurred." [53] The question decided by the Court in *Mitchell v. Forsyth* was whether qualified immunity should be understood as an entitlement not to stand trial that cannot be remedied by an appeal at the end of the case. In concluding that a denial of qualified immunity could be appealed immediately, the Court relied on its assertion in *Harlow* that qualified immunity was "an entitlement not to stand trial or face **[*18]** the other burdens of litigation." [54] If qualified immunity protected only against the financial burdens of liability, there would be no need for interlocutory appeal; defendants denied qualified immunity could appeal after a final judgment and before the payment of any award to a plaintiff. Instead, the Court concluded, qualified immunity "is an *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial." [55] Only an interest in protecting officials from discovery and trial can justify this holding.

C. The Lack of Empirical Support for the Court's Concerns and Interventions

The Supreme Court's qualified immunity decisions over the past thirty-five years have relied on the assumptions that discovery and trial impose substantial burdens on government officials, and that qualified immunity can shield government officials from these burdens. Four years after it decided *Harlow*, the Court asserted that the

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[47] 533 U.S. 194, 201 (2001).

[48] *Id.*

[49] 555 U.S. 223 (2009).

[50] Id. at 236-37.

[51] Id. at 237 (alteration in original) (quoting Brief of National Ass'n of Criminal Defense Lawyers as Amicus Curiae Supporting Respondent at 30, Pearson, 555 U.S. 223 (No. 07-751)).

[52] Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985). Note that a defendant can immediately appeal a decision that the law was clearly established, but cannot immediately appeal a denial of qualified immunity made on the grounds that there exists a genuine issue of fact for trial. *See* Johnson v. Jones, 515 U.S. 304, 319-20 (1995).

[53] Mitchell, 472 U.S. at 525.

[54] Id. at 526.

[55] *Id.*

decision had achieved the Court's goal of facilitating dismissal at summary judgment. [56] In subsequent years, the Court's repeated invocation of the burdens of discovery and trial, and repeated reliance on qualified immunity doctrine to protect defendants from those assumed burdens, suggest the Court's continued faith in these positions. Yet the Court has relied on no empirical evidence to support its views.

Scholars have decried the lack of empirical evidence about the realities of civil rights litigation relevant to questions about the proper scope of qualified immunity doctrine and the extent to which the doctrine achieves its intended purposes. Twenty years ago, Alan Chen complained that the Court and its critics make assertions about the role of qualified immunity in constitutional litigation without evidence to support their claims. [57] Although scholars have empirically **[*19]** examined some questions about qualified immunity--paying particular attention to the impact of *Pearson* on the development of constitutional law--the same is largely true today. [58] As Richard Fallon has observed, "[W]e could make far better judgments of how well qualified immunity serves the function of getting the right balance between deterrence of constitutional violations and chill of conscientious official action if we had better empirical information." [59] This Article, and my research more generally, aims to fill that gap.

II. STUDY METHODOLOGY

To evaluate the role that qualified immunity plays in the litigation of Section 1983 suits, I reviewed the dockets of cases filed from January 1, 2011 to December 31, 2012 in five districts: the Southern District of Texas, Middle District of Florida, Northern District of Ohio, Eastern District of Pennsylvania, and Northern District of California. Several considerations led me to study these five districts.

I chose to look at decisions from district courts in the Third, Fifth, Sixth, Ninth, and Eleventh Circuits because I expected that judges from these circuits might differ in their approach to qualified immunity and to Section 1983 litigation more generally. This expectation was based on my review of district court qualified immunity decisions from each of the circuits, as well as a view, shared by others, that judges in these circuits range from conservative to more liberal. [60] Moreover, commentators believe that courts in these circuits vary in their approach to qualified immunity, with judges in the Third and Ninth Circuits favoring plaintiffs, and judges in the Eleventh Circuit so hostile to Section 1983 cases that they are described as applying "*un*qualified immunity." [61]

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[56] *See* Malley v. Briggs, 475 U.S. 335, 341 (1986) ("The *Harlow* standard is specifically designed to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment,' and *we believe it sufficiently serves this goal*." (emphasis added)). Scholars appear to agree. *See supra* note 6 and accompanying text.

[57] Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 102 (1997) ("Presently, there is no empirical foundation for the advocates of the present qualified immunity doctrine or its critics. While the Court has consistently hypothesized that significant social costs are engendered by § 1983 and *Bivens* litigation against individual government officials, it has never relied on empirical data concerning the impact of constitutional tort litigation on officials' actual behavior. Similarly, while other commentators also have observed that qualified immunity litigation may generate substantial social costs, they have offered no supporting empirical data either." (footnotes omitted)).

[58] *See supra* notes 10-12 and *infra* notes 179-180 and accompanying text.

[59] Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 500 (2011).

[60] *See, e.g.*, Reinert, *supra* note 11, at 832 n.126 (citing Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 312 fig.4 (2007)).

[61] John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 250 n.151 (2013) (quoting Elizabeth J. Normal & Jacob E. Daly, *Statutory Civil Rights*, 53 MERCER L. REV. 1499, 1556 (2002)); *see also* Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011) ("We have repeatedly told courts--and the Ninth Circuit in particular--not to define clearly established law at a high level of generality." (citation omitted)); Charles R. Wilson, *"Location, Location, Location": Recent Developments in the Qualified*

[*20] I chose these five districts within these five circuits for two reasons. First, I expected that these five districts would have a large number of cases to review: from 2011 to 2012, these districts were among the busiest in the country, as measured by case filings. [62] Second, these five districts have a range of small, medium, and large law enforcement agencies and agencies of comparable sizes. [63]

I chose to review dockets instead of relying on the most obvious alternative--decisions available on Westlaw. [64] Although Westlaw can quickly sort out decisions in which qualified immunity is addressed by district courts, Westlaw could not capture information essential to my analysis about the frequency with which qualified immunity protects government officials from discovery and trial. First, a Westlaw search could capture no information about the number of cases in which qualified immunity was never raised. In addition, a Westlaw search could not capture information about the number of cases in which qualified immunity was raised by the defendant in his motion but was not addressed by the court in its decision. Even when a defendant raises a qualified immunity defense and the district court addresses qualified immunity in its decision, the decision may not appear on Westlaw--Westlaw does not capture motions resolved without a written opinion, and includes only those opinions that are selected to appear on the service. [65] In other words, opinions on **[*21]** Westlaw can offer insights about the ways in which district courts assess qualified immunity when they choose to address the issue in a written opinion and the opinion is accessible on Westlaw, but can say little about the frequency with which qualified immunity is raised, the manner in which all motions raising qualified immunity are decided, and the impact of qualified immunity on case dispositions.

I reviewed the dockets of cases filed in 2011 and 2012 in the five districts in my study. [66] I searched case filings in the five districts in my study through Bloomberg Law, an online service that has dockets otherwise available through PACER and additionally provides access to documents submitted to the court--complaints, motions, orders, and other papers. [67] Within Bloomberg Law, I

Immunity Defense, 57 N.Y.U. ANN. SURV. AM. L. 445, 447-48 (2000) (describing the Eleventh Circuit as having a very restrictive view and other circuits, including the Third Circuit, as having a broader view of what constitutes "clearly established" law).

[62] *See Judicial Facts and Figures*, ADMIN. OFF. U.S. CTS. tbl.4.2 (Sept. 30, 2012), http://www.uscourts.gov/sites/default/files/statistics_import_dir/Table402_6.pdf [http://perma.cc/697A-JWVH].

[63] For example, the Philadelphia and Houston Police Departments are both large, with between 5,000 and 7,000 officers; the Cleveland Police Department, San Francisco Police Department, and Jacksonville Sheriff's Office are midsized, with between 1,600 and 2,000 officers; the Orlando Police Department and Oakland Police Department each have between 750 and 800 officers; and all five districts have smaller agencies. *See* Bureau of Justice Statistics, *Census of State and Local Law Enforcement Agencies (CSLLEA)*, NAT'L ARCHIVE CRIM. JUST. DATA (2008) [hereinafter *BJS Law Enforcement Census Data*], http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/27681 [http://perma.cc/MLQ3-W2AH].

[64] Most empirical studies examining qualified immunity have relied on decisions available on Westlaw. *See* sources cited *supra* note 10 and *infra* note 180. One notable exception is Alexander Reinert's study of *Bivens* dockets. *See* Reinert, *supra* note 11, at 834.

[65] Relying on Westlaw would have significantly reduced the number of qualified immunity opinions in my dataset. There are a total of 365 district court decisions on motions raising qualified immunity in my dataset. *See infra* Table 6. I searched on Westlaw for each of the 365 qualified immunity decisions I found on Bloomberg Law, and 178 (48.8%) of those decisions were available on Westlaw. Nineteen of fifty-six decisions (33.9%) on qualified immunity motions from the Southern District of Texas were available on Westlaw; forty-one of ninety-one (45.1%) decisions on qualified immunity motions from the Middle District of Florida were available on Westlaw; thirty-seven of sixty-one (60.7%) decisions on qualified immunity motions from the Northern District of Ohio; forty-six of seventy-six (60.5%) decisions on qualified immunity motions from the Northern District of California; and thirty-five of eighty-one (43.2%) decisions on qualified immunity motions from the Eastern District of Pennsylvania. *Cf.* David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 710 (2007) (finding that only 3% of all district court orders appear on Westlaw).

[66] I chose this two-year period because it is a recent period in which most (if not all) cases have been resolved by the time of this Article's publication.

[67] *See* E-mail from Tania Wilson, Bloomberg BNA Law Sch. Relationship Manager, W. Coast, to Kelly Leong, Reference

limited my search to those cases that plaintiffs had designated under the broad term "Other Civil Rights," nature-of-suit code 440. [68] This search generated 462 dockets in the Southern District of Texas, 465 dockets in the Northern District of Ohio, 674 dockets in the Middle District of Florida, 712 dockets in **[*22]** the Northern District of California, and 1,435 dockets in the Eastern District of Pennsylvania. I reviewed the complaints associated with these 3,748 dockets and included in my dataset those cases, brought by civilians, alleging constitutional violations by state and local law enforcement agencies and their employees. [69]

I limited my study to cases brought by civilians against law enforcement defendants for several reasons. First, many of the Supreme Court's qualified immunity decisions have involved cases brought against law enforcement. Of the twenty-nine qualified immunity cases that the Supreme Court has decided since 1982, almost half have involved constitutional claims against state and local law enforcement. [70] Because the Court has developed qualified immunity doctrine (and articulated its underlying purposes) primarily in cases involving law enforcement, it makes sense to examine whether the doctrine is meeting its express goals in these types of cases.

Limiting my study to Section 1983 cases against state and local law enforcement also creates some substantive consistency across the cases in my dataset. Most Section 1983 cases against state and local law enforcement allege Fourth Amendment violations--excessive force, false arrest, and wrongful searches--and, less frequently, First and Fourteenth Amendment violations. Restricting my study to suits by civilians against state and local law enforcement facilitates direct comparison of outcomes in similar cases across the five districts in my study. Finally, much of my own prior research has focused on lawsuits against state and local law enforcement, and maintaining this focus here allows for future synthesis of my findings. [71]

[*23] The resulting dataset includes a total of 1,183 cases from these five districts: 131 cases

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Librarian, UCLA Sch. of Law (July 8, 2016, 12:18 PM) (on file with author) ("[Bloomberg Law] ha[s] everything on PACER. We are also able to obtain docket sheets and documents via courier retrieval (which would fill in the gap of some cases not available electronically).").

[68] Every complainant in federal court must choose from various "Nature of Suit" codes on the "Civil Cover Sheet," also known as Form JS 44. *See* Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI.-KENT L. REV. 439, 452 & n.71 (2006). Code 440 designates "Other Civil Rights" actions, excluding specific categories related to voting, employment, housing, disabilities, and education. The official description for Code 440 offers, as an example, an "[a]ction alleging excessive force by police incident to an arrest." *Civil Nature of Suit Code Descriptions*, U.S. CTS. (Aug. 2016), http://www.uscourts.gov/sites/default/files/js_044_code_descriptions.pdf [http://perma.cc/F8A2-7H7T]. It is possible that some plaintiffs in Section 1983 cases against state and local law enforcement did not choose Code 440. Code 550, for example, is titled "Prisoner Petitions--Civil Rights," but its proper use is limited to suits "alleging a civil rights violation by corrections officials."*Id.* Bloomberg Law separately allows users to filter using the "Cause of Action" field on the Civil Cover Sheet. But that field does not impose a limited set of options on complainants, and I found that many Section 1983 cases were not correctly designated. Accordingly, I used the nature-of-suit search.

[69] I limited my study to state and local law enforcement agencies identified in the Bureau of Justice Statistics' *Census of State and Local Law Enforcement Agencies. See BJS Law Enforcement Census Data*, *supra* note 63. I excluded decisions involving other types of government officials, including some government officials that perform law enforcement functions, like law enforcement employed by school districts, state correctional officers, and federal law enforcement. I have additionally excluded Section 1983 actions brought by law enforcement officials as plaintiffs. Finally, I removed duplicate filings, cases that were consolidated, and cases that were improperly brought against law enforcement agencies located outside of the five districts.

[70] *See* Baude, *supra* note 3, at 45. In the remaining fifteen cases, two alleged constitutional violations by state corrections officials, nine alleged constitutional violations by federal law enforcement, and four asserted constitutional claims against government officials not involved in the criminal justice system. *See id.*

[71] *See, e.g.*, Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144 (2016); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010); Schwartz, *supra* note 16; Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841 (2012) [hereinafter Schwartz, *What Police Learn*].

from the Southern District of Texas, 225 cases from the Middle District of Florida, 172 cases from the Northern District of Ohio, 248 cases from the Northern District of California, and 407 cases from the Eastern District of Pennsylvania. For each of these dockets, I tracked multiple pieces of information relevant to this study, including whether the plaintiff(s) sued individual officers and/or the municipality, the relief sought by the plaintiff(s), whether the law enforcement defendant(s) filed one or more motions to dismiss on the pleadings or for summary judgment, whether and when the defendant(s) raised qualified immunity, how the court decided the motions raised by the defendant(s), whether there was an interlocutory or final appeal of a qualified immunity decision, and how the case was ultimately resolved. [72] Although some of this information was available from the docket sheet, I obtained much of the information by reading motions and opinions linked to the dockets on Bloomberg Law.

Although some of my coding decisions were straightforward, others involved less obvious choices. Because my coding decisions may make most sense when reviewed in context, I have described those decisions in detail in the footnotes accompanying the data. [73] Throughout, my coding decisions were guided by my focus on the role that qualified immunity played in the resolution of cases and the frequency with which the doctrine meets its goal of shielding government officials from discovery and trial.

My dataset is comprehensive in the five chosen districts. It includes most--if not all--Section 1983 cases filed by civilians against state and local law enforcement in these federal districts over a two-year period, and it offers insights about how frequently qualified immunity is raised in these cases, how courts decide these motions, and how the cases are resolved. There are, however, several limitations of the data. First, although I selected these five districts in part to capture regional variation, they may not represent the full range of court and litigant behavior nationwide. The marked differences in my data across districts do, however, suggest a considerable degree of regional variation. Second, the data offer no information about the role of qualified immunity in state **[*24]** court litigation. This is in part because Bloomberg Law does not offer much information about the litigation of constitutional cases in state courts. [74]

Third, although this study sheds light on the litigation of constitutional claims against state and local law enforcement officers, it does not necessarily describe the role qualified immunity plays in the litigation of constitutional claims against other types of government employees. It may be that the types of constitutional claims often raised in cases against law enforcement--Fourth Amendment claims alleging excessive force, unlawful arrests, and improper searches--are particularly difficult to resolve on qualified immunity grounds in advance of trial. Fourth Amendment claims may be comparatively easy to

[72] I tracked additional information as well, including whether the plaintiff was represented, the attorneys involved in the cases, and the law enforcement agencies implicated in the cases. These data are relevant to subsequent related projects I intend to undertake and are not reported in this Article.

[73] For descriptions of my coding decisions, see, for example, *infra* notes 82, 87, 88, 91, 93, 98.

[74] I looked at state court dockets available on Bloomberg Law for counties in the Northern District of California and found that very few had any information about motions filed (in the instances that they were not removed to federal court). In addition, federal constitutional cases filed in state court are at least sometimes removed to federal court. In the Northern District of California, fifty-five of the 248 cases filed during the study period--22.2%--were initially filed in state court and removed to federal court. In the Northern District of Ohio, fifty-nine of the cases were removed from state court, which constitutes 34.3% of the 172 cases filed in federal district court over those two years. In the Southern District of Texas, twenty-seven cases were removed from state court, amounting to 20.6% of the 131 total filings in federal district court. In the Eastern District of Pennsylvania, sixty-three of the cases were removed from state court, which constitutes 15.5% of the 407 cases filed in federal court over these two years. In the Middle District of Florida, sixty of the cases were removed from state court, which constitutes 26.7% of the 225 cases filed in federal court over these two years. Of course, these figures do not capture how many cases were filed in state court but were not removed.

plead in a plausible manner (and so could survive a motion to dismiss), and such claims may be particularly prone to factual disputes (making resolution at summary judgment difficult). If so, perhaps qualified immunity motions in cases raising other types of claims would be more successful. On the other hand, John Jeffries has argued that it may be particularly difficult to clearly establish that a use of force violates the Fourth Amendment because Fourth Amendment analysis requires a fact-specific inquiry about the nature of the force used and the threat posed by the person against whom force was used, viewed from the perspective of an officer on the scene. [75] Further research should explore whether qualified immunity plays a different role in cases brought against other government actors, or cases alleging different types of constitutional violations.

Fourth, qualified immunity may be influencing the litigation of constitutional claims in ways that cannot be measured through the examination of case **[*25]** dockets. [76] For example, my study does not measure how frequently qualified immunity causes people not to file lawsuits. It also does not capture information about the frequency with which plaintiffs' decisions to settle or withdraw their claims are influenced by the threat of a qualified immunity motion or decision. Exploration of these issues is critical to a complete understanding of the role qualified immunity plays in constitutional litigation. I discuss these issues in more depth in Part IV, and future research should explore these questions. [77] Yet this Article illuminates several important aspects of qualified immunity's role in Section 1983 cases. Moreover, by measuring the frequency with which qualified immunity motions are raised, granted, and dispositive, this Article reveals the extent to which the doctrine functions as the Supreme Court expects and critics fear.

III. FINDINGS

The Supreme Court has explained that a goal of qualified immunity is to "avoid 'subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery' in cases where the legal norms the officials are alleged to have violated were not clearly established at the time." [78] Logically, qualified immunity will only achieve this goal in a case if four conditions are met.

First, the case must be brought against an individual officer and must seek monetary damages. Qualified immunity is not available for claims against municipalities or claims for noneconomic relief. Second, the defendant must raise the qualified immunity defense early enough in the litigation that it can protect him from discovery or trial. If the defendant seeks to protect himself from discovery, he must raise qualified immunity in a motion to dismiss or a motion for judgment on the pleadings; if a defendant seeks to protect himself from trial, he can raise qualified immunity at the pleadings or at summary judgment. [79] **[*26]** Third, for a qualified immunity motion to protect government officials against burdens associated with discovery or trial, the court must grant the motion on qualified immunity grounds. [80] Finally, the grant of qualified immunity must

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[75] *See* Jeffries, *supra* note 6, at 859-61.

[76] For further discussion of these remaining questions about the role of qualified immunity in constitutional litigation, see *infra* text accompanying notes 118-122.

[77] *See infra* notes 162-163 and accompanying text.

[78] Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (alteration in original) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982)).

[79] In some instances, motions for summary judgment may be made before the parties have engaged in full-fledged discovery, either because the parties will attach documentary evidence to their Rule 12 motion and the court will convert the motion to one for summary judgment, or because the parties will engage in partial discovery sufficient only to address the qualified immunity question. For further discussion of the frequency with which defendants in my dataset moved for summary judgment without discovery, see *infra* note 86 and accompanying text.

[80] It is possible that a court could deny a qualified immunity motion in part or whole, but the motion could nevertheless influence the

completely resolve the case. If qualified immunity is granted for an officer on one claim but not another, that officer will continue to have to participate in the litigation of the case. Even when a grant of qualified immunity results in the dismissal of all claims against a defendant, that defendant may still have to participate in the litigation of claims against other defendants. To be sure, the government official who has been dismissed from the case may no longer feel the same psychological burdens associated with the litigation and may have lesser discovery burdens than he would have had as a defendant. But the grant of qualified immunity will not necessarily shield him from the burdens of participating in discovery and trial.

This Part describes my findings regarding the frequency with which each of these conditions is met. I empirically examine six topics: (1) the number of cases in which qualified immunity can be raised by defendants; (2) the number of cases in which defendants choose to raise qualified immunity; (3) the stage(s) of litigation at which defendants raise qualified immunity; (4) the ways in which district courts decide qualified immunity motions; (5) the frequency and outcome of qualified immunity appeals; and (6) the frequency with which qualified immunity is the reason that a case ends before discovery or trial.

My findings regarding these six topics show that, at least in filed cases, qualified immunity rarely functions as expected. Qualified immunity could not be raised in more than 17% of the cases in my dataset, either because the cases did not name individual defendants or seek monetary damages, or because the cases were dismissed sua sponte by the court before the defendants had an opportunity to answer or otherwise respond. Defendants raised qualified immunity in 37.6% of the cases in my dataset in which the defense could be raised. Defendants were particularly disinclined to raise qualified immunity in motions to dismiss: they did so in only 13.9% of the cases in which they could raise the defense at that stage. Courts granted (in whole or part) less than 18% of the motions that raised a qualified immunity defense. Qualified immunity was the reason for dismissal in just 3.9% of the cases in my dataset in which the defense **[*27]** could be raised, and just 3.2% of all cases in my dataset. The remainder of this Part describes each of these findings in more detail.

courts' other rulings regarding discovery or other pretrial matters. I have not endeavored to measure these possible secondary effects of denied qualified immunity motions.

A. Cases in Which Qualified Immunity Cannot Play a Role

There are certain types of cases in which qualified immunity cannot play a role. The Supreme Court has held that qualified immunity does not apply to claims against municipalities and claims for injunctive or declaratory relief. [81] Accordingly, qualified immunity cannot protect government officials from discovery or trial in cases asserting only these types of claims. In my docket dataset of 1,183 cases, ninety-nine cases (8.4%) were brought solely against municipalities and/or sought only injunctive or declaratory relief. [82]

TABLE 1.

FREQUENCY WITHWHICH QUALIFIED IMMUNITY CAN BE RAISED, IN FIVE DISTRICTS

Go to table1

[*28] Even when cases are brought against individual officers and seek monetary relief, there are some cases in which defendants have no need to

[81] *See supra* notes 35-36 and accompanying text.

[82] In some of these instances, plaintiffs apparently intended to sue individual officers (indicated by the fact that they named Doe defendants) but were ultimately unable to identify the officers. When Doe defendants are identified in the complaint and subsequently named, I count these as cases against individual defendants; when Doe defendants are named but their true identities are never identified, I count these as cases only against the municipality, as the Doe defendants could not raise a qualified immunity defense unless they were identified. In other instances, plaintiffs might have intentionally named only the municipality.

raise qualified immunity as a defense--cases dismissed sua sponte by the court before the defendants respond to the complaint. In these cases, qualified immunity is unnecessary to protect defendants from discovery and trial. In the five districts in my docket dataset, 105 (8.9%) complaints naming individual law enforcement officers and seeking damages were dismissed sua sponte by district courts before defendants answered or responded. Most often, district courts dismissed these cases pursuant to their statutory power to review pro se plaintiffs' complaints and dismiss actions they conclude are frivolous or meritless. [83] Other cases were dismissed by the court at this preliminary stage because the plaintiffs never served the defendants or failed to prosecute the case, or because the court remanded the case to state court for lack of subject matter jurisdiction before the defendants were served or responded.

Qualified immunity can only protect government officials from discovery and trial in cases in which government defendants can raise the defense. Defendants could not raise qualified immunity in 8.4% of cases in my docket dataset because those cases did not name individual defendants and/or seek damages. Qualified immunity was unnecessary to shield government officials from discovery or trial in another 8.9% of cases in my dataset because these cases were dismissed by the district courts before defendants could raise the defense. Accordingly, defendants could raise a qualified immunity defense in a total of 979 (82.8%) of the 1,183 complaints filed in the five districts during my twoyear study period.

B. Defendants' Choices: The Frequency and Timing of Qualified Immunity Motions

Qualified immunity can only protect a defendant from the burdens of discovery and trial if she raises the defense in a dispositive motion. Accordingly, this Section examines the frequency with which defendants raise qualified immunity and the stage of litigation at which they raise the defense. [84]

[*29] TABLE 2.

FREQUENCY WITHWHICH QUALIFIED IMMUNITY IS RAISED

Go to table2

Defendants raised qualified immunity one or more times in 368 (37.6%) of the 979 cases in which defendants could raise the defense. The frequency with which defendants raised qualified immunity varied substantially by district. Defendants in the Southern District of Texas and the Middle District of Florida were most likely to raise the qualified immunity defense; in these districts, defendants brought one or more motions raising qualified immunity in approximately 54% of the cases in which the defense could be raised. Defendants in the Eastern District of Pennsylvania were least likely to raise the qualified immunity defense; defendants brought one or more motions raising qualified immunity in approximately 24% of cases in which the defense could be raised. Defendants in the Northern District of California brought qualified immunity motions in 33.8% of possible cases, and in the Northern District of Ohio defendants raised qualified immunity in 47.5% of possible cases.

I also explored the stage(s) of litigation at which qualified immunity was raised. Of the 368 cases in which qualified immunity was raised at least once, defendants in ninety-five (25.8%) cases raised

[83] *See* 28 U.S.C. § 1915(e)(2) (2012). A total of seventy-one cases were dismissed on these grounds. Note that district courts could exercise this power based on a belief that the defendants were entitled to qualified immunity. However, none of these § 1915(e) dismissals referenced or appeared to rely on qualified immunity as a basis for the decision.

[84] Because qualified immunity is an affirmative defense, government defendants may also raise qualified immunity in their answers. *See* FED. R. CIV. P. 8(c)(1). I did not track the frequency with which government defendants raised qualified immunity in their answers because my focus is on the frequency with which qualified immunity leads to case dismissal, but I found no instances in which a defense raised in an answer led to dismissal without a separate motion raising the defense.

qualified immunity only in a motion to dismiss or motion for judgment on the pleadings, defendants in 229 (62.2%) cases raised qualified immunity only in a motion for summary judgment, and defendants in forty-one (11.1%) cases raised qualified immunity at both the motion to dismiss and summary judgment stages. Based on my review of motions and opinions available on Bloomberg Law, I can confirm only three cases in which defendants included qualified immunity in a motion at or after trial for judgment as a matter of law.My data almost certainly underrepresent the role qualified immunity plays at or after trial, however, as Bloomberg **[*30]** Law does not include oral motions or court decisions issued without a written opinion. [85]

TABLE 3.

TIMING OF QUALIFIED IMMUNITY MOTIONS

Go to table3

Go to table4

Across the five districts in my study, defendants raised qualified immunity at summary judgment approximately twice as often as they did at the motion to dismiss stage. In cases where defendants brought one or more qualified immunity motions, defendants in 73.9% of the cases raised qualified immunity at summary judgment, whereas defendants in 37.0% of the cases raised qualified immunity in a motion to dismiss. There is, however, regional variation in this **[*31]** regard. Defendants in the Middle District of Florida were equally likely to raise qualified immunity at the pleadings stage and at summary judgment, whereas in the Northern District of Ohio and the Northern District of California defendants were more than three times more likely to raise qualified immunity at summary judgment than they were to raise the defense in a motion to dismiss.

Defendants in the Middle District of Florida were also more likely to raise qualified immunity at more than one stage of litigation--they raised qualified immunity at multiple stages of litigation in nineteen (22.6%) of the cases in which they raised the defense. Defendants in the other districts less frequently raised qualified immunity at multiple stages of litigation; they did so in six (10.3%) of the cases in which the defense was raised in the Southern District of Texas, in seven (9.5%) of the cases in which the defense was raised in the Northern District of California, in eight (9.3%) of the cases in which the defense was raised in the Eastern District of Pennsylvania, and in three (4.5%) of the cases in which the defense was raised in the Northern District of Ohio.

I additionally sought to calculate how frequently defendants chose to raise qualified immunity motions in all the cases in which such motions could be brought. This calculation is relatively straightforward regarding motions to dismiss. Defendants could have brought motions to dismiss on qualified immunity grounds in any of the 979 cases in which the defense could be raised and did so in 136 (13.9%) of these cases.

Calculating the number of possible summary judgment motions on qualified immunity grounds is more complicated. Although defendants could bring a summary judgment motion in any case in which they could offer some evidence in support,

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[85] Even more difficult to decipher is the role qualified immunity might play in jury deliberations. Although qualified immunity is a question of law, juries may be called upon to resolve factual disputes relevant to qualified immunity and have been allowed to decide qualified immunity in some instances. *See, e.g.*, Mesa v. Prejean, 543 F.3d 264, 269 (5th Cir. 2008) ("The issue of qualified immunity is a question of law, but in certain circumstances where 'there remain disputed issues of material fact relative to immunity, the jury, properly instructed, may decide the question.'" (citation omitted)); Hale v. Kart, 396 F.3d 721, 728 (6th Cir. 2005) ("[A] court can submit to the jury the factual dispute with an appropriate instruction to find probable cause and qualified immunity if the factual inquiry is answered one way and to find probable cause and qualified immunity lacking if the inquiry is answered in another way."). This study does not attempt to measure the frequency with which qualified immunity is invoked in jury instructions, or the frequency with which juries' decisions are influenced by such instructions.

defendants generally do not move for summary judgment without first engaging in at least some formal discovery. [86] It is difficult to discern from case dockets to what extent parties have engaged in discovery, but the dockets do reflect whether a case management order has been issued, which generally sets the discovery schedule and is the first step of the discovery process. If entry of a case management order can serve as an indication that a case **[*32]** has entered discovery, and if one accepts that defendants in cases that have conducted some discovery could move for summary judgment, then there are 577 cases in my dataset in which defendants could have moved for summary judgment. Defendants brought summary judgment motions on qualified immunity grounds in 272 (47.1%) of these cases.

I also calculated the total number of qualified immunity motions brought by defendants. Defendants sometimes raised qualified immunity in multiple motions to dismiss or summary judgment motions that were resolved by the court in separate opinions: if, for example, defendants moved to dismiss on qualified immunity grounds, the court granted the motion with leave to amend, and the plaintiff filed an amended complaint, the defendants might again move to dismiss on qualified immunity grounds. [87] Defendants filed a total of 440 qualified immunity motions in the 368 cases in which they raised the defense. Table 4 reflects the stage of litigation at which these 440 motions were brought and, again, reflects that defendants file significantly more qualified immunity motions at summary judgment than at the motion to dismiss stage. Of the 440 qualified immunity motions filed, 154 (35.0%) were filed in a motion to dismiss or motion for judgment on the pleadings, and 283 (64.3%) were filed at summary judgment.

[*33] TABLE 4.

TOTAL QUALIFIED IMMUNITY MOTIONS FILED, BY STAGE OF LITIGATION

Go to table5

TABLE 5.

NUMBER OF QUALIFIED IMMUNITY MOTIONS PER CASE

Go to table6

Table 5 reflects the distribution of these 440 motions among the 368 cases in which the defense was raised. Table 5 shows that when defendants raise qualified immunity they usually do so in only one motion, but that defendants in the Southern District of Texas and Middle District of Florida are more likely **[*34]** than defendants in the other three districts to file multiple motions raising qualified immunity.

Finally, I explored how frequently defendants raise other types of defenses in motions to dismiss or for judgment on the pleadings and in summary judgment motions. Qualified immunity is usually one of several arguments defendants make in their motions to dismiss and for summary judgment. Indeed, defendants sometimes move to dismiss or for summary judgment without raising qualified

[86] I located five cases in my dataset--two from the Southern District of Texas and one each from the Northern District of California, Eastern District of Pennsylvania, and Middle District of Florida--in which defendants appear to have moved for summary judgment without first conducting discovery. *See* Egan v. Cty. of Del Norte, No. 1:12-cv-05300 (N.D. Cal. Oct. 11, 2012); Goodarzi v. Hartzog, No. 4:12-cv-02870 (S.D. Tex. Sept. 25, 2012); Rollerson v. City of Freeport, No. 4:12-cv-01790 (S.D. Tex. June 14, 2012); Kline v. City of Philadelphia, No. 2:11-cv-04334 (E.D. Pa. July 6, 2011); Hill v. Lee Cty. Sheriff's Office, No. 2:11-cv-00242 (M.D. Fla. Apr. 27, 2011). In two of these cases, *Rollerson* and *Hill*, the defendants brought a motion to dismiss and simultaneously moved for summary judgment in the alternative; the courts in both cases granted defendants' motions to dismiss without addressing the summary judgment motions.

[87] There were a handful of instances in which different defendants contemporaneously filed separate motions to dismiss or summary judgment motions raising qualified immunity. If the motions were filed at approximately the same time and were resolved by a single district court opinion, I coded them as a single motion because I believe it more accurately reflects the time needed by the parties and the court to resolve each qualified immunity issue as it arose.

immunity at all.

Of the 979 cases in my docket dataset in which defendants could raise qualified immunity, defendants filed a total of 462 motions to dismiss, and 154 (33.3%) included a qualified immunity argument. [88] Defendants in the Middle District of Florida were the most likely to raise qualified immunity in motions to dismiss or for judgment on the pleadings--defendants included a qualified immunity argument in 45.4% of their motions, compared with 39.0% of the motions filed by defendants in the Southern District of Texas, 32.1% of the motions filed by defendants in the Northern District of Ohio, 26.2% of the motions filed by defendants in the Eastern District of Pennsylvania, and 23.5% of the motions filed by defendants in the Northern District of California. Motions to dismiss or for judgment on the pleadings that did not raise qualified immunity argued instead that the complaint did not satisfy plausibility pleading requirements, concerned a claim that was barred by a criminal conviction, or otherwise did not state a legally cognizable claim. [89]

[*35] FIGURE 1. MOTIONS TO DISMISS/FOR JUDGMENT ON THE PLEADINGS

[*35] FIGURE 2. SUMMARY JUDGMENT MOTIONS

Defendants in all five districts were far more likely to include a qualified immunity argument in their summary judgment motions. Defendants filed 374 motions for summary judgment, and 283 (75.7%) of those motions included an argument based on qualified immunity. There was some variation among the districts in this area as well, although the regional variation was less pronounced here than in other aspects of qualified immunity litigation practice. [90]

[*36] *C. District Courts' Decisions: The Success Rate of Qualified Immunity Motions*

This Section examines how frequently district courts grant motions to dismiss and for summary judgment on qualified immunity grounds. As I have shown, qualified immunity is almost always raised in conjunction with other arguments in motions to dismiss or for summary judgment. My focus here is on the way the district court evaluates the qualified immunity argument.

TABLE 6.

SUCCESS OF MOTIONS RAISING QUALIFIED IMMUNITY

Go to table7

Go to table8

In the five districts in my docket dataset, defendants raised qualified immunity in a total of 440 motions. Table 6 reflects the way in which district courts resolved those motions. [91] Across

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[88] *See infra* Figure 1. I have included in my count of motions to dismiss and for summary judgment instances in which the municipality moved to dismiss but the individual defendant(s) did not. One could take issue with this choice, as municipalities are not protected by qualified immunity. Yet I included these motions in my calculation because they reflect opportunities in which the law enforcement defendants moved to dismiss but failed to raise qualified immunity in the motion.

[89] *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) (setting out the plausibility pleading standard); Heck v. Humphrey, 512 U.S. 477, 486-87 (1994) (holding that a plaintiff seeking damages for an unconstitutional conviction or sentence must have that conviction or sentence declared invalid before a Section 1983 claim can proceed).

[90] Qualified immunity was raised in 64.4% of summary judgment motions filed in the Eastern District of Pennsylvania, 76.7% of summary judgment motions filed in the Southern District of Texas, 79.8% of summary judgment motions filed in the Northern District of California, 81.0% of summary judgment motions filed in the Middle District of Florida, and 81.8% of summary judgment motions filed in the Northern District of Ohio.

[91] I have coded decisions in a way that focuses on the role of qualified immunity in the decision. If a defendant's motion raises multiple arguments and qualified immunity is granted but all other bases for the motion are denied, I coded that decision as granted on qualified immunity grounds. Conversely, if a defendant's motion raises multiple arguments and qualified immunity is denied and all other bases for the motion are granted, I coded that decision as

the five districts in my study, qualified **[*37]** immunity motions were denied 31.6% of the time. [92] Qualified immunity motions in these five districts were granted in part--on some claims or defendants but not others--5.9% of the time and granted in full on qualified immunity grounds 12.0% of the time. In another 11.4% of the decisions, courts concluded that the plaintiff had not met her burden of establishing a constitutional violation and either declined to reach the second step of the qualified immunity analysis (whether a reasonable officer would have believed that the law was clearly established) or granted qualified immunity in the alternative. [93] Courts in 14.1% of the decisions granted defendants' motions on other grounds without addressing qualified immunity, and in another 2.0% of the decisions the courts offered little or no rationale. Courts in 5.9% of the decisions granted the motion in part without mentioning qualified immunity, or on qualified immunity in the alternative. And district courts in my study did not decide 17.0% of the motions raising qualified immunity, usually because the cases settled or were voluntarily dismissed while the motions were pending.

There was substantial variation in courts' decisions across the districts in my study. The Southern District of Texas had the lowest rate of qualified immunity denials (21.7%). In the remaining four districts, judges denied 30-38% of defendants' qualified immunity motions. The Southern District of Texas also had the highest rate of qualified immunity grants: courts in the Southern District of Texas granted 33.3% of defendants' qualified immunity motions in part or full on qualified immunity grounds. In contrast, courts in the Eastern District of Pennsylvania granted only 6.1% of the qualified immunity motions in whole or part on qualified immunity grounds. [94]

[*38] TABLE 7.

RULINGS ON MOTIONS TO DISMISS/ON THE PLEADINGS THAT RAISED QUALIFIED IMMUNITY

Go to table9

Go to table10

[*39] TABLE 8.

RULINGS ON SUMMARY JUDGMENT MOTIONS THAT RAISED QUALIFIED IMMUNITY

Go to table11

Go to table12

I additionally evaluated differences in courts' decisions at the motion to dismiss and summary judgment stages. [95] Of the 154 motions to dismiss and motions for judgment on the pleadings raising qualified immunity, courts granted seventy-nine

denied on qualified immunity. Included in the "QI granted in part" row are decisions in which one or more defendants who have moved to dismiss on qualified immunity grounds were awarded qualified immunity but qualified immunity was denied for some defendants or claims.

[92] This finding is consistent with findings in other qualified immunity studies described *supra* note 10, even though there are significant differences in our datasets and the manner in which we coded decisions.

[93] If a court did not specify which step of the qualified immunity analysis was dispositive, or concluded that the law was not clearly established without resolving whether a constitutional violation occurred, I coded these decisions as grants or partial grants on qualified immunity grounds. These decisions are reflected in rows two and three of Tables 6-8.

[94] The differences in the frequency with which motions are granted or granted in part on qualified immunity grounds (rows two and three in Table 6) across the five districts are statistically significant ($\chi^2 = 23.32$, $p<.001$). But the differences in the frequency with which qualified immunity is denied (row one in Table 6) across the five districts are not statistically significant ($\chi^2 = 5.15$, $p=.27$). The differences in the frequency with which motions are granted in the alternative or granted in part on grounds other than qualified immunity (rows four, five, six, and seven in Table 6) across the five districts are also not statistically significant ($\chi^2 = 5.58$, $p=.23$).

[95] *See supra* Tables 7 & 8. Because the three qualified immunity motions raised at or after trial are not included in these tables, there are a total of 437 motions included in these two tables--three fewer than the 440 motions included in Table 6.

(51.3%) of the motions in whole or part. Twenty-one (26.6%) of those seventy-nine full or partial grants were decided on qualified immunity grounds. Of the 283 summary judgment motions raising qualified immunity, courts granted 146 (51.6%) in whole or part. Fifty-eight (39.7%) of those 146 full or partial grants were decided on qualified immunity grounds. In other words, although courts were equally likely to grant summary judgment motions and motions to dismiss, courts were more likely to grant summary judgment motions on qualified immunity grounds than they were to grant motions to dismiss on qualified immunity grounds. But courts more often than not granted both types of motions on grounds other than qualified immunity.

[*40] *D. Circuit Courts' Decisions: The Frequency and Success of Qualified Immunity Appeals*

A complete examination of the role qualified immunity plays in constitutional litigation must examine the frequency and outcome of qualified immunity appeals. Defendants can appeal denials of qualified immunity immediately, and any qualified immunity decision can be appealed after a final judgment in the case. [96]

TABLE 9.

INTERLOCUTORY APPEALS OF QUALIFIED IMMUNITY DENIALS

Go to table13

Defendants immediately appealed 41 of the 189 qualified immunity decisions in my docket dataset that were denied or granted in part and thus could have been appealed at this stage of the litigation--an interlocutory appeal rate of 21.7%. Across the five districts in my dataset, more than one-third of the lower courts' decisions were affirmed on interlocutory appeal, 12.2% were reversed in whole, 7.3% were reversed in part, and 39.0% were withdrawn by the parties without a decision by the court of appeals.

[*41] TABLE 10.

FINAL APPEALS OF QUALIFIED IMMUNITY GRANTS

Go to table14

I also tracked the frequency with which plaintiffs appealed qualified immunity grants after a final judgment in the case. [97] Plaintiffs appealed twenty-six (32.9%) of the seventy-nine decisions granting defendants' motions on qualified immunity grounds in whole or part. [98] Lower court decisions granting qualified immunity were affirmed 65.4% of the time and reversed 7.7% of the time. Almost 27% of the appeals were withdrawn without a decision.

E. The Impact of Qualified Immunity on Case Dispositions

A final question concerns the frequency with which a grant of qualified immunity results in the dismissal of Section 1983 cases. There are multiple ways to frame this inquiry. First, there is the question of which cases should be counted in the numerator--cases dismissed on qualified immunity grounds. I have included qualified immunity grants in this category unless the court ended its qualified immunity analysis after concluding that the plaintiff could not establish a constitutional violation, or granted the motion on qualified immunity in the alternative. Although the question of whether a constitutional violation occurred is the first step of the qualified immunity analysis, the court **[*42]** would also need to resolve this question in the

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[96] *See supra* Section I.B.3.

[97] There was one case in the docket dataset in which a defendant appealed a qualified immunity decision at the end of the case. The jury verdict in the case was affirmed with no mention of qualified immunity. *See* Ayers v. City of Cleveland, 773 F.3d 161 (6th Cir. 2014).

[98] I have not tracked appeals of motions granted on qualified immunity in the alternative, granted in whole or in part on other grounds, or granted based on unclear reasoning.

absence of qualified immunity. And although a court's decision to grant qualified immunity in the alternative may influence its dispositive holding in some manner, the qualified immunity decision was not necessary to resolve the case. [99]

In addition, I have counted a case as dismissed on qualified immunity grounds only if the entire case has been dismissed as a result of the motion. One might assume that a grant of qualified immunity will always end a case. Yet there are multiple scenarios in which a case can continue after a grant of qualified immunity. At the pleadings stage, a court may grant a motion to dismiss on qualified immunity but also grant the plaintiff an opportunity to amend her complaint. [100] Not all defendants in a case will necessarily move to dismiss on qualified immunity grounds, [101] or a defendant may seek qualified immunity regarding some but not all claims against him. [102] State law claims may also remain for which qualified immunity is not available, and these claims may proceed in federal court or be remanded to and pursued in state court. [103] **[*43]** In addition, municipalities cannot assert qualified immunity; accordingly, if there is a municipality named in the case at the time qualified immunity is granted, the case will continue. [104] Under each of these circumstances, government officials still face the possibility that they will be required to participate in discovery and trial as defendants, representatives of the defendants' agency, and/or witnesses to the events in question. [105]

TABLE 11.

IMPACT OF QUALIFIED IMMUNITY, BY STAGE OF LITIGATION

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[99] If I included these cases in my count, the total number of cases dismissed on qualified immunity grounds would increase from thirty-eight to seventy-one: a total of fifteen cases in the Southern District of Texas, twenty-three cases in the Middle District of Florida, twelve cases in the Northern District of Ohio, eight cases in the Northern District of California, and thirteen cases in the Eastern District of Pennsylvania. This amounts to 7.3% of all cases in which qualified immunity could be raised, and 6.0% of all the cases in my dataset.

[100] *See, e.g.*, Daleo v. Polk Cty. Sheriff, No. 8:11-cv-2521 (M.D. Fla. Nov. 7, 2011).

[101] *See, e.g.*, Tarantino v. Canfield, No. 5:12-cv-0434 (M.D. Fla. Aug. 3, 2012); Roberts v. Knight, No. 4:12-cv-1174 (S.D. Tex. Apr. 18, 2012); Brivik v. Law, No. 8:11-cv-2101 (M.D. Fla. Sept. 15, 2011); Terrell v. City of La Marque, No. 3:11-cv-0229 (S.D. Tex. May 16, 2011).

[102] *See, e.g.*, Jones v. City of Lake City, No. 3:11-cv-1210 (M.D. Fla. Dec. 6, 2011); Snowden v. City of Philadelphia, No. 2:11-cv-5041 (E.D. Pa. Aug. 5, 2011); Castillo v. City of Corpus Christi, No. 2:11-cv-0093 (S.D. Tex. Apr. 5, 2011); Kelley v. Papanos, No. 4:11-cv-0626 (S.D. Tex. Feb. 22, 2011).

[103] *See, e.g.*, McKay v. City of Hayward, No. 3:12-cv-1613 (N.D. Cal. Mar. 30, 2012); Stephenson v. McClelland, No. 4:11-cv-2243 (S.D. Tex. June 15, 2011). There are eight cases in my dataset--six in the Middle District of Florida, one in the Northern District of Ohio, and one in the Eastern District of Pennsylvania--in which the federal claims were dismissed on qualified immunity grounds and the state law claims were remanded to state court. I have sought information about whether plaintiffs continued to litigate these claims in state court by contacting the plaintiffs' attorneys in these cases. Attorneys in two cases confirmed that they pursued the state claims in state court, and both cases resulted in settlements in state court. *See* E-mail from Nicholas Noel, attorney for plaintiffs in *O'Neill v. Kerrigan*, No. 5:11-cv-3437 (E.D. Pa. June 5, 2011), to author (Mar. 2, 2017, 12:18 PM) (on file with author) (confirming that the case was refiled in state court and settled after the federal claims were dismissed on qualified immunity grounds); E-mail from Jerry Theophilopoulos, attorney for plaintiffs in *Merricks v. Adkisson*, No. 8:12-cv-1805 (M.D. Fla. Aug. 10, 2012), to author (Mar. 13, 2017, 6:50 AM) (on file with author) (confirming that plaintiff refiled the case in state court after the federal claims were dismissed on qualified immunity grounds, and that the case settled at mediation for $ 30,000). Attorneys in two cases confirmed that the cases were not refiled in state court. *See* E-mail from Cynthia Conlin, attorney for plaintiffs in *Olin v. Orange Cty. Sheriff*, No. 6:12-cv-1455 (M.D. Fla. Sept. 25, 2012), to author (Mar. 2, 2017, 10:31 AM) (on file with author) (reporting that plaintiff did not pursue state law claims in state court after federal claims were dismissed on qualified immunity grounds); E-mail from W. Cort Frohlich, attorney for plaintiffs in *Spann v. Verdoni*, No. 8:11-cv-0707 (M.D. Fla. Apr. 4, 2011), to author (Mar. 2, 2017, 10:15 AM) (on file with author) (reporting that the state claims were not refiled in state court after summary judgment was granted on the federal claims). I sought but did not receive information about the other four cases.

[104] *See, e.g.*, *McKay*, No. 3:12-cv-1613; Porter v. City of Santa Rosa, No. 3:11-cv-4886 (N.D. Cal. Oct. 3, 2011); *Terrell*, No. 3:11-cv-0229.

[105] *See supra* note 42 and accompanying text (describing the Court's concerns about burdens on government officials who are not named defendants).

Go to table15

[*44] As Table 11 shows, there are fifty-three motions in my dataset that district courts granted in full on qualified immunity grounds--fourteen at the pleadings stage and thirty-nine at summary judgment. Of those fifty-three motions, thirty-four (64.2%) were dispositive, meaning that the cases were dismissed as a result of the qualified immunity decision. Half of qualified immunity grants at the pleadings stage led to case dismissals, and 69.2% of qualified immunity grants at summary judgment led to case dismissals. Defendants brought forty-one interlocutory appeals of qualified immunity denials, and courts of appeals reversed five (12.2%) of those decisions. All five reversals were of summary judgment decisions, and four of the five resulted in case dismissals. In total, qualified immunity led to dismissal of thirty-eight cases in my dataset.

The next question, when thinking about the impact of qualified immunity on case disposition, is how to frame the denominator--the universe of cases against which to measure the cases dismissed on qualified immunity grounds. It is my view that the broadest definition of the denominator--all 1,183 Section 1983 cases filed against law enforcement--offers the most accurate picture of the role qualified immunity plays in Section 1983 litigation. Yet, as I will show, there are at least three ways to frame the denominator, and each answers a different question about the extent to which qualified immunity achieves its intended goals.

One way to think about the impact of qualified immunity is to consider the frequency with which a defendant's motion to dismiss or for judgment on the pleadings, for summary judgment, or for judgment as a matter of law on qualified immunity grounds actually leads to the dismissal of a case--whether because the motion is granted or because the motion is denied by the district court but reversed on appeal. Presumably, a defendant will only bring a qualified immunity motion when two conditions are met: he has a non-frivolous basis for the motion, and he believes that the costs of bringing the motion are justified by the likelihood of success or some other benefit associated with the motion. Accordingly, this framework assesses the frequency with which qualified immunity results in the dismissal of cases in which both these things are true.

Defendants brought 440 qualified immunity motions in a total of 368 cases in the five districts in my study: defendants raised qualified immunity in 154 motions to dismiss and raised qualified immunity in 283 summary judgment motions. Courts granted 9.1% of the motions to dismiss on qualified immunity grounds, and 4.5% of the motions resulted in case dismissals. Courts granted 13.8% of the summary judgment motions on qualified immunity grounds, and 9.5% of the motions resulted in case dismissals. Defendants brought forty-one interlocutory appeals of qualified immunity denials, courts of appeals reversed **[*45]** five (12.2%) of those decisions, and four of the five were dismissed as a result. In total, thirty-eight (8.6%) of the 440 qualified immunity motions raised by defendants in my dataset resulted in case dismissals, and 10.3% of the 368 cases in which qualified immunity was raised were dismissed on qualified immunity grounds.

Another way to assess the impact of qualified immunity on case outcomes is to examine what percentage of the 979 cases in my dataset in which qualified immunity could be raised were in fact dismissed on qualified immunity grounds. One objection to this framing might be that it includes cases that defendants declined to challenge on qualified immunity grounds. But qualified immunity motions would not necessarily have failed in these cases; rather, defendants in these cases concluded that the costs of raising the defense were not justified by the likelihood of success or other benefits of bringing the motions. Moreover, this broader framework illustrates the frequency with which qualified immunity doctrine serves its intended and expected role of shielding government officials from burdens associated with discovery

and trial. Evaluated in this manner, qualified immunity is less frequently successful. Qualified immunity was the basis for dismissal in 3.9% of the 979 cases in which the defense could be raised: just seven (0.7%) of cases were dismissed on qualified immunity grounds at the motion to dismiss stage, and thirty-one (3.2%) of cases were dismissed on qualified immunity grounds at summary judgment--either by the district court or on appeal.

Indeed, to evaluate fully the role that qualified immunity plays in the resolution of constitutional claims against law enforcement, the most appropriate denominator is the complete universe of 1,183 cases in my dataset. This approach includes cases that could not be resolved on qualified immunity grounds--because the cases were either brought only against municipalities or sought only equitable relief. But to the extent that the Court views qualified immunity doctrine as a shield for all government officials--not only defendants--from burdens associated with discovery and trial, a thorough assessment of qualified immunity's role should take account of all the cases in which government officials must participate. Qualified immunity was the basis for dismissal in 3.2% of the 1,183 cases in my dataset: 0.6% of cases were dismissed on qualified immunity grounds at the motion to dismiss stage, and 2.6% of cases were dismissed on qualified immunity grounds at summary judgment--either by the district court or on appeal. [106]

[*46] My data show that qualified immunity is rarely the formal reason that Section 1983 cases are dismissed. How, then, are Section 1983 suits against law enforcement resolved? Table 12 reports case outcomes for the 1,183 cases in the five districts in my study.

TABLE 12.

CASE DISPOSITIONS

Go to table16

Go to table17

[*47] If one adopts the standard definition of plaintiff "success" to include jury verdicts, settlements, and voluntary or stipulated dismissals, the plaintiffs in my dataset succeeded in 682 (57.7%) cases. [107] This success rate is similar to the results of Theodore Eisenberg and Stewart Schwab's studies of non-prisoner Section 1983 cases. [108] The remaining 42.3% of cases resolved in various ways: 256 (21.6%) were dismissed on motions to dismiss or for judgment on the pleadings, at summary judgment, or at or after trial on grounds other than qualified immunity; 173 (14.6%) were dismissed sua sponte before defendants answered, dismissed as a sanction, or dismissed for failure to prosecute; and thirty-seven (3.1%) were dismissed for other reasons or remain open. Thirty-eight (3.2%) were dismissed on qualified immunity grounds.

My data do not capture how frequently qualified immunity influences plaintiffs' decisions to settle, or how frequently cases are decided on qualified immunity grounds even though other defenses are available. Instead, my data reflect the frequency with which a grant of qualified immunity formally

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[106] These findings are consistent with another study that used dockets to track case outcomes in *Bivens* actions. *See* Reinert, *supra* note 11, at 843 (finding qualified immunity to be "the basis for a dismissal in only 5 out of the 244 complaints studied").

[107] *See id.* at 812-13 n.13 (describing the common definition of plaintiff "success" in similar studies). Even those who adopt this standard definition recognize that it is likely over-inclusive--at least some of these cases are settled or withdrawn on terms unfavorable to the plaintiff. *See id.* Note that I am including the three split verdicts in my count of plaintiff successes.

[108] Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 730 (1988) (finding that "[n]onprisoner constitutional tort cases succeed[ed] about half the time" in their study of filings in three districts); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 682 (1987) (finding that "[t]he success rate for counseled cases (which eliminates nearly all prisoner cases) is about one-half" in their study of the Central District of California).

ends a case. There is, once again, marked regional variation in the frequency with which qualified immunity leads to the dismissal of Section 1983 actions. [109] But despite this regional variation, grants of qualified immunity motions infrequently end Section 1983 suits before discovery, and are infrequently the reason suits are dismissed before trial.

IV. IMPLICATIONS

My findings undermine prevailing assumptions about the role qualified immunity plays in the litigation of Section 1983 claims. Accordingly, in this Part I consider the implications of my findings for ongoing discussions about the proper scope of qualified immunity in relation to its underlying purposes. First, I revisit empirical claims implicit in the Supreme Court's qualified immunity **[*48]** decisions in light of my findings. Next, I consider why qualified immunity disposes of so few cases before trial. Armed with this more realistic appraisal of qualified immunity's role, I argue that the Court has struck the wrong balance between fairness and accountability for law enforcement officers. Finally, I suggest that qualified immunity doctrine should be adjusted to comport with available evidence about the role the doctrine plays in constitutional litigation.

A. Toward a More Accurate Description of Qualified Immunity's Role in Constitutional Litigation

The Court's qualified immunity decisions paint a clear picture of the ways in which the Court believes the doctrine should operate: it should be raised and decided at the earliest possible stage of the litigation (at the motion to dismiss stage if possible), it should be strong (protecting all but the plainly incompetent or those who knowingly violate the law), and it should, therefore, protect defendants from the time and distractions associated with discovery and trial in insubstantial cases. Commentators similarly believe that qualified immunity is often raised by defendants, usually granted by courts, and causes many cases to be dismissed. [110]

My study shows that, at least in filed cases, qualified immunity rarely functions as expected. Defendants could not or did not need to raise qualified immunity in 17.3% of the 1,183 cases in my docket dataset, either because the cases did not name individual defendants or seek monetary damages, or because the cases were dismissed sua sponte by the court before the defendants had an opportunity to answer. Defendants raised qualified immunity in motions to dismiss and motions for judgment on the pleadings in only 13.9% of the cases in which the defense could be raised. [111] Courts granted those motions on qualified immunity grounds 9.1% of the time, but those grants were not always dispositive because additional claims or defendants remained, or because plaintiffs were given the opportunity to amend. As a result, just seven of the 1,183 cases in my docket dataset were dismissed at the motion to dismiss stage on qualified immunity grounds.

Qualified immunity more often prevented cases from proceeding past summary judgment. Defendants were more likely to include qualified immunity **[*49]** in motions for summary judgment than in motions to dismiss, and courts were more likely to grant summary judgment motions than motions to dismiss on qualified immunity grounds. [112] Moreover, courts of appeals reversed five denials of summary judgment motions on interlocutory appeal and granted qualified

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[109] *See supra* Table 12; *see also infra* text accompanying note 115 (describing this variation).

[110] *See supra* note 6 and accompanying text.

[111] There was a total of 979 cases in which qualified immunity could be raised, and defendants raised motions to dismiss or for judgment on the pleadings on qualified immunity grounds in 136 of those cases. *See supra* Tables 2 & 3.

[112] *See supra* Table 4 (showing that 64.3% of qualified immunity motions were made at summary judgment); *supra* Table 8 (showing that 13.8% of qualified immunity motions made at summary judgment were granted).

immunity in these cases. Yet qualified immunity motions at the summary judgment stage rarely shield government officials from discovery because most summary judgment motions require at least some depositions or document exchange. [113] And grants of qualified immunity at summary judgment relatively rarely achieved their goal of protecting government officials from trial--such decisions by the district courts or courts of appeals disposed of plaintiffs' cases just thirty-one times across the five districts in my study, amounting to just 2.6% of the 1,183 cases in my dataset.

Qualified immunity is likely raised more often at or after trial than my data suggest. But even if many more qualified immunity motions are made during or after trial, and even if qualified immunity regularly convinces judges and juries to enter defense verdicts, qualified immunity would still fail to serve its expected role. Qualified immunity doctrine is intended to shield government officials from burdens associated with litigation and trial. A grant of qualified immunity entered during or after trial has come too late to shield government officials from these assumed burdens.

My data demonstrate considerable regional differences in the litigation and adjudication of qualified immunity across the country. Scholars have observed that the federal circuits interpret qualified immunity standards differently. [114]

[*50] My findings suggest that regional differences in qualified immunity doctrine affect the decisions of courts and litigants. Defendants in the Southern District of Texas and the Middle District of Florida were more likely to raise qualified immunity than defendants in the Eastern District of Pennsylvania and the Northern District of California; courts in the Southern District of Texas and the Middle District of Florida were more likely to grant defendants' qualified immunity motions than were judges in the Eastern District of Pennsylvania and the Northern District of California; and grants of qualified immunity ended more cases in the Southern District of Texas and the Middle District of Florida than in the Eastern District of Pennsylvania and the Northern District of California. But even in the Southern District of Texas--the district in my dataset most likely to dismiss cases on qualified immunity grounds--just 2.3% of all suits were dismissed on qualified immunity grounds at the motion to dismiss stage, and 6.9% of all suits were dismissed at summary judgment on qualified immunity grounds. [115] Unless the vast majority of law enforcement officer defendants in the Southern District of Texas are "plainly incompetent" or have "knowingly violate[d] the law," [116] qualified immunity is not playing its expected role even in the district in my dataset most sympathetic to the defense.

Although qualified immunity is rarely the reason that Section 1983 cases end, there are other ways in which qualified immunity doctrine might influence the litigation of constitutional claims against law enforcement. For example, qualified immunity may discourage people from ever filing suit. Available evidence suggests that just 1% of people who

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[113] *See supra* note 79 and accompanying text.

[114] Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 925 (2015) ("One has to look hard to find some doctrinal consistency or predictability in the case law and the circuits are hopelessly conflicted both within and among themselves." (footnotes omitted)); Jeffries, *supra* note 6, at 852 ("[D]etermining whether an officer violated 'clearly established' law has proved to be a mare's nest of complexity and confusion. The circuits vary widely in approach, which is not surprising given the conflicting signals from the Supreme Court."); Jeffries, *supra* note 61, at 250 n.151 ("There is considerable variation among the circuits. The Ninth Circuit often construes qualified immunity to favor plaintiffs and is often reversed for that reason. The Eleventh Circuit leans so far in the other direction that it has been called the land of '*un*qualified immunity.'" (citations omitted)); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 40-41 (2015) (finding circuit variation in the frequency with which the Fifth, Sixth, and Ninth Circuits courts exercise their discretion under *Pearson* to decide whether a constitutional violation occurred); Wilson, supra note 61, at 447-48 (describing variation in the ways circuit courts analyze whether the law is clearly established).

[115] *See supra* Table 12.

[116] Malley v. Briggs, 475 U.S. 335, 341 (1986).

believe they have been harmed by the police file lawsuits against law enforcement. [117] We do not know how frequently qualified immunity doctrine plays a role in the decision not to sue. But available evidence suggests that qualified immunity often factors into plaintiffs' attorneys' decisions about whether to accept potential clients. When Alexander Reinert interviewed plaintiffs' attorneys about qualified immunity in *Bivens* cases, attorneys reported that "the qualified immunity defense play[s] a substantial role at the screening stage." [118] Attorneys described being discouraged from accepting civil rights cases both because qualified immunity motions can be difficult to defeat and because the costs and delays associated with litigating qualified immunity can make the cases too burdensome to pursue. [119] But attorneys **[*51]** also described qualified immunity as one of many factors they considered when deciding whether to accept a case, and we do not know how attorneys weigh these different considerations. [120]

Even when cases are filed, qualified immunity may influence litigation decisions in ways that are not easily observable through docket review. For example, it may be that a pending qualified immunity motion will cause a plaintiff to settle her claims. Consistent with this theory, seventy-five (17.0%) of the qualified immunity motions in my dataset were never decided, presumably because the parties settled while the motions were pending. [121] Of the sixty-seven qualified immunity interlocutory and final appeals in my dataset, twenty-three (34.3%) were withdrawn or dismissed without decision, which suggests that many of those cases settled while on appeal. [122] When the Supreme Court has described the ways in which it expects qualified immunity to shield government officials from discovery and trial, it has never suggested that the doctrine might serve this function by discouraging people from filing lawsuits or pursuing their claims. But these are certainly ways in which qualified immunity could achieve this goal.

A complete understanding of the frequency with which qualified immunity protects government officials from discovery and trial would measure these other potential litigation effects. For the time being, available evidence suggests that qualified immunity may make it more difficult for plaintiffs to secure representation and may encourage plaintiffs to settle, but it is infrequently the formal reason that cases end.

B. Why Qualified Immunity Disposes of So Few Cases

The Supreme Court designed qualified immunity to protect "all but the plainly incompetent or those who knowingly violate the law." [123] Why, then, does it lead to the dismissal of so few cases? One possibility is that qualified immunity doctrine discourages people from filing cases that are unlikely to meet qualified immunity's exacting standard. [124] But even if qualified immunity **[*52]** has this selection effect, plaintiffs would continue to file cases in which qualified immunity motions *might* be successful. Consistent with this theory, defendants raised qualified immunity in more than one-third of the Section 1983 cases in which the defense could be asserted, and courts granted 51.4% of motions raising qualified immunity in full or part. [125] Yet most of these

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[117] *See* Schwartz, *What Police Learn*, *supra* note 71, at 863.

[118] Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 492 (2011).

[119] Id. at 492-94.

[120] *Id.*

[121] *See supra* Table 6.

[122] *See supra* Tables 9 & 10.

[123] Malley v. Briggs, 475 U.S. 335, 341 (1986).

[124] *See supra* notes 118-122 and accompanying text. For further discussion of selection effects, see Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1965 (2009); and George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

[125] *See supra* Table 6.

motions to dismiss and summary judgment motions raised multiple arguments, and courts only granted 17.9% of these motions in part or whole on qualified immunity grounds. Ultimately, qualified immunity resulted in the dismissal of only 3.9% of the cases in which the defense could be raised. Although the threat of qualified immunity may cause some people not to sue, this selection effect does not explain why qualified immunity plays such a limited role in the resolution of motions raising qualified immunity and in the disposition of cases that are filed.

The Supreme Court's decisions suggest another theory that could partially explain why qualified immunity disposes of few cases: because courts improperly deny defendants' qualified immunity motions. For this reason, and because of the "importance of qualified immunity 'to society as a whole,'" the Supreme Court has taken the unusual step of "often correct[ing] lower courts when they wrongly subject individual officers to liability." [126] Yet qualified immunity grant rates are lower than expected even in the circuits generally believed to be the most amenable to qualified immunity: 33.3% of motions raising qualified immunity were granted in whole or part on qualified immunity grounds in the Southern District of Texas, and 22.5% of motions raising qualified immunity were granted in whole or part on qualified immunity grounds in the Middle District of Florida. [127] Moreover, only 9.2% of cases from the Southern District of Texas and 6.7% of cases from the Middle District of Florida were actually dismissed on qualified immunity grounds. Unless one believes that the Southern District of Texas and the Middle District of Florida, as well as the Fifth and Eleventh Circuits, are regularly flouting the letter and spirit of the Supreme Court's qualified immunity doctrine, error in the lower courts is an unconvincing--or at least incomplete--explanation for these findings.

My data suggest two additional explanations for why qualified immunity disposes of so few cases: the doctrine is not well suited to dismiss many claims before trial, and qualified immunity is often unnecessary to serve its intended role.

[*53] *1. Qualified Immunity Is Ill Suited To Dispose of Cases*

Qualified immunity motions are infrequently dispositive in part because the doctrine is ill suited to dispose of many cases before trial. Although qualified immunity doctrine creates a seemingly insurmountable barrier for plaintiffs, the standards for review at the motion to dismiss and summary judgment stages may prevent courts from granting defendants' motions. At the motion to dismiss stage, a defendant's qualified immunity motion should be denied so long as the plaintiff has plausibly alleged a violation of a clearly established right. As one district judge from the Middle District of Tennessee observed,

> The rationale for the existence of qualified immunity is to avoid imposing needless discovery costs upon government officials, so determining whether the immunity applies must be made at an early stage in the litigation. At the same time, the determination of qualified immunity is usually dependent on the facts of the case, and, at the pleadings stage of the litigation, there is scant factual record available to the court. Since plaintiffs are not required to anticipate a qualified immunity defense in their pleadings, and since at this stage of the litigation the exact contours of the right at issue--and thus the degree to which it is clearly established--are unclear, the Sixth Circuit advises that qualified immunity should usually be determined pursuant to a summary judgment motion rather than a motion to dismiss. [128]

[126] City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982)).

[127] *See supra* Table 6.

[128] Turner v. Weikal, No. 3:12-cv-0915, 2013 WL 3272481, at *3 (M.D. Tenn. June 27, 2013) (internal quotation marks and citations omitted).

This is a common refrain in circuit courts across the country [129] and decisions in my dataset. [130]

[*54] District courts also find that factual disputes prevent resolution on qualified immunity grounds at summary judgment. Alan Chen has argued that the Supreme Court's qualified immunity decisions "have embedded a central paradox into the doctrine": although the Court repeatedly writes that "qualified immunity claims can and should be resolved at the earliest stages of litigation," it ignores the fact that these determinations "inherently entail nuanced, fact-sensitive, case-by-case determinations involving the application of general legal principles to a particular context." [131] My data offer anecdotal evidence to support Chen's observation. In the five districts in my study, courts repeatedly found that factual disputes prevented summary judgment on qualified immunity grounds. [132] In these decisions, courts duly recited the benefits of resolving **[*55]** qualified immunity at the earliest possible stage and qualified immunity's intended role as protection from discovery and trial. Yet the same courts found that factual disputes made summary judgment inappropriate.

The Supreme Court's recent decision in *White v. Pauly* provides additional anecdotal evidence of this underappreciated phenomenon. In *White v. Pauly*, the Supreme Court held that it would be appropriate to grant summary judgment on qualified immunity grounds to an officer who shot and killed a suspect without first identifying himself and ordering the suspect to drop his gun, because "[n]o 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 [the defendant] confronted here." [133] The decision has been described as evidence that the Supreme Court "wants fewer

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[129] *See, e.g.*, Wesley v. Campbell, 779 F.3d 421, 433-34 (6th Cir. 2015); Owens v. Balt. City State's Attorneys' Office, 767 F.3d 379, 396 (4th Cir. 2014); Newland v. Reehorst, 328 F. App'x 788, 791 n.3 (3d Cir. 2009); Field Day, LLC v. Cty. of Suffolk, 463 F.3d 167, 191-92 (2d Cir. 2006); St. George v. Pinellas Cty., 285 F.3d 1334, 1337 (11th Cir. 2002); Alvarado v. Litscher, 267 F.3d 648, 651-52 (7th Cir. 2001); Sims v. Adams, 537 F.2d 829, 832 (5th Cir. 1976).

[130] *See, e.g.*, Order Denying Motion to Dismiss at 2-3, Dudley v. Borough of Upland, No. 2:12-cv-5651 (E.D. Pa. July 19, 2013), ECF No. 33 ("Without discovery, I cannot determine whether the Officers acted reasonably. For instance, it is unclear what the Officers knew about the warrant when they arrested Plaintiff and whether the warrant bore an expiration date. Viewing the factual allegations in the light most favorable to Plaintiff, it may have been objectively unreasonable that the Officers failed to look into the validity of a 2 1/2-year-old warrant. Accordingly, I cannot yet determine whether the Officers are entitled to qualified immunity." (citation omitted)); Report and Recommendation at 15, Coldwater v. City of Clute, No. 3:12-cv-0028 (S.D. Tex. Aug. 30, 2012), ECF No. 41 ("Accepting the allegations in her Amended Complaint as true, the Court cannot conclude, at least at this juncture in the litigation, that the conduct of these Defendants was objectively reasonable in the light of then clearly established law."); Pippin v. Kirkland, No. 8:12-cv-0776, 2012 WL 12903175, at *2 (M.D. Fla. July 3, 2012) ("[A]ccepting all factual allegations in the Complaint as true, it is not possible to determine whether Defendant Kirkland is entitled to qualified immunity."); Mantell v. Health Prof'ls Ltd., 5:11-cv-1034, 2012 WL 28469, at *4 (N.D. Ohio Jan. 5, 2012) ("[T]he Court takes no stance on whether discovery will ultimately support these allegations against any of the moving defendants and the issues may appropriately be revisited during summary judgment practice in this matter. However, for the purposes of a motion to dismiss, the complaint properly pleads deliberate indifference and precludes a finding of qualified immunity *at this time*."); Nishi v. Cty. of Marin, No. 4:11-cv-0438, 2011 WL 1807043, at *2 (N.D. Cal. May 11, 2011) ("[R]esolution of the qualified immunity defense frequently raises issues of fact that are more appropriately determined at a later stage. While such a defense may thus very well prove viable at a future stage of these proceedings, it does not present an adequate basis for dismissal here.").

[131] Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 230 (2006); *see also* Jeffries, *supra* note 61, at 252-53.

[132] *See, e.g.*, Martin v. City of Reading, 118 F. Supp. 3d 751, 765-67 (E.D. Pa. 2015) ("[A]s the Court of Appeals for the Third Circuit

lawsuits against police to go forward." [134] This may well be true. Yet the decision in *White v. Pauly* did not end Daniel Pauly's lawsuit; as Justice Ginsburg notes in her concurrence, the Court's decision "leaves open the propriety of denying summary judgment" based on various factual disputes about the officer's conduct. [135]

Plaintiffs' decisions about how to frame their cases also make qualified immunity ill suited to dispose of many cases. Defendants could not raise a qualified immunity defense in 8.4% of the cases in my study because the plaintiffs did not sue an individual officer for money damages. [136] Even in cases in which defendants could raise qualified immunity, plaintiffs' other pleading decisions sometimes diminished the impact of qualified immunity. In the vast majority of cases asserting claims against individual officers for money damages, plaintiffs also included claims against municipalities, claims for injunctive relief, and/or state law claims that could not be dismissed on qualified immunity grounds. [137] Even when a plaintiff brings a claim for damages against an individual **[*56]** defendant (for which qualified immunity is available), the defendant raises a qualified immunity defense, and the court grants the motion, claims against the municipality, claims for injunctive relief, and state law claims may remain. [138]

2. Qualified Immunity Is Unnecessary To Dispose of Cases

My data also suggest that qualified immunity may lead to the dismissal of few cases because cases are so often resolved on other grounds. Qualified immunity could not be raised in 126 (10.7%) of the cases in my study because the judges dismissed the cases sua sponte before the defendants could answer or otherwise respond. [139] In these cases, qualified immunity doctrine was unnecessary to shield defendants from discovery and trial.

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recently observed in a case involving a claim of excessive force that arose out of the use of a Taser, 'if there are facts material to the determination of reasonableness in dispute, then that issue of fact should be decided by the jury.' . . . Thus, affording Defendant Errington qualified immunity at this time is inappropriate in light of the genuine dispute between the parties of the facts bearing on his entitlement to immunity." (quoting Geist v. Ammary, 617 F. App'x 182, 185 (3d Cir. 2015))); Hayes v. City of Tampa, No. 8:12-cv-2038, 2014 WL 4954695, at *8 (M.D. Fla. Oct. 1, 2014) ("[C]onstruing the record as a whole in favor of Hayes, whether Hayes's 'stance, demeanor and facial expression' justified Miller's use of a taser is a genuine issue of material fact."); McKissic v. Miller, 37 F. Supp. 3d 907, 918 (N.D. Ohio 2014) ("[W]hen the facts as alleged by the Plaintiff and supported by some evidentiary materials, are taken to be true, there remains a question of fact as to whether Officer Miller's actions constituted excessive force in violation of the Fourth Amendment of the U.S. Constitution."); Bui v. City of San Francisco, 61 F. Supp. 3d 877, 902 (N.D. Cal. 2014) ("[B]ased on the evidence presented by both sides . . . the court cannot decide as a matter of law whether it would have been 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' In these circumstances, the court denies Defendants' motion insofar as it asks the court conclude that the officers are entitled to qualified immunity." (citation omitted) (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001))); Nunez v. City of Corpus Christi, No. 2:12-cv-0092, 2013 WL 4040373, at *3 (S.D. Tex. Aug. 7, 2013) (denying qualified immunity because "there is considerable dispute regarding the timing of Hobbs' shots, the position of the vehicle at the time the shots were fired, and the immediacy of the threat posed to Officer Hobbs").

[133] 137 S. Ct. 548, 552 (2017).

[134] Feldman, *supra* note 5.

[135] Pauly, 137 S. Ct. at 553 (Ginsburg, J., concurring).

[136] *See supra* Table 1.

[137] In the Southern District of Texas, defendants could raise qualified immunity in 106 cases in my dataset; in ninety-nine of those cases, plaintiffs also named municipalities as defendants. In the Middle District of Florida, defendants could raise qualified immunity in 155 cases in my dataset; in 149 of those cases, plaintiffs also named municipalities as defendants. In the Northern District of Ohio, defendants could raise qualified immunity in 139 cases in my dataset; in 129 of those cases, plaintiffs also named municipalities as defendants. In the Northern District of California, defendants could raise qualified immunity in 219 cases in my dataset; in 209 of those cases, plaintiffs also named municipalities as defendants. In the Eastern District of Pennsylvania, defendants could raise qualified immunity in 360 cases in my dataset; in 357 of those cases, plaintiffs also named municipalities as defendants.

[138] *See supra* notes 102-104 and accompanying text (providing examples of these cases from my dataset).

[139] *See supra* Table 12. In addition to the 105 cases dismissed sua sponte that were brought against individual defendants, *see supra* Table 1, twenty-one cases brought against municipalities or seeking

Qualified immunity was also often unnecessary to dispose of cases at the motion to dismiss stage. Defendants in the cases in my dataset clearly held this view: even when defendants could raise qualified immunity at the motion to dismiss stage, they often chose not to do so. [140] More often than not, when defendants moved to dismiss or for judgment on the pleadings, they did not include a qualified immunity argument. Instead, defendants moved to dismiss for failure to plead plausible claims for relief or failure to assert a constitutional violation, among other grounds. Even when defendants raised qualified immunity at the motion to dismiss stage, and courts concluded that the cases should be dismissed, courts often resolved the motions on other grounds. Courts granted, in whole or part, seventy-nine (51.3%) out of the 154 motions to dismiss or for judgment on the pleadings that raised qualified immunity. Of **[*57]** those seventy-nine grants, twenty-one (26.6%) were granted on qualified immunity grounds, and fifty-eight (73.4%) were granted on grounds other than qualified immunity. [141]

Qualified immunity played a more substantial role at summary judgment. Defendants raised qualified immunity arguments in most of their summary judgment motions. [142] And when courts granted defendants' summary judgment motions in whole or part, they relied on qualified immunity 39.7% of the time. [143] Still, courts decided a clear majority of the motions on other grounds. Most often, these summary judgment motions were granted in whole or part because the plaintiff could not establish a genuine dispute about a material question of fact. This finding should not come as a surprise to at least one member of the Court--Justice Kennedy noted in *Wyatt v. Cole* that the Court's summary judgment decisions reduced the need for qualified immunity to shield government officials from trial. As Justice Kennedy explained:

> *Harlow* was decided at a time when the standards applicable to summary judgment made it difficult for a defendant to secure summary judgment regarding a factual question such as subjective intent, even when the plaintiff bore the burden of proof on the question; and in *Harlow* we relied on that fact in adopting an objective standard for qualified immunity. However, subsequent clarifications to summary-judgment law have alleviated that problem . . . . Under the principles set forth in *Celotex* and related cases, the strength of factual allegations such as subjective bad faith can be tested at the summary-judgment stage. [144]

When the Supreme Court discusses qualified immunity, it appears to presume that qualified immunity is the only barrier standing between government officials and discovery and trial. Instead, my study illustrates that there are other tools that parties can--and often do--use to resolve Section 1983 cases before trial. [145]

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[*58] In this Section, I have offered some possible explanations for why cases are infrequently dismissed on qualified immunity grounds. This phenomenon is not solely attributable to plaintiffs'

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injunctive relief were also dismissed before defendants answered or otherwise responded. These dismissals were most often based on the court's power to dismiss frivolous pro se claims sua sponte, but others were dismissed at this early stage for failure to prosecute or lack of subject matter jurisdiction. Cases dismissed for failure to prosecute or remanded to state court *after* defendants responded to the complaints are counted separately in Table 12.

[140] *See supra* Figure 1; *supra* note 88 and accompanying text.

[141] *See supra* Table 7. I include in the latter category cases where qualified immunity was the alternate ground for decision and cases where the court's reasoning was unclear.

[142] *See supra* Figure 2.

[143] *See supra* Table 8. Summary judgment was granted in whole or in part 146 times. Of those cases, the court relied on qualified immunity fifty-eight times.

[144] Wyatt v. Cole, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring) (citations omitted).

[145] *Accord* Fallon, *supra* note 59, at 504-05 (observing that other mechanisms can be used to achieve the goals of qualified immunity).

decisions not to file cases in which qualified immunity motions might be successful. Nor can lower courts be shouldered with all the blame for the low rate of qualified immunity dispositions. Instead, my data suggest that qualified immunity doctrine is ill suited in some cases and unnecessary in others to serve its intended role.

My data also make clear that qualified immunity's role in Section 1983 litigation is the product of decisions made by multiple actors--judges, defendants, plaintiffs, and the litigants' attorneys. Moreover, there is at least some evidence to suggest that district judges' varying inclinations to grant qualified immunity motions may influence defendants' and plaintiffs' litigation decisions. In jurisdictions with judges who most often granted defendants' qualified immunity motions--the Southern District of Texas and the Middle District of Florida--defendants brought qualified immunity motions more frequently, and plaintiffs more frequently crafted their cases in ways that prevented defendants from raising the defense. Conversely, in jurisdictions with judges who less frequently granted defendants' qualified immunity motions--the Eastern District of Pennsylvania and the Northern District of California--defendants less frequently brought qualified immunity motions, and plaintiffs less frequently crafted their cases to avoid the defense. A complete understanding of the role of qualified immunity in constitutional litigation against law enforcement must attend to regional differences in the dynamic interactions between judges, defendants, and plaintiffs. I plan to explore these interactions in future work.

C. Implications for the Balance Struck by Qualified Immunity

The Supreme Court has explained that qualified immunity is intended to balance "the need to hold government officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." [146] Many have argued, and I agree, that the Court's qualified immunity doctrine puts a heavy thumb on the scale in favor of government interests, and disregards the interests of individuals whose rights have been violated. [147] My research offers an additional reason to believe that the Supreme Court has gotten the balance wrong: qualified immunity doctrine does not appear to be necessary or well **[*59]** suited to protect government officials "from harassment, distraction, and liability when they perform their duties reasonably." [148] This observation makes it even more difficult to justify the burdens the doctrine appears to place on plaintiffs.

1. Interests in Protecting Government Officials

The Supreme Court explained in *Harlow* that qualified immunity was necessary to protect government officials from four harms: 1) "the expenses of litigation"; 2) "the diversion of official energy from pressing public issues"; 3) "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties'"; and 4) "the deterrence of able citizens from acceptance of public office." [149] The Court has relied on no empirical evidence to support its conclusions that these threats exist, or that qualified immunity can protect against them. Although questions remain about the government interests served by qualified immunity, this study and my prior research suggest that qualified immunity doctrine is often unfit to protect against some of these harms, and often unnecessary to protect against others.

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[146] Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[147] *See, e.g.*, Blum, Chemerinsky & Schwartz, *supra* note 8 (criticizing the Court's qualified immunity jurisprudence along these lines); Reinhardt, *supra* note 7 (same).

[148] Pearson, 555 U.S. at 231.

[149] Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (alteration in original) (citations omitted).

The first--and frequently repeated--justification for qualified immunity is that it protects government officials from the burdens of financial liability. But my prior research has shown that qualified immunity is unnecessary to serve this role--virtually all law enforcement defendants are provided with counsel free of charge, and are indemnified for settlements and judgments entered against them. In the six-year period from 2006 to 2011, law enforcement officers in forty-four of the seventy largest law enforcement agencies paid just 0.02% of the dollars awarded to plaintiffs in police misconduct suits. [150] In thirty-seven small and midsized agencies, no officer contributed to settlements or judgments to plaintiffs awarded during this period. Officers were indemnified even when they were disciplined, fired, and criminally prosecuted for their misconduct. And no officer paid a penny of the punitive damages awarded to plaintiffs in these jurisdictions. I could confirm only two jurisdictions in which officers contributed to settlements and judgments during the study period--New York City and Cleveland. [151] In these jurisdictions, the median contribution **[*60]** was $ 2,250, and no officer contributed more than $ 25,000. [152] Given this evidence, qualified immunity cannot be justified as a means of protecting officers from personal financial liability.

In recent years, the Supreme Court has described "the 'driving force' behind creation of the qualified immunity doctrine" to be resolving "'insubstantial claims' against government officials . . . prior to discovery." [153] But qualified immunity resulted in the dismissal of just 0.6% of the cases in my dataset before discovery, and resulted in the dismissal of just 3.2% of the 1,183 cases in my dataset before trial.

Indeed, qualified immunity may actually increase the costs and delays associated with Section 1983 litigation. Although qualified immunity terminated only 3.9% of the 979 cases in my dataset in which qualified immunity could be raised, the defense was in fact raised by defendants in more than 37% of these cases--and was sometimes raised multiple times, at the motion to dismiss stage, at summary judgment, and through interlocutory appeals. [154] Each time qualified immunity is raised, it must be researched, briefed, and argued by the parties and decided by the judge. And litigating qualified immunity is no small feat. John Jeffries describes qualified immunity doctrine as "a mare's nest of complexity and confusion." [155] Lower courts are "hopelessly conflicted both within and among themselves" as a result. [156] One circuit court judge reported that "[w]ading through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal appellate court judges routinely face." [157]

The time and effort necessary to resolve qualified immunity motions could nevertheless further the goals of qualified immunity doctrine if it effectively protected defendants from discovery and trial. But in the five districts in my study, just 8.6% of qualified immunity motions brought by defendants in my docket dataset resulted in case dismissals. [158] The remaining 91.4% of qualified immunity motions brought by defendants required the parties and judges to **[*61]** dedicate time and

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[150] *See* Schwartz, *supra* note 16, at 890.

[151] *See id.* at 926-29. An officer was not indemnified for a $ 300 punitive damages judgment in Los Angeles, but the officer never paid the award. And officials believed--but could not confirm--that employees of the Jacksonville Sheriff's Office and the Illinois State Police may each have been required to contribute to one settlement during the study period.

[152] *Id.* at 939.

[153] Pearson, 555 U.S. at 231 (quoting Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987)).

[154] *See supra* Tables 4 & 5.

[155] Jeffries, *supra* note 6, at 852.

[156] Blum, *supra* note 114, at 925 (footnotes omitted).

[157] Wilson, supra note 61, at 447; *see also* Blum, *supra* note 114, at 945-46 (quoting two judges' descriptions of the complexities of determining whether a law is clearly established).

[158] *See supra* Table 11 (thirty-eight of the 440 qualified immunity motions raised by defendants resulted in case dismissals).

resources to briefing, arguing, and deciding the motions without shielding defendants from discovery and trial.

Even in the cases in which qualified immunity motions resulted in case dismissals, it is far from certain that qualified immunity saved the parties and the courts time. As Alan Chen has observed, when considering the efficiencies of qualified immunity, "the costs eliminated by resolving the case prior to trial must be compared to the costs of trying the case . . . . [T]he pretrial litigation costs caused by the invoking of the immunity defense may cancel out the trial costs saved by that defense." [159] In this study, I have not calculated how much time was spent litigating qualified immunity motions, or compared that time with the amount of time spent preparing for and conducting a trial. Yet--given the complexity of qualified immunity doctrine, the use of interlocutory appeals of qualified immunity denials, the fact that most trials in my docket dataset lasted just a few days, and the possibility that a case will settle instead of going to trial even when qualified immunity is denied--the aggregate benefits of qualified immunity do not necessarily outweigh its costs for government officials.

In *Pearson*, the Supreme Court wrote that the *Saucier* two-step qualified immunity analysis "'disserve[s] the purpose of qualified immunity' when it 'forces the parties to endure additional burdens of suit--such as the costs of litigating constitutional questions and delays attributable to resolving them--when the suit otherwise could be disposed of more readily.'" [160] Given the costs and delays associated with qualified immunity motion practice and the infrequency with which qualified immunity motions terminate Section 1983 cases, the doctrine arguably disserves its own purposes.

Although qualified immunity doctrine appears to do little to shield defendants from burdens associated with litigation in filed cases--and may in fact increase the amount of time spent on a substantial number of those cases--my data leave open the possibility that qualified immunity doctrine shields government officials from burdens associated with discovery and trial in other ways, namely by causing people never to file insubstantial claims or to settle them quickly. [161] The possibility that qualified immunity doctrine serves its intended purpose in these ways, however, does not mean that it actually does. At **[*62]** least two pressing questions would have to be answered before qualified immunity doctrine could be justified on these grounds.

First, what are the merits of cases that are never filed or settled quickly because of qualified immunity? If qualified immunity doctrine discourages people from filing or pursuing insubstantial cases, the doctrine is meeting its express goals. [162] But if the doctrine discourages people from filing or pursuing meritorious cases because the briefing and interlocutory appeals associated with qualified immunity would be too expensive, the doctrine is not sorting cases in the way anticipated by the Court. Although more research is necessary to answer this question, available evidence offers reason for concern. Alexander Reinert's interviews with attorneys who bring *Bivens* actions suggest that people with strong claims may sometimes be unable to find a lawyer because the cost of litigating qualified immunity is too high or because the conduct at issue has not been clearly established by prior cases. [163] Some people who do file their cases may settle at a discount, not because their cases are weak but

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[159] Chen, *supra* note 57, at 100.

[160] Pearson v. Callahan, 555 U.S. 223, 237 (2009) (alteration in original) (quoting Brief for National Ass'n of Criminal Defense Lawyers as Amicus Curiae Supporting Respondent, Pearson, 555 U.S. 223 (No. o7-751)).

[161] *See supra* notes 117-122 and accompanying text (discussing case selection and settlement behavior effects).

[162] *See* Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982) (discussing qualified immunity's goal of preventing "insubstantial claims" from proceeding to trial).

[163] *See* Reinert, *supra* note 118, at 491-95.

because they cannot afford to litigate qualified immunity in the district court or on interlocutory appeal.

Second, how frequently does qualified immunity cause plaintiffs not to file or to settle insubstantial cases? The costs associated with litigating qualified immunity and the difficulty of overcoming a qualified immunity motion may cause plaintiffs not to file some insubstantial cases. But other, independent considerations may cause plaintiffs not to file such cases, including rigorous pleading requirements, stringent standards for proving underlying constitutional violations, and minimal potential damages awards. Without further study, it is not possible to conclude that qualified immunity, rather than these alternative considerations, is responsible for plaintiffs' decisions to settle or never file insubstantial cases.

In short, there is limited evidence to support the hypothesis that qualified immunity serves its purpose through screening cases or coercing settlement. Indeed, some evidence suggests that the doctrine may be discouraging plaintiffs from filing or pursuing meritorious cases because qualified immunity would take too long or cost too much to litigate. Our existing knowledge about qualified immunity's effects on filing and settlement decisions cannot justify the doctrine on these grounds.

The Supreme Court has mentioned, but dwelled little upon, two other possible benefits of qualified immunity doctrine--that it lessens "the danger that **[*63]** fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties'" and that it mitigates "the deterrence of able citizens from acceptance of public office." [164] The available evidence casts doubt on these rationales as well. The Court has written that dangers of overdeterrence should dissipate for officials who are not financially responsible for settlements and judgments. [165] Consistent with this observation, studies have found that "the prospect of civil liability has a deterrent effect in the abstract survey environment but that it does not have a major impact on field practices." [166] Further, civil liability does not appear to play a sizable role in people's decisions to apply to become police officers. Police departments around the country report difficulties finding recruits, but the long list of reasons police officials believe people are not applying does not include the threat of being sued. [167] These speculative benefits cannot justify qualified immunity's highly restrictive standards.

Perhaps the Court believes that qualified immunity doctrine serves other interests that it has failed to mention. Even if officers are almost always indemnified, and cases are rarely dismissed on qualified immunity grounds, qualified **[*64]** immunity doctrine may somehow reduce the costs of litigation for the municipalities that end up paying the settlements and judgments on behalf of

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[164] Harlow, 457 U.S. at 814 (alteration in original) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

[165] Owen v. City of Independence, 445 U.S. 622, 655-56 (1980) (explaining that the overdeterrence rationale for qualified immunity "loses its force" when "the threat of personal liability is removed").

[166] VICTOR E. KAPPELER, CRITICAL ISSUES IN POLICE CIVIL LIABILITY 7 (4th ed. 2006) (citing several studies); *see also* Schwartz, *supra* note 16, at 942-43 (discussing studies of civil liability as a deterrent to aggressive police behaviors).

[167] *See, e.g.*, Yamiche Alcindor & Nick Penzenstadler, *Police Redouble Efforts To Recruit Diverse Officers*, USA TODAY (Jan. 21, 2015), http://www.usatoday.com/story/news/2015/01/21/police-redoubling-efforts-to-recruit-diverse-officers/21574081 [http://perma.cc/4MFX-3ZE9]; Edmund DeMarche,*'Who Needs This?' Police Recruits Abandon Dream Amid Anti-Cop Climate*, FOX NEWS (Sept. 2, 2015), http://www.foxnews.com/us/2015/09/02/who-needs-this-police-recruits-abandon-dream-amid-anti-cop-climate.html [http://perma.cc/DAC4-EQR3]; Daniel Denvir,*Who Wants To Be a Police Officer?*, CITYLAB (Apr. 21, 2015), http://www.citylab.com/crime/2015/04/who-wants-to-be-a-police-officer/391017 [http://perma.cc/RB27-LEUZ]; Mori Kessler,*Thinning Blue Line: Police See Declines in Applicants*, ST. GEORGE NEWS (Dec. 13, 2015), http://www.stgeorgeutah.com/news/archive/2015/12/13/mgk-thinning-blue-line-police-decline [http://perma.cc/L2ENVRE2]; Oliver Yates Libaw,*Police Face Severe Shortage of Recruits*, ABC

their officers. [168] Qualified immunity doctrine may encourage the development of constitutional law because it allows courts to announce new constitutional rules without fear of subjecting defendants to financial liability. [169] In this Article, I do not evaluate the sensibility of--or empirical support for--these alternative justifications for qualified immunity. Neither has been relied upon by the Court. If these or other policy interests motivate the Supreme Court's qualified immunity jurisprudence, the Court should be explicit about those motivations so that courts, practitioners, and scholars can evaluate the sensibility of these interests and measure the extent to which qualified immunity advances them. Until then, we are left with the justifications for qualified immunity doctrine that the Court has offered. Available evidence suggests that the doctrine is unnecessary to serve some of qualified immunity's key goals and ill suited for others.

2. Interests in Government Accountability

My research indicates that filed lawsuits are rarely dismissed on qualified immunity grounds. As I have argued, this finding suggests that qualified immunity doctrine rarely achieves its intended function as a shield for government officials against discovery and trial in filed cases. What are the implications of this finding for the other side of qualified immunity's balance, described by the Court both as "the importance of a damages remedy to protect the rights of citizens" [170] and as "the need to hold public officials accountable when they exercise power irresponsibly"? [171] Commentators have long criticized qualified immunity doctrine for protecting government officials at the expense of Section 1983's accountability goals. If qualified immunity is not doing much to protect government officials, does that allay concerns that the doctrine compromises government accountability? In other words, do my data suggest that qualified immunity does little of great significance, either to defendants' benefit or to plaintiffs' detriment?

[*65] Evidence that few cases are dismissed on qualified immunity grounds suggests that the direst descriptions of qualified immunity's impact on plaintiffs perhaps go too far. Critics assert that qualified immunity closes the courthouse door for plaintiffs. [172] And there is no shortage of decisions by the Supreme Court and lower courts dismissing cases on qualified immunity grounds. [173] Yet, my study suggests that qualified immunity doctrine appears to close the courthouse door far less frequently than critics have assumed--at least once a case is filed. My findings do not, however, undermine other concerns raised about the impact of qualified immunity on plaintiffs' claims. Qualified immunity could significantly damage law enforcement accountability without protecting officials from the burdens of discovery and trial.

First, qualified immunity doctrine may discourage people from filing their cases or may cause them to settle or withdraw their claims. [174] If qualified immunity had this effect only on insubstantial cases, the doctrine would be achieving its intended role, albeit in a manner unexpected by the Court.

NEWS (July 10, 2016), http://abcnews.go.com/US/story?id=96570 [http://perma.cc/NJ27-866M]; John Vibes,*Surprised? Some Police Departments Experiencing Sharp Decline in New Applicants*, FREE THOUGHT PROJECT (Feb. 20, 2015), http://thefreethoughtproject.com/good-news-areas-find-people-police [http://perma.cc/7KFB-RABB]; William J. Woska,*Police Officer Recruitment: A Public-Sector Crisis*, POLICE CHIEF (Apr. 2016), http://www.policechiefmagazine.org/police-officer-recruitment-a-public-sector-crisis [http://perma.cc/S57T-5T5N].

168 *See* Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 856 (2007).

169 *See, e.g.*, Jeffries, *supra* note 61, at 247 ("Limitations on money damages facilitate constitutional evolution and growth by reducing the cost of innovation. Judges contemplating an affirmation of constitutional rights need not worry about the financial fallout.").

170 Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (citing Butz v. Economou, 438 U.S. 478, 504-05 (1978)).

171 Pearson v. Callahan, 555 U.S. 223, 231 (2009).

172 *See supra* notes 6-8 and accompanying text.

173 *See supra* note 3 and accompanying text.

174 *See supra* notes 162-163 and accompanying text.

But if qualified immunity is causing people not to file or to settle meritorious cases, as available anecdotal evidence suggests, then the doctrine is preventing people from vindicating their rights and holding government accountable. [175]

Moreover, my findings do not undermine other common critiques of the doctrine. Qualified immunity doctrine has been criticized by courts and scholars alike for being confusing and difficult to apply, and leading to inconsistent adjudications. [176] These characteristics of qualified immunity doctrine may well increase the time it takes courts to decide qualified immunity motions, even as the decisions are infrequently dispositive. [177]

In addition, many are critical of the Court's decision in *Pearson* to allow lower courts to grant qualified immunity without first assessing whether a defendant violated the constitutional or statutory rights of the plaintiff. [178] Their fear is that if courts regularly find that the law is not clearly established without first ruling on the scope of the underlying constitutional right, the constitutional **[*66]** right at issue will never become clearly established. This catch-22 may lead to constitutional uncertainty and stagnation, making it more difficult for plaintiffs to prevail on constitutional claims and offering little guidance to government officials about the scope of constitutional rights. [179] Scholars who have studied the impact of *Pearson* have found some evidence to support these concerns. [180] The fact that few cases are dismissed on qualified immunity grounds is immaterial to this critique. The Supreme Court's decision in *Pearson* to allow lower courts to grant qualified immunity without deciding whether a right has been violated may still lead to constitutional uncertainty, particularly in cases involving new technologies or practices. [181]

Finally, many have argued that the Supreme Court's qualified immunity decisions protect bad actors. The Court's disregard of subjective intent protects officers who act in bad faith, so long as their conduct does not violate clearly established law. [182] In addition, a government official who has acted in a clearly unconstitutional manner can be shielded from liability simply because no prior case has held similar conduct to be unconstitutional. The Supreme Court's recent **[*67]** decisions have made it increasingly difficult to meet this standard. [183] It is, as John Jeffries has written, "as if the one-bite rule for bad dogs started over with every change in

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[175] *See supra* notes 162-163 and accompanying text.

[176] *See supra* notes 155-159 and accompanying text.

[177] *See* Chen, *supra* note 57, at 99 ("Plaintiffs, defendants, and trial courts are likely to expend substantial resources simply litigating the qualified immunity defense--an elaborate sideshow, independent of the merits, that in many cases will do little to advance or accelerate resolution of the legal claims.").

[178] *See supra* Section I.B.2 (describing *Pearson*).

[179] *See, e.g.*, Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 502-06 (2009); Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 149; John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 120; James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1605-06 (2011).

[180] *See* Nielson & Walker, *supra* note 114; *see also* Paul W. Hughes, *Not a Failed Experiment*: Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 428 & n.121 (2009) (predicting that *Pearson* will lead to constitutional stagnation); Colin Rolfs, *Qualified Immunity After* Pearson v. Callahan, 59 UCLA L. REV. 468 (2011) (finding that after *Pearson* district courts often answered both steps of the qualified immunity analysis, but circuit courts more often decided qualified immunity motions without ruling on the underlying constitutional right); *cf.* Ted Sampsell-Jones & Jenna Yauch, *Measuring* Pearson *in the Circuits*, 80 FORDHAM L. REV. 623, 629 (2011) (finding that circuit courts followed the *Saucier* two-step process "most of the time").

[181] *See, e.g.*, Matthew Slaughter, *First Amendment Right To Record Police: When Clearly Established Law Is Not Clear Enough*, 49 J. MARSHALL L. REV. 101 (2015) (describing circuit variation in analysis of the right to record the police); Bailey Jennifer Woolfstead, *Don't Tase Me Bro: A Lack of Jurisdictional Consensus Across Circuit Lines*, 29 T.M. COOLEY L. REV. 285 (2012) (describing circuit variation in analysis of qualified immunity for claims involving electronic control devices).

[182] For example, in *Ashcroft v. al-Kidd*, the Supreme Court held that the then-Attorney General John Ashcroft was entitled to qualified immunity, even though he authorized federal prosecutors to use the

weather conditions." [184] Even this critique of qualified immunity is left largely intact by my findings. Qualified immunity's disregard for officials' subjective intent, and the need for precedent that "place[s] the statutory or constitutional question beyond debate," [185] may insulate bad actors from financial liability, but still expose them to discovery and trial if other claims or defendants remain.

McKay v. City of Hayward, [186] a case from the Northern District of California in my docket dataset, illustrates how qualified immunity can impair government accountability in these ways without shielding defendants from discovery or trial. On May 29, 2011, officers from the Hayward Police Department used a police dog to track an armed suspect who had robbed a restaurant. [187] The dog guided the officers to an eight-foot wall. Without any warning, the officers lifted the dog over the wall. On the other side of the wall was the backyard of a mobile home belonging to Jesse Porter, an 89-year-old who had no connection to the robbery. The dog bit Porter on the leg, leaving a wound so severe that Porter's leg had to be amputated. Mr. Porter was then moved into a residential **[*68]** care facility, where he died two months later. Mr. Porter's children sued the involved officers and the City of Hayward under federal and state law.

At summary judgment, the district court in *McKay* granted the officers qualified immunity. [188] The court found that, to survive summary judgment, the plaintiffs had to be able to show that the failure to warn before seizure by a police dog constitutes a Fourth Amendment violation. The court surveyed Ninth Circuit cases involving police dogs and found that "[n]o Ninth Circuit case holds explicitly that failure to warn before seizure by a police dog constitutes a violation of the Fourth Amendment." [189] The court surveyed other circuits and found some variation: the Fourth and Eighth Circuits had held that the failure to give a warning before using

material-witness statute pretextually, because qualified immunity doctrine "demands that we look to whether the arrest is objectively justified, rather than to the motive of the arresting officer." 563 U.S. 731, 740 (2011).

[183] Despite the confusion in the doctrine, the Supreme Court's most recent decisions suggest that it is very difficult to show that conduct violates "clearly established law." Although the Court once held that the obviousness of a constitutional violation can defeat qualified immunity even without a case on point, *see* Hope v. Pelzer, 536 U.S. 730 (2002), in recent years the Court's primary focus has been whether a prior court has held the right to be clearly established, *see* Blum, Chemerinsky & Schwartz, *supra* note 8, at 652-53. The Court's recent decisions have made it difficult to clearly establish the law in other ways as well. In 1999, the Court explained that a plaintiff could show the law was clearly established by pointing to "controlling authority in their jurisdiction" or a "consensus of cases of persuasive authority." Wilson v. Layne, 526 U.S. 603, 617 (1999). Yet in more recent decisions, the Court has backed away from this position; it now only assumes *for the sake of argument* that controlling circuit authority or a consensus of cases of persuasive authority can clearly establish the law. *See* Kinports, *supra* note 2, at 70-71 (describing this shift in the law). The Court's most recent decisions also suggest that the facts of the prior decision must closely resemble those of the instant case. The Court has repeatedly assured plaintiffs that it "do[es] not require a case directly on point," but requires that "existing precedent must have placed the statutory or constitutional question beyond debate." Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (per curiam) (citing *al*-Kidd, 563 U.S. at 741). In recent years, the Court has reversed several lower court decisions for relying on prior precedent that established constitutional principles at too-general a level. *See, e.g.*, White v. Pauly, 137 S. Ct. 548 (2017); Mullenix, 136 S. Ct. 305.

[184] Jeffries, *supra* note 61, at 256.

[185] Mullenix, 136 S. Ct. at 308 (citing *al*-Kidd, 563 U.S. at 741).

[186] No. 3:12-cv-1613 (N.D. Cal. Mar. 30, 2012).

[187] The facts of the case are taken from the district court's summary judgment decision. *See* McKay v. City of Hayward, 949 F. Supp. 2d 971, 975-76 (N.D. Cal. 2013).

[188] Id. at 985.

[189] Id. at 983.

a police dog violates the Fourth Amendment, but the Eleventh, Seventh, and Tenth Circuits had held that failure to warn before deploying a police dog was "not dispositive of the reasonableness of seizing an individual with a police dog." [190] Because of this variation among circuits, the court in the Northern District of California concluded that that the unconstitutionality of the officers' conduct had not been clearly established.

The decision granting qualified immunity in *McKay* did not shield government officials from burdens associated with either discovery or trial. In McKay's case, qualified immunity was raised at summary judgment, after the officers had already participated in discovery. The motion was granted less than two weeks before trial was scheduled to begin. [191] Moreover, even after the court granted qualified immunity to the individual officers, the officers still faced the prospect of trial. In addition to the Section 1983 claims against the two individual officers, the plaintiffs brought state law claims against the individual officers and state and federal claims against the City--the qualified immunity defense did not apply to any of these claims. [192] In the days following the court's summary judgment decision, the parties drafted and submitted voir dire questions, multiple motions in limine, and briefs regarding whether the **[*69]** trial should be separated into three stages. [193] The case settled and the court entered a conditional dismissal the day trial was scheduled to begin. [194]

Although the district court's qualified immunity decision in *McKay* did not shield officials from discovery and was not formally the reason the case did not go to trial, it did negatively affect interests in government accountability. The qualified immunity motion likely increased the amount of time spent by the attorneys for the plaintiffs and defendants. [195] The grant of qualified immunity in *McKay* may also have ripple effects that extend far beyond the parties to the litigation. The district court found that it was not clearly established in the Ninth Circuit that deploying police dogs without a prior warning violates the Constitution. This decision may cause lawyers to decline to represent people with similar claims. One could argue that qualified immunity is serving its intended role by discouraging people from bringing Section 1983 cases when the underlying constitutional rights have not been clearly established. But this position goes further than the Court's own justification for qualified immunity doctrine: to protect government officials from insubstantial claims. [196] That no prior court has decided a given constitutional issue does not imply that a case raising it lacks merit.

Uncertainty about the constitutionality of deploying a police dog without a prior warning may also influence police departments' policy and training decisions. Although the Supreme Court appears confident that police departments can regulate themselves, [197] police officials look to court

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[190] Id. at 984.

[191] *See* Case Management Minutes, McKay, 949 F. Supp. 2d 971 (No. 3:12-cv-1613), ECF No. 67.

[192] McKay, 949 F. Supp. 2d at 985, 988.

[193] *See* McKay, 949 F. Supp. 2d 971 (No. 3:12-cv-1613), ECF Nos. 76-79.

[194] *See* Order of Conditional Dismissal, McKay, 949 F. Supp. 2d 971 (No. 3:12-cv-1613), ECF No. 81.

[195] In some cases, the grant of qualified immunity might cause plaintiffs to settle instead of going to trial or cause plaintiffs to settle for an amount smaller than they would have otherwise accepted. In this case, the plaintiffs' attorney reported that the qualified immunity grant had a "negligible" impact on the value of the case because the *Monell* claim remained and, "[u]nlike many civil rights cases, [the plaintiffs] had good evidence to support the *Monell* claim." E-mail from Matthew D. Davis, Attorney for Plaintiffs in McKay, 949 F. Supp. 2d 971, to author (Nov. 28, 2016, 9:17 AM) (on file with author).

[196] *See* Harlow v. Fitzgerald, 457 U.S. 800, 815-16 (1982) (discussing qualified immunity's goal of preventing "insubstantial claims" from proceeding to trial).

[197] *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 598-99 (2006) (asserting that the rise of police professionalism and internal discipline reduces the need for the exclusionary rule to deter police misbehavior).

decisions to guide their policies and trainings. [198] Were, for example, the Ninth Circuit to hold that **[*70]** officers should give prior warnings before using police dogs, departments in the jurisdiction of the Ninth Circuit would likely train their officers to issue warnings under these circumstances. Without such a decision, and with the *McKay* court's conclusion that there is no clearly established constitutional right to such a warning, departments may be less likely to train their officers to give such warnings. [199] These costs to government accountability accrue whether or not qualified immunity protects government officials from discovery and trial.

D. Moving Forward

The Supreme Court has written that evidence undermining its assumptions about the realities of constitutional litigation might "justify reconsideration of the balance struck" in its qualified immunity decisions. [200] My research has, indeed, undermined the Court's assumptions about the purposes served by qualified immunity doctrine. In this Section, I consider how these findings should shape qualified immunity doctrine moving forward.

My findings suggest that the Court's efforts to advance its policy goals through qualified immunity doctrine has been an exercise in futility. In *Harlow v. Fitzgerald*, the Supreme Court "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action." [201] The Court believed that "[t]he transformation was justified by the special policy concerns arising from public officials' exposure to repeated suits." [202] Some--including Justice Thomas--have argued that this transformation was a mistake because the scope of qualified immunity doctrine should mirror the common law defenses **[*71]** that existed in 1871, and should not reflect the Court's policy preferences at all. [203]

This Article offers an additional reason to conclude this transformation was a mistake: the doctrine does not serve its intended policy objectives. Although the Supreme Court repeatedly describes qualified immunity doctrine as a means of shielding government officials from the costs and burdens of litigation, I have found officers are virtually always indemnified, and that qualified immunity is rarely the reason that Section 1983 cases end. Future research can explore whether qualified immunity causes plaintiffs not to file or pursue in-substantial claims, or advances the doctrine's goals in other ways. At this point, however, available evidence contradicts the Court's assumptions about the role qualified immunity plays in constitutional litigation.

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[198] For examples of instances in which court decisions have influenced police department policies and trainings, see POLICE EXEC. RESEARCH FORUM, GUIDING PRINCIPLES ON USE OF FORCE 18 (Mar. 2016), http://www.policeforum.org/assets/30%20guiding%20principles.pdf [http://perma.cc/G9YU-C4UA] (explaining that after the Fourth Circuit held that using a Taser repeatedly in drive-stun mode was unconstitutional, "several agencies in jurisdictions covered by the Fourth Circuit ruling amended their use-of-force and ECW [Electronic Control Weapons] policies" in response to the decision); and Joanna C. Schwartz,*Who Can Police the Police?*, 2016 U. CHI. L.F. 437, 452 n.53, 455 n.68.

[199] *See* David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 580-81 (2008) (observing that, when a United States Supreme Court decision removed the exclusionary rule as a remedy for conduct that violated California constitutional law--searching garbage without a warrant--police in California were "trained to ignore" California law).

[200] Anderson v. Creighton, 483 U.S. 635, 641 n.3 (1987).

[201] Id. at 645 (citing Harlow, 457 U.S. at 815-20).

[202] Wyatt v. Cole, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring).

[203] *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in 'interpret[ing] the intent of Congress in enacting' the Act. . . . Our qualified immunity precedents instead represent precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make." (citations omitted)).

Justices sympathetic to qualified immunity's policy goals might conclude based on my findings that they should further strengthen qualified immunity doctrine to protect defendants. I would discourage this approach for several reasons. First, it is far from clear that qualified immunity doctrine is well designed to weed out only "insubstantial" cases. Available evidence suggests that some people may decline to file or pursue their claims because of the cost of litigating qualified immunity, even when they might succeed on the merits. [204] And cases alleging clearly unconstitutional behavior may be dismissed on qualified immunity grounds simply because no prior case has held sufficiently similar conduct to be unconstitutional. [205] Strengthening qualified immunity doctrine would presumably aggravate these preexisting concerns.

Setting aside the question of whether such a shift is desirable, I am not convinced that it is feasible. It is hard to imagine how the Court could make qualified immunity doctrine any stronger than it already is. [206] Perhaps members of the Court believe that lower courts are not applying qualified immunity doctrine as expansively as they should. Indeed, the Court's flurry of recent **[*72]** summary reversals suggests that it is attempting to encourage lower courts to follow course. [207]

But even if all judges applied qualified immunity doctrine as expansively as does the Supreme Court, qualified immunity doctrine would likely still fall short of its intended role in many cases filed against law enforcement. Plaintiffs could often still plead a plausible entitlement to relief at the motion to dismiss stage, and could often still raise factual disputes at summary judgment that prevent dismissal on qualified immunity grounds. Plaintiffs would continue to include claims against municipalities, claims for declaratory or injunctive relief, and state law claims in their cases that qualified immunity cannot resolve. [208] Defendants would still sometimes conclude that other defenses or an inexpensive settlement is preferable to the added costs of qualified immunity motion practice. And courts would continue to dismiss cases for multiple other reasons besides qualified immunity. Presumably the number of cases dismissed on qualified immunity grounds would increase somewhat, but given litigation dynamics and other applicable doctrines, many cases would remain in which qualified immunity never shielded government officials from discovery or trial. Qualified immunity is the Supreme Court's hammer. But many civil rights damages actions against law enforcement are not nails.

The fact that qualified immunity is often ill suited and unnecessary to advance the Court's policy objectives provides additional reason to adopt Justice Thomas's view and realign the doctrine with historical common law defenses. According to those who have studied the common law at the time Section 1983 was passed, little would remain of qualified immunity if the Court adopted this approach. [209] But other defenses would remain--

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[204] *See supra* notes 174-175 and accompanying text.

[205] *See supra* notes 182-184 and accompanying text.

[206] *See supra* note 183 and accompanying text (describing recent shifts in the doctrine).

[207] *See* Baude, *supra* note 3 (commenting on numerous summary reversals by the Supreme Court).

[208] The Court could conceivably hold that qualified immunity can be asserted by municipalities and in claims for injunctive and declaratory relief. But the Court has already held that qualified immunity does not apply to both types of claims. And the Court has no power to create a qualified immunity defense for state claims.

[209] For discussion of the common law and government practices in place when Section 1983 became law, see Alschuler, *supra* note 179, at 506 ("A justice who favored giving § 1983 its original meaning or who sought to restore the remedial regime favored by the Framers of the Fourth Amendment could not have approved of either *Pierson* or *Harlow*."); Baude, *supra* note 3, at 1 (observing that qualified immunity is justified as "deriv[ing] from a common law 'good faith' defense," but that "[t]here was no such defense"); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1924 (2010) ("During the early republic, the courts--state and federal--did not take responsibility for adjusting the incentives of officers or for protecting them from the burdens of litigation and personal liability. These were matters for Congress to adjust through indemnification and other modes of

including arguments that **[*73]** plaintiffs cannot state plausible claims for relief in their complaint or cannot establish material factual disputes at summary judgment. Defendants would still be able to argue that plaintiffs cannot meet the Court's exceedingly rigorous standards for constitutional violations. [210] Even in the absence of qualified immunity, these other procedural and substantive barriers would prevent many Section 1983 cases from being filed, proceeding to discovery, or advancing to trial.

If the Court is unwilling to eliminate or dramatically restrict qualified immunity, it could make more modest alterations that would align the doctrine with evidence of its role in constitutional litigation. For example, the Court could undo adjustments to qualified immunity doctrine that were expressly motivated by an interest in shielding government officials from discovery and trial in filed cases. In *Harlow*, the Court eliminated consideration of officers' subjective intent because it believed doing so would "avoid 'subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery' in cases where the legal norms the officials are alleged to have violated were not clearly established at the time." [211] My study shows that the Court's elimination of the subjective prong of qualified immunity in *Harlow* should be viewed as a failed experiment. Despite courts' and commentators' assumptions to the contrary, [212] the decision in *Harlow* appears to have done little to shield government officials from discovery and trial in filed cases.

Restoring the subjective prong to qualified immunity analysis could also mitigate at least one serious concern with the doctrine. Currently, government officials acting in bad faith or with knowledge of the unconstitutionality of their behavior can be shielded from liability simply because no prior case proscribed their conduct. If the subjective prong were restored to the qualified immunity analysis, government officials would not be entitled to qualified immunity if they knew or should have known that their conduct was unlawful. A recent Supreme Court case, *Mullenix v. Luna*, illustrates how reversing *Harlow* might address this concern. [213]

[*74] The facts relevant to *Mullenix* began when Tulia Police Department officers attempted to arrest Israel Leija, Jr. for violating misdemeanor probation. [214] Leija fled the scene in his car, and officers from several agencies participated in the pursuit. Officers set up spike strips on the highway to puncture Leija's tires as he drove by--a strategy they had been trained to use in just this type of situation. Texas Department of Public Safety Trooper Chadrin Mullenix decided that instead of setting up spike strips he would try to disable Leija's car by shooting at it. [215] He had received no training in shooting at a car to disable it and was instructed by his supervisor not to do so. [216] Nevertheless, Mullenix fired six rounds at Leija's car as it passed under the bridge where Mullenix was standing. Leija died, with one of the shots determined to be the cause of death. [217] Soon after the shooting, Mullenix remarked to his supervisor, "How's that for proactive?"--an apparent reference to a conversation they had had early in the day in which the superior had criticized the officer for not

calibrating official zeal.").

[210] For discussions of the difficulty of establishing constitutional violations against law enforcement see, for example, Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017).

[211] Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (alteration in original) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982)).

[212] *See supra* notes 6 and 56 and accompanying text.

[213] 136 S. Ct. 305 (2015) (per curiam).

[214] Luna v. Mullenix, 773 F.3d 712, 715 (5th Cir. 2014), *rev'd per curiam*, 136 S. Ct. 305 (2015).

[215] Mullenix, 136 S. Ct. at 306.

[216] Id. at 306-07.

[217] Id. at 307.

taking enough initiative. [218]

The district court denied Mullenix's motion for summary judgment on qualified immunity grounds, Mullenix filed an interlocutory appeal, and the Fifth Circuit affirmed the district court. The Supreme Court granted Mullenix's petition for certiorari and reversed. The Court did not answer whether Mullenix violated the Constitution but instead held that prior cases had not clearly established that his conduct was unconstitutional. [219] Mullenix's remark to his supervisor played no role in the analysis, as "an officer's actual intentions are irrelevant" to the qualified immunity analysis. [220] Restoring the subjective prong to the qualified immunity analysis would likely change the outcome of a case like *Mullenix*. Mullenix's "How's that for proactive?" statement would once again be relevant to the qualified immunity analysis, and would constitute at least triable evidence of bad faith. [221]

The Court could also reconsider other adjustments to qualified immunity made with the express goal of shielding defendants from burdens of discovery and trial. For example, the Court granted defendants the right to immediately appeal denials of qualified immunity as a means of shielding defendants from **[*75]** burdens of discovery and trial. [222] Yet my data show interlocutory appeals of qualified immunity denials infrequently serve that function. Defendants filed interlocutory appeals of 21.7% of decisions denying qualified immunity in whole or part. Of the appeals that were filed, just 12.2% of the lower court decisions were reversed in whole, and just 9.8% of the interlocutory appeals filed resulted in case dismissals. Interlocutory appeals may have prompted case resolutions in another way--39.0% of interlocutory appeals were never decided, apparently because the cases were settled while the motions were pending. [223] But defendants' interlocutory appeals rarely resulted in case dismissals on qualified immunity grounds. It is far from clear that interlocutory appeals shield defendants from litigation burdens--the time and money spent briefing and arguing interlocutory appeals may in fact exceed the time and money saved in the relatively few reversals on interlocutory appeal. If so, the policy objectives motivating *Mitchell* militate in favor of eliminating the right of interlocutory appeal.

Finally, and still more modestly, the Court could reconsider the restrictive manner in which it defines "clearly established law." John Jeffries has written that the Court's narrow definition of clearly established law is inspired by its interest in facilitating qualified immunity dismissals at summary judgment. [224] My data show that the Court's decisions are not having their intended effect. Yet, as others have pointed out, the Court's doctrinal framework creates confusion in the lower courts and protects bad actors when there is no prior case on point. [225] Jeffries's proposed solution is to focus the qualified immunity inquiry not on whether the law was clearly established but, instead, on whether the defendant's conduct was "clearly unconstitutional." [226] I believe that my data support a more complete transformation of the doctrine, but this adjustment would at least be a

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[218] Id. at 316 (Sotomayor, J., dissenting).

[219] Id. at 312 (majority opinion).

[220] Id. at 316 (Sotomayor, J., dissenting).

[221] *See id.*

[222] *See supra* Section I.B.3.

[223] *See supra* Section III.D; *cf.* Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1179 (1990) (assessing the impact of interlocutory appeals for qualified immunity denials, and reporting that "the district judges with whom I have spoken . . . all believed that defendants used the *Mitchell* appeal as a delaying tactic that hampered litigation that would otherwise be tried or settled relatively quickly").

[224] *See* Jeffries, *supra* note 6, at 866. For the Court's most recent decisions interpreting what constitutes clearly established law, see *supra* note 183.

[225] *See supra* notes 176-185 and accompanying text.

[226] *See* Jeffries, *supra* note 6, at 867.

step in the right direction.

At this point, it is impossible to predict what impact these proposed changes to qualified immunity doctrine would have on the litigation of constitutional claims against law enforcement. Perhaps narrowing the qualified immunity defense, **[*76]** restoring the subjective prong, or eliminating qualified immunity altogether would dramatically increase the number of suits filed against the police, or increase the number of filed cases that were settled or tried. On the other hand, these changes might inspire courts to place other limits on Section 1983 claims to maintain the status quo. [227] This Article does not predict how changes to qualified immunity doctrine might influence the collection of doctrines relevant to constitutional litigation, or suggest the ideal ways in which they should relate. My suggestions are motivated by a less lofty ambition--to achieve greater consistency across qualified immunity doctrine's structure, intended policy goals, and actual role in constitutional litigation.

CONCLUSION

In recent years, the Supreme Court has dedicated an outsized portion of its docket to qualified immunity motions in cases against law enforcement because, it has explained, the doctrine is so "important to 'society as a whole.'" [228] But the Court relies on no evidence to back up this fervently held position. Instead, my research shows that qualified immunity doctrine infrequently plays its intended role in the litigation of constitutional claims against law enforcement. Qualified immunity doctrine is unnecessary to shield law enforcement officers from financial liability, and the doctrine infrequently protects government officials from burdens associated with discovery and trial in filed cases. Further exploration of dynamics unobservable through my dataset could reveal other ways in which qualified immunity influences the litigation of civil rights actions against law enforcement. At this point, however, available evidence indicates that qualified immunity often is not functioning as assumed, and is not achieving its intended goals. In an ideal world, all open empirical questions about Section 1983 litigation would be answered before any applicable doctrine was adjusted. But it is my view that the perfect should not be the enemy of the good. [229] The Supreme Court, as well as lower courts, should adjust their qualified immunity decisions to comport with this evidence.

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[227] *See* Fallon, *supra* note 59, at 486-89 (observing that adjustments to qualified immunity may influence other aspects of constitutional doctrine).

[228] White v. Pauly, 137 S. Ct. 548, 551 (2017) (quoting City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015)).

[229] *See* Schwartz, *supra* note 16, at 961.

Table1 (Return to related document text)

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
Section 1983 cases against municipalities/seeking solely injunctive or declaratory relief	14	26	13	22	24	99 (8.4%)
Cases brought against individual defendants, seeking damages, but dismissed by court before defendants respond	11	44	20	7	23	105 (8.9%)
Section 1983 cases in which QI can be raised by defendants	106	155	139	219	360	979 (82.8%)
Total Section 1983 cases filed	131	225	172	248	407	1,183

Table1 (Return to related document text)

Table2 (Return to related document text)

District	Total cases in which QI could be raised	Total cases raising QI
S.D. TX	106	58 (54.7%)
M.D. FL	155	84 (54.2%)
N.D. OH	139	66 (47.5%)
N.D. CA	219	74 (33.8%)
E.D. PA	360	86 (23.9%)
Total	979	368 (37.6%)

Table2 (Return to related document text)

Table3 (Return to related document text)

District	QI raised only at MTD/ pleadings	QI raised only at SJ	QI raised only at/after trial
S.D. TX	15 (25.9%)	37 (63.8%)	0
M.D. FL	33 (39.3%)	32 (38.1%)	0
N.D. OH	14 (21.2%)	49 (74.2%)	0
N.D. CA	11	56	0

District	QI raised only at MTD/ pleadings	QI raised only at SJ	QI raised only at/after trial
	(14.9%)	(75.7%)	
E.D. PA	22	55	1
	(25.6%)	(64.0%)	(1.2%)
Total	95	229	1
	(25.8%)	(62.2%)	(0.3%)

Table3 (*Return to related document text*)

Table4 (*Return to related document text*)

District	QI raised at both MTD & SJ	QI raised at both SJ & at/ after trial	Total
S.D. TX	6	0	58
	(10.3%)		
M.D. FL	18	1	84
	(21.4%)	(1.2%)	
N.D. OH	3	0	66
	(4.5%)		
N.D. CA	6	1	74
	(8.1%)	(1.4%)	
E.D. PA	8	0	86
	(9.3%)		
Total	41	2	368
	(11.1%)	(0.5%)	

Table4 (*Return to related document text*)

Table5 (*Return to related document text*)

District	Total MTDs/pleadings raising QI	Total SJ motions raising QI	Total QI motions at/after trial	Total QI motions
S.D. TX	23	46	0	69
	(33.3%)	(66.7%)		
M.D. FL	59	51	1	111
	(53.2%)	(45.9%)	(0.9%)	

District	Total MTDs/pleadings raising QI	Total SJ motions raising QI	Total QI motions at/after trial	Total QI motions
N.D. OH	17 (23.9%)	54 (76.1%)	0	71
N.D. CA	23 (25.3%)	67 (73.6%)	1 (1.1%)	91
E.D. PA	32 (32.7%)	65 (66.3%)	1 (1.0%)	98
Total	154 (35.0%)	283 (64.3%)	3 (0.7%)	440

Table5 (*Return to related document text*)

Table6 (*Return to related document text*)

District	Number of motions in which QI was raised						Total cases in which QI could be raised
	Zero	One	Two	Three	Four	Five	
S.D. TX	48 (45.3%)	48 (45.3%)	9 (8.5%)	1 (0.9%)	0	0	106
M.D. FL	71 (45.8%)	63 (40.6%)	17 (11.0%)	4 (2.6%)	0	0	155
N.D. OH	73 (52.5%)	61 (43.9%)	5 (3.6%)	0	0	0	139
N.D. CA	145 (66.2%)	61 (27.9%)	11 (5.0%)	1 (0.5%)	0	1 (0.5%)	219
E.D. PA	273 (75.8%)	76 (21.1%)	11 (3.1%)	0	0	0	360
Total	610 (62.3%)	309 (31.6%)	53 (5.4%)	6 (0.6%)	0	1 (0.1%)	979

Table6 (*Return to related document text*)

Table7 (*Return to related document text*)

	S.D. TX	M.D. FL	N.D. OH
QI denied	15 (21.7%)	33 (29.7%)	27 (38.0%)
QI granted in part	7 (10.1%)	7 (6.3%)	6 (8.5%)
QI granted in full	16 (23.2%)	18 (16.2%)	3 (4.2%)
QI in the alternative/fails 1st step	5 (7.2%)	12 (10.8%)	11 (15.5%)

	S.D. TX	M.D. FL	N.D. OH
Grant (not on QI)	7 (10.1%)	13 (11.7%)	12 (16.9%)
Grant (reasoning unclear)	2 (2.9%)	2 (1.8%)	0
GiP (not on QI or QI in alt.)	4 (5.8%)	6 (5.4%)	2 (2.8%)
Not decided	13 (18.8%)	20 (18.0%)	10 (14.1%)
Total motions	69	111	71

Table7 (*Return to related document text*)

Table8 (*Return to related document text*)

	N.D. CA	E.D. PA	Total
QI denied	30 (33.0%)	34 (34.7%)	139 (31.6%)
QI granted in part	5 (5.5%)	1 (1.0%)	26 (5.9%)
QI granted in full	11 (12.1%)	5 (5.1%)	53 (12.0%)
QI in the alternative/fails 1st step	9 (9.9%)	13 (13.3%)	50 (11.4%)
Grant (not on QI)	13 (14.3%)	17 (17.3%)	62 (14.1%)
Grant (reasoning unclear)	0	5 (5.1%)	9 (2.0%)
GiP (not on QI or QI in alt.)	8 (8.8%)	6 (6.1%)	26 (5.9%)
Not decided	15 (16.5%)	17 (17.3%)	75 (17.0%)
Total motions	91	98	440

Table8 (*Return to related document text*)

Table9 (*Return to related document text*)

	S.D. TX	M.D. FL	N.D. OH
QI denied	6 (26.1%)	17 (28.8%)	4 (23.5%)
QI granted in part	2 (8.7%)	2 (3.4%)	1 (5.9%)
QI granted	4 (17.4%)	5 (8.5%)	0
QI in the alternative/fails 1st step	1 (4.3%)	3 (5.1%)	4 (23.5%)
Grant (not on QI)	3	11	2

	S.D. TX	M.D. FL	N.D. OH
	(13.0%)	(18.6%)	(11.8%)
Grant (reasoning unclear)	0	2 (3.4%)	0
GiP (not on QI or QI in alt.)	2 (8.7%)	6 (10.2%)	2 (11.8%)
Not decided	5 (21.7%)	13 (22.0%)	4 (23.5%)
Total motions	23	59	17

Table9 (*Return to related document text*)

Table10 (*Return to related document text*)

	N.D. CA	E.D. PA	Total
QI denied	7 (30.4%)	12 (37.5%)	46 (29.9%)
QI granted in part	2 (8.7%)	0	7 (4.5%)
QI granted	2 (8.7%)	3 (9.4%)	14 (9.1%)
QI in the alternative/fails 1st step	0	2 (6.3%)	10 (6.5%)
Grant (not on QI)	6 (26.1%)	4 (12.5%)	26 (16.9%)
Grant (reasoning unclear)	0	4 (12.5%)	6 (3.9%)
GiP (not on QI or QI in alt.)	3 (13.0%)	3 (9.4%)	16 (10.4%)
Not decided	3 (13.0%)	4 (12.5%)	29 (18.8%)
Total motions	23	32	154

Table10 (*Return to related document text*)

Table11 (*Return to related document text*)

	S.D. TX	M.D. FL	N.D. OH
QI denied	9 (19.6%)	15 (29.4%)	23 (42.6%)
QI granted in part	5 (10.9%)	5 (9.8%)	5 (9.3%)
QI granted	12 (26.1%)	13 (25.5%)	3 (5.6%)
QI in the alternative/fails 1st step	4 (8.7%)	9 (17.6%)	7 (13.0%)
Grant (not on QI)	4 (8.7%)	2 (3.9%)	10 (18.5%)

	S.D. TX	M.D. FL	N.D. OH
Grant (reasoning unclear)	2 (4.3%)	0	0
GiP (not on QI or QI in alt.)	2 (4.3%)	0	0
Not decided	8 (17.4%)	7 (13.7%)	6 (11.1%)
Total motions	46	51	54

Table11 (*Return to related document text*)

Table12 (*Return to related document text*)

	N.D. CA	E.D. PA	Total
QI denied	23 (34.3%)	21 (32.3%)	91 (32.2%)
QI granted in part	3 (4.5%)	1 (1.5%)	19 (6.7%)
QI granted	9 (13.4%)	2 (3.1%)	39 (13.8%)
QI in the alternative/fails 1st step	8 (11.9%)	11 (16.9%)	39 (13.8%)
Grant (not on QI)	7 (10.4%)	13 (20.0%)	36 (12.7%)
Grant (reasoning unclear)	0	1 (1.5%)	3 (1.1%)
GiP (not on QI or QI in alt.)	5 (7.5%)	3 (4.6%)	10 (3.5%)
Not decided	12 (17.9%)	13 (20.0%)	46 (16.3%)
Total motions	67	65	283

Table12 (*Return to related document text*)

Table13 (*Return to related document text*)

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
Affirmed	3	3	7	2	0	15 (36.6%)
Reversed	0	3	1	0	1	5 (12.2%)
Reversed in part	0	0	2	1	0	3 (7.3%)
Dismissed for lack of jurisdiction	0	0	1	0	0	1 (2.4%)
Withdrawn	2	3	6	5	0	16 (39.0%)
Pending	0	0	0	1	0	1 (2.4%)
Total interlocutory appeals	5	9	17	9	1	41

Table13 (*Return to related document text*)

Table14 (*Return to related document text*)

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
Affirmed	7	5	3	1	1	17 (65.4%)
Reversed	0	0	1	1	0	2 (7.7%)
Affirmed in part	0	0	0	0	0	0
Withdrawn/ dismissed without decision	3	4	0	0	0	7 (26.9%)
Pending	0	0	0	0	0	0
Total appeals by plaintiff(s)	10	9	4	2	1	26

Table14 (*Return to related document text*)

Table15 (*Return to related document text*)

	S.D. TX	M.D. FL	N.D. OH	N.D. CA	E.D. PA	Total
Motions raising QI on the pleadings	23	59	17	23	32	154
Total QI grants on the pleadings	4	5	0	2	3	14
Case dismissals on QI at the pleadings	3	3	0	0	1	7
Motions raising QI at summary judgment	46	51	54	67	65	283
Total QI grants at SJ	12	13	3	9	2	39
Case dismissals on QI at SJ	9	10	3	3	2	27
Total QI appeals by Ds	5	9	17	9	1	41
Total reversals	0	3	1	0	1	5
Case dismissals from appeal	0	2	1	0	1	4

Table15 (*Return to related document text*)

Table16 (*Return to related document text*)

	S.D. TX	M.D. FL	N.D. OH
Settlement/R.68 Judgment	41	59	69
Voluntary/stipulated dismissal	30	37	34
Sua sponte dismissal	11	50	27

	S.D. TX	M.D. FL	N.D. OH
before defendant responds			
Dismissed as sanction	1	1	0
Dismissed for failure to prosecute	1	7	7
Remanded to state court	0	8	0
Motion to dismiss granted (not based on QI)	11	21	12
Summary judgment granted (not based on QI)	17	13	16
Directed verdict for D (not based on QI)	0	0	0
MTD granted based on QI	3	3	0
SJ granted based on QI	9	10	3
QI granted at or after trial	0	0	0
QI granted on appeal	0	2	1
Case open, stayed, or on appeal	0	0	2
Trial -- plaintiff verdict	0	0	1
Trial -- defense verdict	7	11	0
Split verdict	0	1	0
Other	0	2	0
Total cases	131	225	72

Table16 (*Return to related document text*)

Table17 (*Return to related document text*)

	N.D. CA	E.D. PA	Total
Settlement/R.68 Judgment	103	218	490
Voluntary/stipulated dismissal	45	36	182
Sua sponte dismissal before defendant responds	11	27	126
Dismissed as sanction	0	3	5
Dismissed for failure to prosecute	24	3	42
Remanded to state court	3	5	16
Motion to dismiss granted (not based on QI)	16	26	86
Summary judgment granted (not based on QI)	21	33	100
Directed verdict for D (not based on QI)	1	2	3
MTD granted based on QI	0	1	7 (0.6%)

	N.D. CA	E.D. PA	Total
SJ granted based on QI	3	2	27 (2.3%)
QI granted at or after trial	0	0	0
QI granted on appeal	0	1	4 (0.3%)
Case open, stayed, or on appeal	5	5	12
Trial -- plaintiff verdict	2	4	7
Trial -- defense verdict	12	37	67
Split verdict	0	2	3
Other	2	2	6
Total cases	248	407	1,183

Table17 (*Return to related document text*)

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