Qualified Immunity Update

Recent Developments in Qualified Immunity & Qualified Immunity at Trial

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Per Curiam

SUPREME COURT OF THE UNITED STATES

DANIEL RIVAS-VILLEGAS *v.* RAMON CORTESLUNA

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

No. 20–1539. Decided October 18, 2021

PER CURIAM.

Petitioner Daniel Rivas-Villegas, a police officer in Union City, California, responded to a 911 call reporting that a woman and her two children were barricaded in a room for fear that respondent Ramon Cortesluna, the woman's boyfriend, was going to hurt them. After confirming that the family had no way of escaping the house, Rivas-Villegas and the other officers present commanded Cortesluna outside and onto the ground. Officers saw a knife in Cortesluna's left pocket. While Rivas-Villegas and another officer were in the process of removing the knife and handcuffing Cortesluna, Rivas-Villegas briefly placed his knee on the left side of Cortesluna's back. Cortesluna later sued under Rev. Stat. §1979, 42 U. S. C. §1983, alleging, as relevant, that Rivas-Villegas used excessive force. At issue here is whether Rivas-Villegas is entitled to qualified immunity because he did not violate clearly established law.

The undisputed facts are as follows. A 911 operator received a call from a crying 12-year-old girl reporting that she, her mother, and her 15-year-old sister had shut themselves into a room at their home because her mother's boyfriend, Cortesluna, was trying to hurt them and had a chainsaw. The girl told the operator that Cortesluna was "'always drinking,'" had "'anger issues,'" was "'really mad,'" and was using the chainsaw to "'break something in the house.'" *Cortesluna* v. *Leon*, 979 F. 3d 645, 649 (CA9 2020). A police dispatcher relayed this information along with a description of Cortesluna in a request for officers to respond.

Per Curiam

Rivas-Villegas heard the broadcast and responded to the scene along with four other officers. The officers spent several minutes observing the home and reported seeing through a window a man matching Cortesluna's description. One officer asked whether the girl and her family could exit the house. Dispatch responded that they "'were unable to get out'" and confirmed that the 911 operator had "'hear[d] sawing in the background'" and thought that Cortesluna might be trying to saw down the door. *Cortesluna* v. *Leon*, 2018 WL 6727824, *2 (ND Cal., Dec. 21, 2018).

After receiving this information, Rivas-Villegas knocked on the door and stated loudly, "'police department, come to the front door, Union City police, come to the front door.'" *Ibid.* Another officer yelled, "'he's coming and has a weapon.'" *Ibid.* A different officer then stated, "'use less-lethal,'" referring to a beanbag shotgun. *Ibid.* When Rivas-Villegas ordered Cortesluna to "'drop it,'" Cortesluna dropped the "weapon," later identified as a metal tool. *Ibid.*

Rivas-Villegas then commanded, "'come out, put your hands up, walk out towards me.'" 979 F. 3d, at 650. Cortesluna put his hands up and Rivas-Villegas told him to "'keep coming.'" *Ibid.* As Cortesluna walked out of the house and toward the officers, Rivas-Villegas said, "'Stop. Get on your knees.'" *Ibid.* Plaintiff stopped 10 to 11 feet from the officers. Another officer then saw a knife sticking out from the front left pocket of Cortesluna's pants and shouted, "'he has a knife in his left pocket, knife in his pocket,'" and directed Cortesluna, "'don't put your hands down,'" "'hands up.'" 2018 WL 6727824, *2. Cortesluna turned his head toward the instructing officer but then lowered his head and his hands in contravention of the officer's orders. Another officer twice shot Cortesluna with a beanbag round from his shotgun, once in the lower stomach and once in the left hip.

After the second shot, Cortesluna raised his hands over his head. The officers shouted for him to "'get down,'"

which he did. Another officer stated, "'left pocket, he's got a knife.'" *Ibid.* Rivas-Villegas then straddled Cortesluna. He placed his right foot on the ground next to Cortesluna's right side with his right leg bent at the knee. He placed his left knee on the left side of Cortesluna's back, near where Cortesluna had a knife in his pocket. He raised both of Cortesluna's arms up behind his back. Rivas-Villegas was in this position for no more than eight seconds before standing up while continuing to hold Cortesluna's arms. At that point, another officer, who had just removed the knife from Cortesluna's pocket and tossed it away, came and handcuffed Cortesluna's hands behind his back. Rivas-Villegas lifted Cortesluna up and moved him away from the door.

Cortesluna brought suit under 42 U. S. C. §1983, claiming, as relevant here, that Rivas-Villegas used excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Rivas-Villegas, but the Court of Appeals for the Ninth Circuit reversed. 979 F. 3d, at 656.

The Court of Appeals held that "Rivas-Villegas is not entitled to qualified immunity because existing precedent put him on notice that his conduct constituted excessive force." *Id.,* at 654. In reaching this conclusion, the Court of Appeals relied solely on *LaLonde* v. *County of Riverside*, 204 F. 3d 947 (CA9 2000). The court acknowledged that "the officers here responded to a more volatile situation than did the officers in *LaLonde*." 979 F. 3d, at 654. Nevertheless, it reasoned: "Both *LaLonde* and this case involve suspects who were lying face-down on the ground and were not resisting either physically or verbally, on whose back the defendant officer leaned with a knee, causing allegedly significant injury." *Ibid.*

Judge Collins dissented. As relevant, he argued that "the facts of *LaLonde* are materially distinguishable from this case and are therefore insufficient to have made clear to every reasonable officer that the force Rivas-Villegas used

here was excessive." *Id.,* at 664 (internal quotation marks omitted).

We agree and therefore reverse. Even assuming that controlling Circuit precedent clearly establishes law for purposes of §1983, *LaLonde* did not give fair notice to Rivas-Villegas. He is thus entitled to qualified immunity.

"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." *White* v. *Pauly*, 580 U. S. ___, ___ (2017) (*per curiam*) (slip op., at 6) (internal quotation marks omitted). A right is clearly established when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix* v. *Luna*, 577 U. S. 7, 11 (2015) (*per curiam*) (internal quotation marks omitted). Although "this Court's case law 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 ___ (slip op., at 6) (alterations and internal quotation marks omitted). This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau* v. *Haugen*, 543 U. S. 194, 198 (2004) (*per curiam*) (internal quotation marks omitted).

"[S]pecificity is especially important in the Fourth Amendment context, where . . . 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*, 577 U. S., at 12 (alterations and internal quotation marks omitted). Whether an officer has used excessive force depends on "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." *Graham* v. *Connor*, 490 U. S. 386, 396 (1989); see

also *Tennessee* v. *Garner*, 471 U. S. 1, 11 (1985) ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force"). However, *Graham*'s and *Garner*'s standards are cast "at a high level of generality." *Brosseau*, 543 U. S., at 199. "[I]n an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant case law." *Ibid.* But this is not an obvious case. Thus, to show a violation of clearly established law, Cortesluna must identify a case that put Rivas-Villegas on notice that his specific conduct was unlawful.

Cortesluna has not done so. Neither Cortesluna nor the Court of Appeals identified any Supreme Court case that addresses facts like the ones at issue here. Instead, the Court of Appeals relied solely on its precedent in *LaLonde*. Even assuming that Circuit precedent can clearly establish law for purposes of §1983, *LaLonde* is materially distinguishable and thus does not govern the facts of this case.

In *LaLonde*, officers were responding to a neighbor's complaint that LaLonde had been making too much noise in his apartment. 204 F. 3d, at 950–951. When they knocked on LaLonde's door, he "appeared in his underwear and a T-shirt, holding a sandwich in his hand." *Id.,* at 951. LaLonde testified that, after he refused to let the officers enter his home, they did so anyway and informed him he would be arrested for obstruction of justice. *Ibid.* One officer then knocked the sandwich from LaLonde's hand and "grabbed LaLonde by his ponytail and knocked him backwards to the ground." *Id.,* at 952. After a short scuffle, the officer sprayed LaLonde in the face with pepper spray. At that point, LaLonde ceased resisting and another officer, while handcuffing LaLonde, "deliberately dug his knee into LaLonde's back with a force that caused him long-term if not permanent back injury." *Id.,* at 952, 960, n. 17.

The situation in *LaLonde* and the situation at issue here

diverge in several respects. In *LaLonde*, officers were responding to a mere noise complaint, whereas here they were responding to a serious alleged incident of domestic violence possibly involving a chainsaw. In addition, LaLonde was unarmed. Cortesluna, in contrast, had a knife protruding from his left pocket for which he had just previously appeared to reach. Further, in this case, video evidence shows, and Cortesluna does not dispute, that Rivas-Villegas placed his knee on Cortesluna for no more than eight seconds and only on the side of his back near the knife that officers were in the process of retrieving. LaLonde, in contrast, testified that the officer deliberately dug his knee into his back when he had no weapon and had made no threat when approached by police. These facts, considered together in the context of this particular arrest, materially distinguish this case from *LaLonde*.

"Precedent involving similar facts can help move a case beyond the otherwise hazy borders between excessive and acceptable force and thereby provide an officer notice that a specific use of force is unlawful." *Kisela* v. *Hughes*, 584 U. S. ___, ___ (2018) (*per curiam*) (slip op., at 5) (internal quotation marks omitted). On the facts of this case, neither *LaLonde* nor any decision of this Court is sufficiently similar. For that reason, we grant Rivas-Villegas' petition for certiorari and reverse the Ninth Circuit's determination that Rivas-Villegas is not entitled to qualified immunity.

It is so ordered.

Per Curiam

SUPREME COURT OF THE UNITED STATES

CITY OF TAHLEQUAH, OKLAHOMA, ET AL. *v.* AUSTIN P. BOND, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF DOMINIC F. ROLLICE, DECEASED

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

No. 20–1668. Decided October 18, 2021

PER CURIAM.

On August 12, 2016, Dominic Rollice's ex-wife, Joy, called 911. Rollice was in her garage, she explained, and he was intoxicated and would not leave. Joy requested police assistance; otherwise, "it's going to get ugly real quick." 981 F. 3d 808, 812 (CA10 2020). The dispatcher asked whether Rollice lived at the residence. Joy said he did not but explained that he kept tools in her garage.

Officers Josh Girdner, Chase Reed, and Brandon Vick responded to the call. All three knew that Rollice was Joy's ex-husband, was intoxicated, and would not leave her home.

Joy met the officers out front and led them to the side entrance of the garage. There the officers encountered Rollice and began speaking with him in the doorway. Rollice expressed concern that the officers intended to take him to jail; Officer Girdner told him that they were simply trying to get him a ride. Rollice began fidgeting with something in his hands and the officers noticed that he appeared nervous. Officer Girdner asked if he could pat Rollice down for weapons. Rollice refused.

Police body-camera video captured what happened next. As the conversation continued, Officer Girdner gestured with his hands and took one step toward the doorway, causing Rollice to take one step back. Rollice, still conversing with the officers, turned around and walked toward the back of the garage where his tools were hanging over a

workbench. Officer Girdner followed, the others close behind. No officer was within six feet of Rollice. The video is silent, but the officers stated that they ordered Rollice to stop. Rollice kept walking. He then grabbed a hammer from the back wall over the workbench and turned around to face the officers. Rollice grasped the handle of the hammer with both hands, as if preparing to swing a baseball bat, and pulled it up to shoulder level. The officers backed up, drawing their guns. At this point the video is no longer silent, and the officers can be heard yelling at Rollice to drop the hammer.

He did not. Instead, Rollice took a few steps to his right, coming out from behind a piece of furniture so that he had an unobstructed path to Officer Girdner. He then raised the hammer higher back behind his head and took a stance as if he was about to throw the hammer or charge at the officers. In response, Officers Girdner and Vick fired their weapons, killing Rollice.

Rollice's estate filed suit against, among others, Officers Girdner and Vick, alleging that the officers were liable under 42 U. S. C. §1983, for violating Rollice's Fourth Amendment right to be free from excessive force. The officers moved for summary judgment, both on the merits and on qualified immunity grounds. The District Court granted their motion. *Burke* v. *Tahlequah*, 2019 WL 4674316, *6 (ED Okla., Sept. 25, 2019). The officers' use of force was reasonable, it concluded, and even if not, qualified immunity prevented the case from going further. *Ibid.*

A panel of the Court of Appeals for the Tenth Circuit reversed. 981 F. 3d, at 826. The Court began by explaining that Tenth Circuit precedent allows an officer to be held liable for a shooting that is itself objectively reasonable if the officer's reckless or deliberate conduct created a situation requiring deadly force. *Id.,* at 816. Applying that rule, the Court concluded that a jury could find that Officer Girdner's

initial step toward Rollice and the officers' subsequent "cornering" of him in the back of the garage recklessly created the situation that led to the fatal shooting, such that their ultimate use of deadly force was unconstitutional. *Id.,* at 823. As to qualified immunity, the Court concluded that several cases, most notably *Allen* v. *Muskogee*, 119 F. 3d 837 (CA10 1997), clearly established that the officers' conduct was unlawful. 981 F. 3d, at 826. This petition followed.

We need not, and do not, decide whether the officers violated the Fourth Amendment in the first place, or whether recklessly creating a situation that requires deadly force can itself violate the Fourth Amendment. On this record, the officers plainly did not violate any clearly established law.

The doctrine of qualified immunity shields officers from civil liability so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson* v. *Callahan*, 555 U. S. 223, 231 (2009). As we have explained, qualified immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" *District of Columbia* v. *Wesby*, 583 U. S. ___, ___ –___ (2018) (slip op., at 13–14) (quoting *Malley* v. *Briggs*, 475 U. S. 335, 341 (1986)).

We have repeatedly told courts not to define clearly established law at too high a level of generality. See, *e.g.*, *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 742 (2011). It is not enough that a rule be suggested by then-existing precedent; the "rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Wesby*, 583 U. S., at ___ (slip op., at 14) (quoting *Saucier* v. *Katz*, 533 U. S. 194, 202 (2001)). Such specificity is "especially important in the Fourth Amendment context," where 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. 7, 12 (2015) (*per curiam*) (internal quotation marks omitted).

The Tenth Circuit contravened those settled principles here. Not one of the decisions relied upon by the Court of Appeals—*Estate of Ceballos* v. *Husk*, 919 F. 3d 1204 (CA10 2019), *Hastings* v. *Barnes*, 252 Fed. Appx. 197 (CA10 2007), *Allen*, 119 F. 3d 837, and *Sevier* v. *Lawrence*, 60 F. 3d 695 (CA10 1995)—comes close to establishing that the officers' conduct was unlawful. The Court relied most heavily on *Allen*. But the facts of *Allen* are dramatically different from the facts here. The officers in *Allen* responded to a potential suicide call by sprinting toward a parked car, screaming at the suspect, and attempting to physically wrest a gun from his hands. 119 F. 3d, at 841. Officers Girdner and Vick, by contrast, engaged in a conversation with Rollice, followed him into a garage at a distance of 6 to 10 feet, and did not yell until after he picked up a hammer. We cannot conclude that *Allen* "clearly established" that their conduct was reckless or that their ultimate use of force was unlawful.

The other decisions relied upon by the Court of Appeals are even less relevant. As for *Sevier*, that decision merely noted in dicta that deliberate or reckless preseizure conduct can render a later use of force excessive before dismissing the appeal for lack of jurisdiction. See 60 F. 3d, at 700–701. To state the obvious, a decision where the court did not even have jurisdiction cannot clearly establish substantive constitutional law. Regardless, that formulation of the rule is much too general to bear on whether the officers' particular conduct here violated the Fourth Amendment. See *al-Kidd*, 563 U. S., at 742. *Estate of Ceballos*, decided after the shooting at issue, is of no use in the clearly established inquiry. See *Brosseau* v. *Haugen*, 543 U. S. 194, 200, n. 4 (2004) (*per curiam*). And *Hastings*, an unpublished decision, involved officers initiating an encounter with a potentially suicidal individual by chasing him into his bedroom, screaming at him, and pepper-spraying him. 252 Fed.

Appx., at 206. Suffice it to say, a reasonable officer could miss the connection between that case and this one.

Neither the panel majority nor the respondent have identified a single precedent finding a Fourth Amendment violation under similar circumstances. The officers were thus entitled to qualified immunity.

The petition for certiorari and the motions for leave to file briefs *amici curiae* are granted, and the judgment of the Court of Appeals is reversed.

It is so ordered.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DISTRICT OF COLUMBIA ET AL. *v.* WESBY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15–1485. Argued October 4, 2017—Decided January 22, 2018

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 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 officers then arrested the partygoers 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. 7–13.

(a) Considering the "totality of the circumstances," *Maryland* v. *Pringle*, 540 U. S. 366, 371, the officers made an "entirely reasonable inference" that the partygoers knew they did not have permission to

be in the house, *id.*, at 372. 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. 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. The partygoers' vague and implausible answers to questioning also gave the officers reason 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. 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. 7–11.

(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. 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. 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. Pp. 11–13.

2. The officers are entitled to qualified immunity. Pp. 13–19.

(a) As relevant here, officers are 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. To be clearly established, a legal principle must be "settled law," *Hunter* v. *Bryant*, 502 U. S. 224, 228, and it must clearly prohibit the officer's conduct in the particular circumstances before him, see *Saucier* v. *Katz*, 533 U. S. 194, 202. 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.

Even assuming that the officers lacked actual probable cause to arrest 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. The panel majority and the partygoers have failed to identify a single precedent

Syllabus

finding a Fourth Amendment violation "under similar circumstances." *White* v. *Pauly,* 580 U. S. ___, ___. And this is not an "obvious case" where "a body of relevant case law" is unnecessary. *Brosseau, supra*, at 199. Pp. 13–16.

(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 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. 16–19.

765 F. 3d 13, reversed and remanded.

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.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 15–1485

DISTRICT OF COLUMBIA, ET AL., PETITIONERS *v.* THEODORE WESBY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January 22, 2018]

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 Columbia 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.

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 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 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 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 she had permission before hanging up a second time. The officers eventually got 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]

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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

II

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 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] entering against the [owner's] will.'" *Id.*, at 32. The District Court also concluded that the officers were not entitled to qualified immunity under

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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 (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 (2007) (explaining that, at summary judgment, courts must view the facts and draw reasonable inferences in favor of the nonmoving party).

[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, 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.

§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." *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" to its determination that the officers lacked probable cause to arrest the partygoers for unlawful entry. 765 F. 3d 13, 21 (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.*

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[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 (CADC 2014).

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 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 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 (2016) (quoting *Carroll* v. *Carman,* 574 U. S. ___, ___ (2014) (*per curiam*) (slip op., at 4)). The panel majority—Judges 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 to arrest the partygoers, and whether the officers were entitled to qualified immunity. See 580 U. S. ___ (2017). We address each question in turn.

III

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 *Payton* v. *New York*, 445 U. S. 573, 585 (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 (2001).

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 (2003) (quoting *Ornelas* v. *United States*, 517 U. S. 690, 696 (1996)). Because probable cause "deals with probabilities and depends on the totality of the circumstances," 540 U. S., at 371, 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 (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 (1983). Probable cause "is not a high bar." *Kaley* v. *United States*, 571 U. S. ___, ___ (2014) (slip op., at 18).

A

There is no dispute that the partygoers entered 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 reason-

able inference" that the partygoers were knowingly taking advantage of a vacant house as a venue for their late-night party. *Pringle*, *supra*, at 372.

Consider first the condition of the house. Multiple neighbors, including a former neighborhood official, informed 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 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 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 party-

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[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.

[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 (1948) (noting that "the odor" of narcotics can "be evidence of the most persuasive character").

goers left 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.'" *Gates*, *supra*, at 231 (quoting *United States* v. *Cortez*, 449 U. S. 411, 418 (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. "[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 the totality of the circumstances. *Illinois* v. *Wardlow*, 528 U. S. 119, 124–125 (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 (1968) (emphasis added). A reasonable officer could

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And the officers could consider the drug use inside the house as evidence that the partygoers knew their presence was unwelcome.

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 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 (2004) (noting that the 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. *Wardlow*, *supra*, at 124 (explaining that the police can take a suspect's "nervous, evasive behavior" into account). After initially insisting that she had permission 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. 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. This was "mistaken in light of our precedents." *Ibid.* The "totality of the circumstances" requires courts to consider "the whole picture." *Cortez*, *supra,* at 417. 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 (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.

Second, the panel majority mistakenly believed that it

could dismiss outright any circumstances that were "susceptible of innocent explanation." *Id.,* at 277. 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 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, "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. 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.*

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 a totality. *Arvizu*, *supra*, at 274. 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 probable cause to arrest the partygoers is sufficient to resolve this case. But 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 (2011); see, *e.g., Plumhoff* v. *Rickard*, 572 U. S. ___ (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.[7]

A

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 (2012). "Clearly established" means that, at the time of the officer's conduct, the law was "'sufficiently clear' that every 'reasonable official would understand that what he is doing'" is unlawful. *al-Kidd*, *supra,* at 741 (quoting *Anderson* v. *Creighton*, 483 U. S. 635, 640 (1987)). In other words, existing law must have placed the constitutionality of the officer's conduct "beyond debate." *al-Kidd*, *supra*, at 741. This demanding standard protects "all but the plainly

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[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 (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.

incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U. S. 335, 341 (1986).

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 (1991) (*per curiam*), which means it is dictated by "controlling authority" or "a robust 'consensus of cases of persuasive authority,'" *al-Kidd*, *supra*, at 741–742 (quoting *Wilson* v. *Layne*, 526 U. S. 603, 617 (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. Otherwise, the rule is not one that "every reasonable official" would know. *Id.*, at 664 (internal quotation marks omitted).

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 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 (2001). This requires a high "degree of specificity." *Mullenix* v. *Luna*, 577 U. S. ___, ___ (2015) (*per curiam*) (slip op., at 6). 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 ___–___ (slip op., at 12–13) (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. 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 ___ (slip op., at 6) (quoting *Anderson*, *supra*, at 640–641; some alterations in original).

We have stressed that the "specificity" of the rule is "especially important in the Fourth Amendment context." *Mullenix, supra*, at ___ (slip op., at 5). 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. It is "incapable of precise definition or quantification into percentages." *Pringle*, 540 U. S., at 371. Given 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. ___, ___ (2017) (slip op., at 28). 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. ___, ___ (2017) (*per curiam*) (slip op., at 6); *e.g., Plumhoff*, *supra,* at ___. 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. 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 (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." *Anderson*, 483 U. S., at 640. 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, 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 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. 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 ___ (slip op., at 6). 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. 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 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. 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.

Nor would it have been clear to every reasonable officer that, in these circumstances, the partygoers' bona fide belief that they were invited to the house was "uncontroverted." The officers knew that the partygoers had entered the home against the will of the owner. And District case law suggested that officers can infer a suspect's guilty state of mind based solely on his conduct.[9] In *Tillman* v.

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[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 (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 (2015) (slip op., at 14, n. 4). Instead, we address only how a reasonable official "could have interpreted" them. *Reichle*, *supra*, at 667.

[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.

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 unlawful act, nonetheless demonstrated so clearly that the suspect lacked the required intent that 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 ___ (slip op., at 7).

Moreover, existing precedent would have given the officers reason to doubt that they had to accept the party-goers' assertion of a bona fide belief. 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

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[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

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.

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 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.

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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").

SUPREME COURT OF THE UNITED STATES

No. 15–1485

DISTRICT OF COLUMBIA, ET AL., PETITIONERS *v.* THEODORE WESBY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January 22, 2018]

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 13, n. 7. It is possible that our qualified-immunity decision alone will resolve those claims. 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 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.

SUPREME COURT OF THE UNITED STATES

No. 15–1485

DISTRICT OF COLUMBIA, ET AL., PETITIONERS *v.* THEODORE WESBY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[January 22, 2018]

JUSTICE GINSBURG, concurring in the judgment in part.

This case, well described in the opinion of the Court of Appeals,* leads me to question whether this Court, in assessing probable cause, should continue to ignore why police in fact acted. See *ante,* at 4, n. 2. 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 [partygoers] have the right[,] to be inside that location"). An essential element of unlawful entry in the District of Columbia is that 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 arrestees knew or should have known was irrelevant. They could be arrested, as he comprehended the law, even if they believed their entry

*The Court's account of the undisputed facts goes beyond those recited by the Court of Appeals. Compare *ante,* at 1–3, with 765 F. 3d 13, 17–18 (CADC 2014).

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 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 (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 (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 (2004). See, *e.g.,* 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.

Per Curiam

SUPREME COURT OF THE UNITED STATES

ANDREW KISELA *v.* AMY HUGHES

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

No. 17–467. Decided April 2, 2018

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 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. 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 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 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," but "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 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 (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." *Id.*, at 11.

In *Graham* v. *Connor*, 490 U. S. 386, 396 (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.

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 or constitutional rights of which a reasonable person would have known." *White* v. *Pauly*, 580 U. S. ___, ___ (2017) (*per curiam*) (slip op., at 6) (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* v. *Haugen*, 543 U. S. 194, 198 (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 ___ (slip op., at 6) (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. ___, ___ (2015) (slip op., at 13) (quoting *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 742 (2011)); see also *Brosseau*, *supra*, at 198–199.

"[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. ___, ___ (2015) (*per curiam*) (slip op., at 5) (internal quotation marks 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 ___ (slip op., at 6) (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 ___ (slip op., at 12) (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 ___ (slip op., at 7) (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 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. ___, ___ (2014) (slip op., at 12). 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 imple-

ment 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. 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 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 ___ (slip op., at 13). 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 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 a new set of facts is governed by clearly established law. *Sheehan*, 572 U. S., at ___–___ (slip op., at 13–14). *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 ___ (slip op., at 14).

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 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. *Glenn* was therefore "of no use in the clearly established inquiry." *Brosseau*, *supra,* at 200, n. 4. Other judges brought this mistaken or misleading citation 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 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 Court of Appeals is reversed; and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

ANDREW KISELA *v.* AMY HUGHES

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

No. 17–467. Decided April 2, 2018

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 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. 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. ___, ___ (2014) (*per curiam*) (slip op., at 8). 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 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 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 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 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) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia* v. *Wesby*, 583 U. S. ___, ___ (2018) (slip op., at 13) (quoting *Reichle* v. *Howards*, 566 U. S. 658, 664 (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 (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, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.,* at 396; see also *Tennessee* v. *Garner*, 471 U. S. 1, 11 (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 not a single judge on the Ninth Circuit, including 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 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 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. ___, ___ (2014) (slip op., at 8) ("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 by shooting Hughes four times.

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 (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 official action is protected by qualified immunity unless the very action in question has previously been held unlawful," *Anderson*, 483 U. S., at 640. "[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 (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 (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; see also *Graham*, 490 U. S., at 397. 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 (2007); *Mullenix* v. *Luna,* 577 U. S. ___, ___–___ (2015) (SOTOMAYOR, J., dissenting) (slip op., at 2–3). 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 ("[A] body of relevant case law" may "'clearly establish'" the violation of a constitutional right); *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 746 (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 (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 (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 the man carrying an unloaded crossbow in one hand and what appeared to be "a can or a bottle of 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 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 ___ (slip op., at 15).

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 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 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 ___ (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 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, 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. ___, ___–___ (2015) (slip op., at 13–14)). 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 ___ (slip op., at 14). 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 assertion that "'the differences between [*Deorle*] and the case before us leap from the page.'" *Ante,* at 7 (quoting *Sheehan*, 575 U. S., at ___ (slip op., at 14)).

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*, 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.* 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, decisions from several other Circuits illustrate that the Fourth Amendment clearly

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*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.

forbids the use of deadly force against a person who is 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 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. 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 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 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. It is enough that governing law places "the constitutionality of the officer's conduct beyond debate." *Wesby*, 583 U. S., at ___ (slip op., at 13) (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.

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 incorrect as to warrant "the extraordinary remedy of a summary reversal." *Major League Baseball Players Assn.* v. *Garvey*, 532 U. S. 504, 512–513 (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 (1981) (Marshall, J., dissenting); *Office of Personnel Management* v. *Richmond*, 496 U. S. 414, 422 (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. ___, ___ (2017) (SOTOMAYOR, J., dissenting from denial of certiorari) (slip op., at 8). As I have previously noted, this Court routinely displays an unflinching willingness "to summarily reverse courts for wrongly denying officers the protection of qualified immunity" but "rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases." *Id.,* at ___–___ (slip op., at 8–9); see 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.

Per Curiam

SUPREME COURT OF THE UNITED STATES

RAY WHITE, ET AL. *v.* DANIEL T. PAULY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SAMUEL PAULY, DECEASED ET AL.

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

No. 16–67. Decided January 9, 2017

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 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. Lights were 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, (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 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'" 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. (2015) (*per curiam*) (slip op., at 2, n.). 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.

___, ___ (2015) (slip op., at 9).

Samuel's estate and Daniel filed suit against, *inter alia*, Officers 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 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 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 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 (1985), and *Graham* v. *Connor*, 490 U. S. 386 (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 in his direction must refrain from firing his weapon but, rather, must identify himself 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.

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 ___–___ (slip op., at 4–5). 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 ___ (slip op., at 5). 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 (2015) (slip op., at 10, n.3) (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 "'is effectively lost if a case is erroneously permitted to go to trial,'" *Pearson* v. *Callahan*, 555 U. S. 223, 231 (2009).

Today, it is again necessary to reiterate the longstanding principle that "clearly established law" should not be defined "at a high level of generality." *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 742 (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 (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.

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, "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 (1997), but "in the light of pre-existing law the unlawfulness must be apparent," *Anderson* v. *Creighton*, *supra*, at 640. For that reason, we have held that *Garner* and *Graham* do not by themselves create clearly established law outside "an obvious case." *Brosseau* v. *Haugen*, 543 U. S. 194, 199 (2004) (*per curiam*); see also *Plumhoff* v. *Rickard*, 572 U. S. ___, ___ (2014) (slip op., at 13) (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 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 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.

SUPREME COURT OF THE UNITED STATES

RAY WHITE, ET AL. *v.* DANIEL T. PAULY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SAMUEL PAULY, DECEASED ET AL.

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

No. 16–67. Decided January 9, 2017

JUSTICE 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 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).

Circuit Court Cases

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2017

(Argued: February 8, 2018 Decided: August 14, 2020)

No. 17-1558

LIBERIAN COMMUNITY ASSOCIATION OF CONNECTICUT, on behalf of themselves and those similarly situated, LOUISE MENSAH-SIEH, on behalf of herself and her minor children B.D. and S.N., on behalf of themselves and those similarly situated, VICTOR SIEH, on behalf of themselves and those similarly situated, EMMANUEL KAMARA, on behalf of themselves and those similarly situated, ASSUNTA NIMLEY-PHILLIPS, on behalf of themselves and those similarly situated, LAURA SKRIP, on behalf of themselves and those similarly situated, RYAN BOYKO, on behalf of themselves and those similarly situated, ESTHER YALARTAI, on behalf of themselves and those similarly situated, BISHOP HARMON YALARTAI, on behalf of themselves and those similarly situated,

Plaintiffs-Appellants,

-v.-

NED LAMONT, Governor, DEIDRE S. GIFFORD, Acting Commissioner of Public Health, JEWEL MULLEN, Former Commissioner of Public Health,

Defendants-Appellees.[1]

[1] The Clerk of Court is respectfully directed to amend the caption as set forth above.

Before: WINTER, LIVINGSTON, and CHIN, *Circuit Judges*.

Plaintiffs-Appellants Ryan Boyko, Laura Skrip, the Mensah-Sieh family, Assunta Nimley-Phillips, Bishop Harmon Yalartai, Esther Yalartai, and the Liberian Community Association of Connecticut ("Appellants") appeal from a judgment of the United States District Court for the District of Connecticut (Covello, *J.*) denying their motion for class certification and dismissing their suit for lack of standing and based on qualified immunity. Appellants challenged the quarantine decisions of certain Connecticut state officials in response to an Ebola epidemic in West Africa. On appeal, they primarily argue that (1) they suffered actual or imminent injuries that create standing to seek prospective relief to avert allegedly unconstitutional future quarantines; (2) clearly established law required that any quarantine imposed be medically necessary and comport with certain procedural safeguards; and (3) their class is sufficiently numerous to merit certification. We conclude that (1) the district court properly deemed their injuries too speculative to support standing, and (2) the law surrounding quarantines was not clearly established such that a state official may be held liable for the actions taken here. We do not reach the class certification issue because it is mooted by our conclusion as to standing. Accordingly, the judgment of the district court is AFFIRMED and REMANDED with instructions to amend the judgment to clarify that the state law claims were dismissed without prejudice.

Judge CHIN concurs in part and dissents in part in a separate opinion.

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DEBRA ANN LIVINGSTON, *Circuit Judge*:

This case arises out of the Ebola epidemic that ravaged West Africa between 2014 and 2016. In response to the epidemic, then-Governor Dannel Malloy declared a public health emergency in the State of Connecticut. The declaration authorized Dr. Jewel Mullen, then-Commissioner of Public Health, to isolate or quarantine individuals whom she believed had been exposed to or could transmit the Ebola virus. She ordered twenty-one-day quarantines for two Ph.D. candidates—Ryan Boyko and Laura Skrip—and six members of the Mensah-Sieh family who had recently emigrated from Liberia. None of the quarantined individuals were infected with Ebola.

Boyko, Skrip, the Mensah-Siehs, Assunta Nimley-Phillips, Bishop Harmon Yalartai, Esther Yalartai, and the Liberian Community Association of Connecticut (collectively, "Appellants") filed a putative class-action suit in the United States District Court for the District of Connecticut (Covello, *J.*) challenging the state

officials' actions.[2] They primarily alleged violations of their substantive and procedural due process rights and the Fourth Amendment. The defendants—the Governor and Commissioners of Public Health—moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b). As to these constitutional claims, the district court dismissed the claims for injunctive relief under Rule 12(b)(1), for lack of standing, and dismissed the claims for damages under Rule 12(b)(6), on the basis of Dr. Mullen's assertion of qualified immunity.[3] The court also denied the motion for class certification. We agree with the conclusions reached by the district court as to standing and qualified immunity and need not reach the issue of class certification. Accordingly, we AFFIRM the judgment but REMAND with instructions to the district court that the judgment be amended to reflect that the state law claims were dismissed without prejudice.

[2] Dr. Mary Jean O was also a plaintiff but moved before this Court on May 21, 2020, for an order dismissing this appeal as to her. We granted the motion on June 23, 2020.

[3] As set forth herein, the plaintiffs also raised certain federal statutory claims that were similarly dismissed and that are not pursued on appeal. The district court declined to exercise supplemental jurisdiction as to additional claims raised under Connecticut state law, thus dismissing them without prejudice. *See infra* Background, Section II.

BACKGROUND

I. Factual Background[4]

A. The 2014 Ebola Outbreak

Ebola "is spread through direct physical contact with the bodily fluids of a symptomatic person, the body of a person who has died from Ebola, or objects contaminated with the virus, such as used needles." J.A. 26.[5] Once an individual has contracted the virus, "[t]he incubation period (the time from infection to onset of symptoms) is usually four to nine days but can range from two to twenty-one days." *Id.* "Symptoms include fever, headache, joint and muscle aches, diarrhea, and vomiting." *Id.*

The first victim of the 2014 Ebola outbreak may well have been a young boy from a village "deep within the Guinean forest region" who died in December 2013.[6] The disease thereafter spread, "kill[ing] the boy's mother, then his 3-year-old sister, then his grandmother."[7] In the months that followed, dozens more

[4] The factual background presented here is primarily derived from allegations in the complaint, which we accept as true in considering a motion to dismiss.

[5] "J.A." refers to the Joint Appendix.

[6] Michelle Roberts, *First Ebola boy likely infected by playing in bat tree*, BBC (Dec. 30, 2014), https://www.bbc.com/news/health-30632453.

[7] Denise Grady and Sheri Fink, *Tracing Ebola's Breakout to an African 2-Year-Old*, N.Y. Times (Aug. 9, 2014), https://www.nytimes.com/2014/08/10/world/africa/tracing-

died as the disease moved between relatives, friends, and health care workers. Soon, the virus had "spread rapidly throughout Guinea, Liberia, and Sierra Leone." J.A. 26. On March 23, 2014, "the World Health Organization ('WHO') announced an outbreak of Ebola in West Africa." *Id.* Over the next twenty-two months, more than 28,000 individuals were diagnosed with Ebola. Over 11,000 died. This was the largest Ebola outbreak in history, yet those afflicted resided almost exclusively in Guinea, Liberia, and Sierra Leone. Outside those three countries, fewer than forty cases of Ebola emerged.

During the outbreak, to prevent the spread of the disease in the United States, both the Centers for Disease Control and Prevention ("CDC") and the Department of Homeland Security ("DHS") released policy guidance on how to manage the flow of people from West Africa. The CDC initially "recommended only self-monitoring or active monitoring for twenty-one days, and recommended no movement restrictions or quarantine" "[f]or asymptomatic individuals returning from West Africa with 'no risk' or 'low risk' of exposure."[8] J.A. 27.

ebolas-breakout-to-an-african-2-year-old.html.

[8] "According to the CDC, 'isolation' is the separation of individuals who are sick with a contagious disease from those who are not sick. 'Quarantine' is the separation of asymptomatic individuals exposed to a contagious disease to see if they become sick." J.A. 28. "'Self-monitoring' refers to a practice whereby people check their own

On October 8, 2014, the CDC and the DHS jointly "announced a safety plan" pursuant to which individuals "entering the United States from Guinea, Liberia, and Sierra Leone" were directed "to one of five ports of entry." J.A. 28. On arrival, trained staff screened travelers for signs of illness and inquired about their health and possible prior exposures. If a passenger "required further evaluation or monitoring, federal officers referred those travelers to the appropriate state or local public health authority. Travelers with no symptoms, fever, or a known history of exposure received health information for self-monitoring and were approved to exit the airport." J.A. 28. After the safety plan was announced, the CDC also revised its prior guidance. The new guidance, issued on October 27, "recommended 'no restrictions on travel, work, public conveyances, or congregate gatherings' for asymptomatic individuals . . . who had been in an affected country but had no known exposure." J.A. 30.

Over a year and a half after the virus was first identified, the WHO declared Sierra Leone Ebola-free on November 7, 2015. Guinea and Liberia followed on December 29, 2015, and January 14, 2016, respectively. Despite these

temperature and monitor themselves for symptoms. 'Active monitoring' refers to the 'monitoring of travelers by health departments.'" Appellants Br. 7 n.2.

declarations, experts cautioned that these three nations "remain[ed] at high risk of future Ebola outbreaks." *Id.* Nevertheless, on March 29, 2016, the WHO deemed the "Public Health Emergency of International Concern" over. J.A. 111. Since the end of the Ebola crisis in West Africa, there have been at least ten flare-ups or small outbreaks of Ebola in West Africa, and multiple outbreaks in the Democratic Republic of the Congo.

B. Connecticut's Response

Under Connecticut state law, the state government acquires the authority to quarantine if the Governor declares a public health emergency. Conn. Gen. Stat. § 19a-131a. Once the Governor makes such a declaration, he may authorize the State Public Health Commissioner (the "Commissioner") to quarantine or isolate people "whom the commissioner has reasonable grounds to believe" are or could be infected with a communicable disease. *Id.* § 19a-131b(a). The Commissioner is to issue quarantine and isolation orders only when they are "necessary and the least restrictive alternative to protect or preserve the public health." *Id.* Numerous statutory factors guide the issuance of a quarantine or isolation order. *Id.* § 19a-131b(b). The Commissioner must also comply with various procedural requirements, including informing the quarantined or isolated individuals in

writing, *id.* § 19a-131b(c), limiting the order to a renewable twenty-day period, *id.*, and informing individuals that they have a right to a hearing to challenge their quarantine order and a right to an attorney at this hearing at the State's expense, *id.* § 19a-131b(d).

Turning to the actions of the Governor of Connecticut ("Governor")[9] and then-Commissioner of the Connecticut Department of Public Health Dr. Jewel Mullen (collectively with Acting Commissioner Deidre S. Gifford, "Appellees"), on October 7, 2014, the Governor issued an order declaring a public health emergency for the State of Connecticut. The order authorized Dr. Mullen "to direct the isolation or quarantine of individuals whom she 'reasonably believe[d] to have been exposed to, infected with, or otherwise at risk of passing the Ebola virus.'" J.A. 28.

The following week, on October 16, 2014, "Malloy and Mullen established statewide Ebola response policies . . . that the Governor's office described as 'more stringent than the guidelines thus far issued by the Federal Center[s] for Disease

[9] The Governor at the time of the events underlying this suit and when the complaint was filed was Dannel Malloy. He has since been succeeded by Ned Lamont. Accordingly, Governor Lamont has been automatically substituted as a defendant-appellee. *See* Fed. R. App. P. 43(c)(2).

Control and Prevention . . . .' All asymptomatic individuals who had traveled to affected areas or been in contact with an infected individual were to be quarantined at home for twenty-one days." J.A. 28–29. Appellants allege that the Governor and Dr. Mullen knew that their policy went further than was necessary, citing a statement from a Connecticut Department of Public Health spokesman describing people quarantined as "not sick and not a risk to public health." J.A. 29, 71. The policy was ultimately modified and made less restrictive on October 27, the same day the CDC issued the revised guidance discussed above. The new plan "imposed 'mandatory active monitoring' for asymptomatic travelers arriving in Connecticut from Guinea, Liberia, and Sierra Leone, but still contemplated 'quarantine for individuals based on risk factors'" following an "individualized risk assessment." J.A. 29–30.

The revised policy remained in place until April 1, 2016, when, three days after the WHO declared an end to the public health emergency in West Africa, Governor Malloy terminated the emergency in Connecticut.

C. Appellants' Experiences

1. The Ph.D. Candidates

Ryan Boyko and Laura Skrip were Ph.D. candidates at the Yale School of Public Health who traveled to Liberia to help the Liberian Ministry of Health and Social Welfare analyze data collected during the Ebola outbreak. After arriving in Liberia on September 18, 2014, they did not have contact with any Ebola-symptomatic people and took a variety of precautions to avoid exposure. They planned to return to the United States on October 3 but delayed their trip when Boyko developed a cough. Skrip displayed no symptoms, and Boyko felt better after two days. As a condition of returning on a replacement flight, Yale's travel medical insurance company required that Boyko be tested for Ebola. On October 6, he tested negative and received a letter confirming this. When they learned that a freelance cameraman who spent time at their hotel had developed Ebola symptoms, Boyko and Skrip consulted with CDC representatives, who told them that this presented "no risk" because the cameraman did not display symptoms until after they had last seen him. J.A. 33.

Boyko and Skrip left Liberia on October 11 and, upon arriving back in the United States, underwent Ebola screening procedures. DHS officials allowed

them to enter the country. Federal officials informed Connecticut officials about Boyko and Skrip's arrival. The pair returned to New Haven, where they took their temperatures twice a day and emailed the results to the Yale Health Center.

On October 15, Boyko developed a fever and was transported to the Yale-New Haven Hospital. Hospital staff took blood samples and sent them to the CDC and the Massachusetts Public Health laboratory for testing. Boyko's fever subsided while he was under the hospital's care and both tests came back negative for Ebola. Contemporaneously, the City of New Haven health department told Skrip that she would be subject to "mandatory active monitoring," meaning that the City would call her twice a day to ask her to take her temperature and report the results. J.A. 34.

On October 17, the same day Boyko received his second negative result, Dr. Mullen ordered him quarantined. The order required him to stay in his home through October 30, twenty-one days after October 10, *i.e.*, the longest possible incubation period for Ebola. The order informed Boyko that failure to comply could lead to penalties but acknowledged that Boyko had a right to a counseled hearing. Dr. Mullen signed an equivalent order for Skrip. Boyko received a copy of his quarantine order in the hospital, but Skrip was informed of hers over

the phone. After she informed a Yale official that she had not received an official quarantine order, Skrip received a written order laying out the terms of the quarantine and her rights.

Police officers were deployed outside of Boyko and Skrip's apartments to ensure they complied with the quarantine orders. Their quarantines ended at 12:01 a.m. on October 30, 2014, a day earlier than initially anticipated because of state law requirements. *See* Conn. Gen. Stat. § 19a-131b(c) (only allowing for quarantine orders of twenty days unless the Commissioner of Public Health renews the order). Despite the revision to Connecticut's quarantine policy on October 27, neither Boyko's nor Skrip's quarantine order was reevaluated before the quarantines ended in due course.

2. The Mensah-Sieh Family and Assunta Nimley-Phillips

Assunta Nimley-Phillips, who is Louise Mensah-Sieh's sister, immigrated to the United States from Liberia in the 1980s. Mensah-Sieh, her husband Nathaniel Sieh,[10] and their four children—Victor Sieh, Emmanuel Kamara, B.D., and S.N.—lived in Liberia. After receiving visas to live in the United States through the Diversity Visa Lottery, the entire family underwent medical tests on

[10] Nathaniel Sieh did not appeal the district court's order of dismissal.

the basis of which federal officials approved them for entry into the United States. They arrived on October 18, 2014, at which point the family was screened by DHS personnel and cleared to enter the country. The Mensah-Siehs were neither told to self-monitor nor provided any other quarantine-related information. Nimley-Phillips met her family at the airport and drove them to her home in West Haven, Connecticut. CDC and DHS officials notified Connecticut state and local health officials of the family's arrival.

On October 20, 2014, Maureen Lillis, West Haven Director of Public Health, called Nimley-Phillips and told her that the Mensah-Siehs were subject to a quarantine for twenty-one days. Lillis told Nimley-Phillips to check the family's temperature three times a day and monitor them for symptoms. As with Boyko and Skrip, police officers were stationed outside Nimley-Phillips's home and barred anyone from entering or exiting the house apart from Nimley-Phillips and her adult daughter. Neither Nimley-Phillips nor the Mensah-Sieh family received a written quarantine order, official communications about the quarantine, or information regarding their right to challenge the quarantine. No adjustments were made to the Mensah-Siehs' quarantine orders following the October 27 revision to Connecticut's quarantine policy.

3. The Yalartais and the Liberian Community Association of Connecticut

The other Appellants—Bishop Harmon Yalartai, Esther Yalartai, and the Liberian Community Association of Connecticut ("LCAC")—all allege that they intend to travel to Liberia and fear being subject to quarantine orders upon their return. Indeed, three of the Appellants—the Yalartais and Skrip—were in Liberia when the complaint was filed. The Yalartais, who were born in Liberia but reside in Connecticut, are leaders of a religious organization with churches in both Liberia and Connecticut. They regularly travel to and from Liberia to oversee the work of their church. LCAC is a non-profit organization that works to enhance the lot of the Liberian community in Connecticut and contribute to development efforts in Liberia. Dozens of its 230 members regularly travel to Liberia.

II. Procedural History

Appellants filed their putative class action suit on February 8, 2016. All Appellants sought declaratory and injunctive relief; Boyko and the Mensah-Siehs also sought damages from Dr. Mullen. Appellants allege that Appellees, *inter alia*, (1) violated the substantive due process rights of Boyko, Skrip and the Mensah-Siehs by "quarantining them without medical or epidemiological justification and in a manner that substantially exceeded the least restrictive means

necessary"; (2) violated their procedural due process rights by failing to make individualized assessments or providing adequate notice and an opportunity to challenge their quarantines; and (3) violated the Fourth Amendment by unreasonably seizing them through the quarantines.[11] J.A. 58–62. They also asserted various state law tort claims, and moved to certify a "class consisting of all persons who will or intend to travel from Ebola-affected countries to Connecticut and are at risk of Defendants subjecting them to an unlawful and scientifically unjustified quarantine." J.A. 54. Appellees filed a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and failure to state a claim under Rule 12(b)(6), and they opposed the motion for class certification.

The district court denied the motion for class certification, "concluding that the proposed class is too speculative to satisfy the numerosity requirement for class certification." *Liberian Cmty. Ass'n v. Malloy*, No. 3:16-cv-201, 2016 WL 10314574, at *7 (D. Conn. Aug. 1, 2016). In a separate decision, the district court granted Appellees' motion to dismiss. *Liberian Cmty. Ass'n v. Malloy*, No. 3:16-cv-

[11] Before the district court, Appellants also asserted claims under the Americans with Disabilities Act, 42 U.S.C. § 12132, and the Rehabilitation Act, 29 U.S.C. § 794, which they do not press on appeal and we need not address.

201, 2017 WL 4897048, at *1 (D. Conn. Mar. 30, 2017). As to the claims for declaratory and injunctive relief, the district court found that Appellants lacked standing because they failed to establish "a 'real and immediate' threat of injury." *Id.* at *7–8 (quoting *Shain v. Ellison*, 356 F.3d 211, 215 (2d Cir. 2004)). The district court further concluded that Dr. Mullen was entitled to qualified immunity on the damages claim. *Id.* at *9–14. Finally, as to the state law claims, the district court "decline[d] to exercise supplemental jurisdiction over the plaintiffs' state law causes of action," *id.* at *15, necessarily dismissing them without prejudice. *See Carter v. HealthPort Techs., LLC*, 82 F.3d 47, 54–55 (2d Cir. 2016); *see also Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988) ("[W]hen the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice." (footnote omitted)). Accordingly, the district court entered judgment dismissing the action, although the judgment did not specify that the state claims were dismissed without prejudice.[12] This appeal followed.

[12] In light of our decision to affirm the dismissal of the federal claims, we do not address the merits of the state law claims. However, we remand as to these claims, with instructions to the district court that it amend the judgment to make clear that these claims are dismissed without prejudice.

DISCUSSION

Appellants advance two principal arguments on appeal: *first*, that they have standing to seek prospective relief, and, *second*, that Dr. Mullen is not entitled to qualified immunity on Boyko and the Mensah-Siehs' damages claim. We disagree as to both arguments and discern no error in the district court's standing or qualified immunity analysis.

I

"Standing to sue is a doctrine" that "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "[T]he 'irreducible constitutional minimum' of standing consists of three elements." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.*; *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). As relevant here, the "injury in fact" must have been "concrete and particularized" as well as "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (quotation marks and citations omitted).

"Allegations of possible future injury do not satisfy the requirements of Art[icle] III." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Rather, there must be "a 'substantial risk' that harm will occur." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153–54 (2010)); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014).

"[T]he proper procedural route [for bringing a standing challenge] is a motion under Rule 12(b)(1)." *All. for Envtl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 88 n.6 (2d Cir. 2006). And on appeal from a dismissal under Rule 12(b)(1), as here, "we review the court's factual findings for clear error and its legal conclusions *de novo*." *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.À.R.L.*, 790 F.3d 411, 417 (2d Cir. 2015). "The plaintiff[s] bear[] the burden of 'alleg[ing] facts that affirmatively and plausibly suggest that [they] ha[ve] standing to sue.'" *Id.* (quoting *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011)). All allegations made in the complaint are accepted as true and construed in favor of the plaintiffs. *Id.* (citing *W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 106 (2d Cir. 2008)).

Appellants failed to plead a sufficient likelihood that, under the revised policy, any of them faces a substantial risk of suffering a future injury. *See City of*

Los Angeles v. Lyons, 461 U.S. 95, 106–07 (1983). Indeed, the revised policy—that is, the policy that was in effect when the complaint was filed—defaults to active monitoring for any arriving asymptomatic travelers and permits quarantine only after an individualized assessment. In *Lyons*, the Supreme Court directed the dismissal of Lyons' complaint challenging the use of chokeholds by Los Angeles police because the complaint "did not indicate why Lyons might be realistically threatened by police officers who acted within the strictures of the City's policy." *Id.* at 106. Here, as in *Lyons*, Appellants have failed plausibly to allege any basis for concluding that they will be threatened with quarantine by Connecticut state officials who act within the revised policy.

Appellants argue that Appellees' failure to reassess the quarantines imposed on Boyko, Skrip, and the Mensah-Siehs in light of the revised policy demonstrates its "irrational execution," supposedly enhancing their risk of future injury. Appellants Br. 54. But the fact that Appellees declined to reconsider a previously imposed quarantine offers scant if any basis for assessing the substantiality of the *prospective* risk. Particularly in light of the individualized assessment mandated by the revised policy, Appellants "can only speculate as to whether [Appellees] will authorize such [quarantines]" in the future. *Clapper*,

568 U.S. at 413. And under the circumstances alleged in this complaint, "[w]e decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Id.* at 414.

In a final effort to overcome the deficiencies in the complaint, Appellants assert that they also suffer a "present harm" because the quarantine policy "that was firmly in place at the time of filing and had already been applied against several of them" "restricted [their] freedom by greatly increasing the potential monetary, time, and personal costs of traveling to Liberia." Appellants Br. 56–57 (emphasis omitted). But this argument of present harm is contrary to the complaint's own allegations. As already noted (and as the complaint alleges), the policy that was applied to quarantine Boyko, Skrip and the Mensah-Siehs was revised shortly after their quarantines were imposed. Appellants do not allege that they—or anyone else—have been subjected to a quarantine *since* the revised policy issued. Such circumstances thus distinguish Appellants from the plaintiffs in *Monsanto*, 561 U.S. at 153–55, and *Friends of the Earth*, 528 U.S. at 184–85, upon which they rely. The plaintiffs in those cases averred that they would have to take immediate and concrete steps to avoid harm. *See Monsanto*, 561 U.S. at 154 ("[R]espondents would have to conduct testing to find out whether and to

what extent their crops have been contaminated."); *Friends of the Earth*, 528 U.S. at 184 ("[A] company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms."). Conversely here, Appellants merely allege that they must make travel plans "under the reasonable fear of being subject to another unjustified and unlawful quarantine."[13] J.A. 49. In sum, the notion that Appellants must undertake reasonable efforts in the present to avert injury in the future is also speculative, and Appellants lack standing to pursue any of their prospective claims.[14]

[13] Indeed, Skrip and the Yalartais—the only Appellants who specifically allege that they intend to visit Liberia in the future—allege no changes to their travel plans at all, let alone that they either have incurred or will incur concrete costs because of their fear of the challenged policy.

[14] Because we conclude that none of the named plaintiffs has standing to pursue their claims for prospective relief, the class proposed by Appellants necessarily fails as well. *See Amador v. Andrews*, 655 F.3d 89, 99 (2d Cir. 2011) ("[A] class action cannot be sustained without a named plaintiff who has standing."); *see also NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 159 (2d Cir. 2012) ("[W]e have said that, to establish Article III standing in a class action[,] for every named defendant there must be at least one named plaintiff who can assert a claim directly against that defendant, and at that point standing is satisfied and only then will the inquiry shift to a class action analysis." (brackets, ellipsis, and quotation marks omitted)). Accordingly, we do not reach the class certification question.

II

We now turn to the claim for damages against Dr. Mullen. "To survive a 12(b)(6) motion to dismiss, a 'complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Drimal v. Tai*, 786 F.3d 219, 223 (2d Cir. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Here, Appellees asserted a qualified immunity defense in their Rule 12(b)(6) motion to dismiss. We review a district court's determination as to qualified immunity on a motion to dismiss *de novo*, "'accepting as true the material facts alleged in the complaint and drawing all reasonable inferences in plaintiffs' favor.'" *Garcia v. Does*, 779 F.3d 84, 91 (2d Cir. 2015) (quoting *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 250 (2d Cir. 2001)). The Supreme Court has "repeatedly 'stressed the importance of resolving immunity questions at the earliest possible stage [of the] litigation,'" *Wood v. Moss*, 572 U.S. 744, 755 n.4 (2014) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)), and it is "well established that an affirmative defense of official immunity . . . may be resolved by Rule 12(b)(6) if clearly established by the

allegations within the complaint," *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998); *see also McKenna v. Wright*, 386 F.3d 432, 435 (2d Cir. 2004) (noting that qualified immunity defense may be "successfully asserted in a Rule 12(b)(6) motion").

At the start, qualified immunity doctrine "is intended to provide government officials with the ability to 'reasonably . . . anticipate when their conduct may give rise to liability for damages.'" *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)). When the "general rule of qualified immunity" is applicable, "officials can know that they will not be held personally liable as long as their actions are reasonable in light of current American law." *Id.* Public officials are entitled to qualified immunity "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). And a court need not determine whether a defendant violated a plaintiff's rights if it decides that the right was not clearly established. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

To be sure, "a case directly on point" is not required "for a right to be clearly established." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam). At the same time, "existing precedent must have placed the statutory or constitutional question *beyond debate*." *Id.* (emphasis added). "'Clearly established' means that, at the time of the officer's conduct, the law was sufficiently clear that every 'reasonable official would understand that what he is doing' is unlawful." *Wesby*, 138 S. Ct. at 589 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). In practice, this means that "'controlling authority' or 'a robust consensus of cases of persuasive authority'" dictate the action at issue. *Id.* at 589–90 (quoting *al-Kidd*, 563 U.S. at 741–42). A plaintiff must show with a high "degree of specificity," *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam), that the rule he seeks to apply prohibited the officer's conduct. *See Wesby*, 138 S. Ct. at 590; *see also City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775–76 (2015) (noting that the Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality"). In other words, an official is immune from liability unless, under the particular circumstances the official faced, any "reasonable offic[ial]" would have "known for certain that the conduct was

unlawful" under then-existing precedent. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017).

Boyko and the Mensah-Siehs—the only Appellants seeking damages—advance three legal bases for their claim: substantive due process, procedural due process, and the Fourth Amendment's prohibition on unreasonable seizures. We discuss only whether, at the time of Dr. Mullen's alleged conduct, it was clearly established that her conduct ran afoul of these constitutional protections.[15]

A. Substantive Due Process

Appellants first argue that "[b]ecause quarantines—a form of civil detention—implicate fundamental liberty interests, existing law clearly establishes that officials may impose them only when necessary to achieve a

[15] Appellants urge us to "address the merits of the constitutional issue even if the Court were to conclude that Dr. Mullen's conduct is shielded by qualified immunity." Appellants Br. 48. Yet the Supreme Court has cautioned us to "think hard, and then think hard again, before turning small cases into large ones." *Camreta v. Greene*, 563 U.S. 692, 707 (2011); *see also al-Kidd*, 563 U.S. at 735 ("Courts should think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.'" (quoting *Pearson*, 555 U.S. at 236–37)). While there are circumstances in which discretion is properly exercised to address step one of the qualified immunity analysis even when qualified immunity is appropriate at step two, this is not such a situation. *See, e.g.*, *Jones v. Chandrasuwan*, 820 F.3d 685, 691–92 (4th Cir. 2016); *Morgan v. Swanson*, 659 F.3d 359, 385 (5th Cir. 2011); *cf. Pearson*, 555 U.S. at 237–39 (cataloguing situations where reaching the constitutional question is inappropriate).

compelling state interest and in the absence of less restrictive means." Appellants Br. 30 (citing *Lawrence v. Texas*, 539 U.S. 558, 593 (2003); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)). According to Appellants, "[c]ases in multiple civil commitment settings confirm that substantive due process analysis applies whenever, as with quarantine, a state civilly confines an individual ostensibly to protect the public." Appellants Br. 31 (citing cases). And Appellants cite Second Circuit precedent to the effect that "involuntary confinement of an individual *for any reason*"—which, according to Appellants, includes the quarantining of individuals amidst an infectious disease outbreak—is subject to a least-restrictive-means test. Appellants Br. 33 (quoting *Project Release v. Prevost*, 722 F.2d 960, 971 (2d Cir. 1983)) (emphasis in Appellants Br.).

But Appellants take this Court's language out of context. The full quotation from *Project Release* makes clear that its "for any reason" language refers specifically to various public policy justifications a state might have to commit the mentally ill, such as its "*parens patriae*" or "police power" authority. *See Project Release*, 722 F.2d at 971. Read in context, it is clear that the Court, in articulating a least-restrictive-means test, was referring *only* to the civil detention of people who are mentally ill. Indeed, every case relied upon by *Project Release* in

discussing due process solely addresses confinement of the mentally ill—not, as Appellants contend, multiple settings. *See, e.g.*, *Vitek v. Jones*, 445 U.S. 480 (1980); *Addington v. Texas*, 441 U.S. 418 (1979); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Humphrey v. Cady*, 405 U.S. 504 (1972); *see also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Jones v. United States*, 463 U.S. 354 (1983); *Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000). A "reasonable official" would thus not necessarily interpret *Project Release* or any of these other cases to define the outer limits of the state's quarantine power in the context of a major Ebola outbreak.[16] *Wesby*, 138 S. Ct. at 590.

The dissent similarly finds support for a least-restrictive-means test in the context of an Ebola-related quarantine in the Supreme Court's affirmation in *Jones v. United States* that "'commitment *for any purpose* constitutes a significant deprivation of liberty that requires due process protection.'" Dissenting Op. 3–4 (quoting *Jones*, 463 U.S. at 361) (emphasis in dissent). Again, however, the due

[16] *Jolly v. Coughlin*, 76 F.3d 468, 479–80 (2d Cir. 1996), upon which Judge Chin's partial dissent ("dissent") relies, is similarly unhelpful in establishing the substantive due process standard urged by Appellants. Indeed, *Jolly* does not even address a due process claim. The "medical keeplock" at issue there was challenged under the Religious Freedom Restoration Act, which by its terms applies a least-restrictive-means test only to claims regarding the exercise of religion. *See id.* at 474.

process standards articulated in *Jones*, as in *Project Release*, concern civil commitment of the mentally ill. Taking a generalized statement like that found in *Project Release* or *Jones* as evidence of a "clearly established rule" in the context of quarantines conflicts with the Supreme Court's directive that we should not "define clearly established law at a high level of generality." *Mullenix*, 136 S. Ct. at 308; *see id.* ("This inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)). Quarantines against infectious disease, involving different public safety concerns and implicating different liberty interests, are simply not sufficiently analogous to civil commitment of the mentally ill to clearly establish applicable due process constraints. As the Supreme Court explained in *City of Sacramento v. Lewis*, "[r]ules of due process are not . . . subject to mechanical application in unfamiliar territory." 523 U.S. 833, 850 (1998); *cf. Reno v. Flores*, 507 U.S. 292, 302 (1993) ("'Substantive due process' analysis must begin with a careful description of the asserted right, for 'the doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'" (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)) (brackets omitted)). Accordingly, not "every reasonable official would interpret [civil

commitment cases] to establish the particular rule that the plaintiff[s] seek[] to apply." *Wesby*, 138 S. Ct. at 590.

Indeed, Appellants point to only one decision that has applied the civil commitment line of cases in the infectious disease context: *Best v. St. Vincents Hosp.*, No. 03 CV.0365, 2003 WL 21518829 (S.D.N.Y. July 2, 2003), *adopted by* 2003 WL 21767656, *aff'd in relevant part sub nom. Best v. Bellevue Hosp.*, 115 F. App'x 459 (2d Cir. 2004). But a single magistrate's report and recommendation, even when adopted by a district court, is insufficient, standing alone, to clearly establish a constitutional rule.[17] *Cf. Matusick v. Erie Cty. Water Auth.*, 757 F.3d 31, 61 (2d Cir. 2014) ("[W]e have specifically cautioned against the reliance on non-precedential summary orders [and district court opinions] in 'clearly established' analyses" because "'[n]on-precedential' decisions, by their very definition, do not make law." (citing *Jackler v. Byrne*, 658 F.3d 225, 244 (2d Cir. 2011))).

Nor does it help to situate *Best* among other decisions addressing quarantines and infectious diseases. By the late nineteenth century, "the right of the legislature to enact such measures as will protect all persons from the

[17] We did not have occasion to pass on the merits of the magistrate judge's analysis in summarily affirming in part the judgment on appeal.

impending calamity of a pestilence" was well established. *In re Smith*, 146 N.Y. 68, 77 (1895). As the doctrine developed into the early twentieth century, courts gradually recognized limits on this power. Even so, neither Appellants nor the dissent point to any authority in this archipelago of cases that clearly establishes the substantive due process rule they now urge.[18]

Quite to the contrary. In assessing the constitutionality of a Massachusetts law requiring individuals to either receive the smallpox vaccine or pay a fine, the Supreme Court noted in 1905 that "the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative

[18] For instance, in *Chy Lung v. Freeman,* the Supreme Court considered a California statute which allowed the State to exclude arriving passengers on a number of grounds, including if they were "a public charge, or likely soon to become so" because of "sickness or disease." 92 U.S. 275, 277 (1875). But far from articulating substantive due process limits on the quarantine authority, the Court ultimately struck down the statute because it conflicted with the federal government's authority to regulate immigration. *Id.* at 281. In *Smith*, the New York Court of Appeals ruled unlawful the quarantine of individuals who had been detained for refusing to receive a smallpox vaccine. 146 N.Y. at 78. But it in no way articulated a least-restrictive-means test of the sort urged by Appellants, instead recognizing "some latitude of a reasonable discretion . . . to the local authorities upon the facts of a case." *Id.* A pair of cases from California struck down discriminatorily enforced quarantines. *See Jew Ho v. Williamson*, 103 F. 10, 26 (N.D. Cal. 1900) ("The evidence here is clear that this [quarantine] is made to operate against the Chinese population only . . . ."); *Wong Wai v. Williamson*, 103 F. 1, 7 (N.D. Cal. 1900) (granting injunction prohibiting government officials from enforcing a quarantine targeting Chinese individuals). But neither of these cases is analogous to the instant suit as both involved neighborhood-wide discriminatory quarantines. No similar allegations are made here.

enactment as will protect the public health and the public safety." *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905); *Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health*, 186 U.S. 380, 387 (1902) ("[T]he power of the states to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants . . . is beyond question."). The Court recognized that such measures could be unlawful if undertaken in "an arbitrary, unreasonable manner, or . . . go[ing] so far beyond what was reasonably required for the safety of the public . . ." *Jacobson*, 197 U.S. at 28; *see also id.* at 31 (noting that courts may strike down public health statutes if they have "no real or substantial relation to those objects, or [are], beyond all question, a plain, palpable invasion of rights"). But of particular relevance here is the Supreme Court's acknowledgement that:

> An American citizen arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, . . . although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared.

Id. at 29; *see also United States v. Harris*, 838 F.3d 98, 107 (2d Cir. 2016) ("[E]ven if the statement is fairly characterized as dictum, we are obligated 'to accord great

deference to Supreme Court dicta, absent a change in the legal landscape.'" (quoting *Newdow v. Peterson*, 753 F.3d 105, 108 n.3 (2d Cir. 2014))).

Since *Jacobson*, the Supreme Court has not addressed the limits imposed by due process on a State's power to manage infectious diseases. Moreover, in a small number of decisions, other courts have adopted approaches more deferential than the least-restrictive-means test urged by Appellants. *See, e.g.*, *United States ex rel. Siegel v. Shinnick*, 219 F. Supp. 789, 790–91 (E.D.N.Y. 1963) (upholding the decision to isolate a woman who arrived in the United States from a region infected with smallpox for the entire incubation period of the disease as "reached in obvious good faith" after "forthright, reasoned and circumstantially reassuring" consideration); *People ex rel. Baker v. Strautz*, 386 Ill. 360, 362, 364–65 (1944) (upholding statute authorizing isolation of criminal defendants who "may be suffering from any communicable venereal disease" on the grounds that "the courts will not interfere with the exercise of this power except where the regulations adopted for the protection of the public health are arbitrary, oppressive and unreasonable").

Appellants and the dissent contend that the trend nevertheless goes in the other direction and that courts have grown less deferential in modern times. *See,*

e.g., *City of Newark v. J.S.*, 652 A.2d 265 (N.J. Super. Ct., Essex Cty. 1993) (discussing the least-restrictive-means test). But the cases do not bear out this purported trend. In *Hickox v. Christie*, for example, which arose out of the same Ebola crisis that gave rise to this appeal, the court concluded that "[t]he case law regarding the least restrictive means requirement falls far short of a clear consensus capable of defeating qualified immunity." 205 F. Supp. 3d 579, 599 (D.N.J. 2016). That court's review of the quarantine case law led it to suggest that the usual standard applied is one of "arbitrariness or unreasonableness." *Id.* at 593; *see also Daniels v. Maricopa Cty. Special Health Care Dist.*, No. CV-07-1080, 2009 WL 10708630, at *7 (D. Ariz. Oct. 20, 2009) (rejecting due process challenge to isolation of tuberculosis patient under a "reasonably related" standard).

Nor do the smattering of state trial court decisions relied upon by the dissent change the analysis. Passing over the fact that such precedent cannot clearly establish law, *see Matusick*, 757 F.3d at 61, none of these decisions even purported to apply federal due process standards. Both *In re City of New York v. Antoinette R.*, 165 Misc.2d 1014 (N.Y. Sup. Ct., Queens Cty. 1995), and *Mayhew v. Hickox*, No. CV-2014-26 (Me. Dist. Ct., Oct. 31, 2014), assessed quarantine orders against the backdrop of state or municipal laws that incorporated a least-restrictive-means

test. Appellants and the dissent both emphasize that Connecticut's quarantine law employs a least-restrictive-means test. *See* Conn. Gen. Stat. § 19a-131b(a). But the fact that Connecticut and other states have seen fit to adopt this test by statute is not relevant to our qualified immunity analysis. "[W]e have repeatedly held[] that a state statute does not serve as 'clearly established law' for purposes of qualified immunity." *Tooly v. Schwaller*, 919 F.3d 165, 172 (2d Cir. 2019). Put another way, assuming *arguendo* that Appellees' actions violated Connecticut law, "the court must [still] determine whether the conduct that violated the state statute also violates clearly established federal law, and this is a distinct and separate inquiry." *Id.* at 173.

In sum, there was by no means a "robust consensus" on the proper standard for analyzing quarantine claims at the time of the conduct at issue here. *Wesby*, 138 S. Ct. 591. To the extent the substantive due process restrictions articulated by Appellants existed then, they were "at best undeveloped." *Wilson v. Layne*, 526 U.S. 603, 617 (1999). That district courts in this Circuit (*Best* and *Shinnick*, specifically) have employed different analyses only further "demonstrates that the law on the point [was] not well established." *Ziglar*, 137 S. Ct. at 1868.

In such circumstances, where the precedent is simply not "clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply," *Wesby*, 138 S. Ct. at 589–90, the qualified immunity bar applies. As the Supreme Court has recognized, public officials cannot be expected "to predict the future course of constitutional law" based on their reading of a handful of non-precedential opinions. *Wilson*, 526 U.S. at 617–18 (quoting *Procunier v. Navarette*, 434 U.S. 555, 562 (1978)). It is "unfair" to subject such officials to damages liability when even "judges . . . disagree." *Id.* at 618. Neither civil commitment law nor other infectious disease cases had clearly articulated the substantive due process standard Appellants urge should have governed Dr. Mullen's actions. Accordingly, the district court did not err in affording qualified immunity as to this claim.

B. Procedural Due Process

Appellants next argue that Dr. Mullen violated procedural due process by failing: (1) to conduct an individualized assessment of Appellants' risk to public health; (2) to provide timely notice of the process for judicial review; and (3) to initiate a judicial hearing whereby Appellants could challenge their detention. Again, however, Appellants are unable to point to clearly established law that

supports the conclusion that every reasonable official would have understood that these measures were required at the time the challenged events occurred.

The inquiry into the existence of a procedural due process right is guided by the three-factor balancing test enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). At the start, because that analysis entails balancing multiple factors, procedural due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 895, (1961)). Rather, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "Given this flexible, context-dependent approach, it will be a rare case in which prior precedents have definitively resolved a novel claim of procedural due process. That makes particularly fertile ground for qualified immunity, given that state officials can be liable only for violations of rights that have been established 'beyond debate' and with 'particular[ity]' by existing constitutional precedents." *Francis v. Fiacco*, 942 F.3d 126, 149 (2d Cir. 2019) (quoting *White*, 137 S. Ct. at 551–52).

Again, Appellants and the dissent rely almost exclusively upon cases imported from the civil commitment context or upon Connecticut state law. But as already explained, the civil commitment cases are insufficiently analogous to clearly establish the procedural rights Appellants urge us to adopt in this case. *See Levin v. Adalberto M.*, 156 Cal. App. 4th 288, 298–02 (2007) (referring, in dicta, to civil commitment context as "analogous" to the civil detention of a tuberculosis patient but noting that infectious diseases like tuberculosis "differ[] from mental illness in ways that justify fewer procedural safeguards, not more"). And "[a] violation of state law neither gives plaintiffs a § 1983 claim nor deprives defendants of the defense of qualified immunity to a proper § 1983 claim." *Doe v. Conn. Dep't of Child & Youth Servs.*, 911 F.2d 868, 869 (2d Cir. 1990).

Indeed, we have been unable to find—and Appellants do not identify—any cases articulating *federal* procedural due process protections in the quarantine context. The most analogous case, *Greene v. Edwards*, 164 W. Va. 326, 327–29 (1980) (per curiam), held that due process guarantees certain procedural rights—including adequate notice, a right to counsel, and an elevated burden of proof—when the state seeks to involuntarily confine an individual with tuberculosis. *See also Kirk v. Wyman*, 83 S.C. 372, 390 (1909) ("[B]oards of health may not deprive any

person of his property or his liberty, unless the deprivation is made to appear, by due inquiry, to be reasonably necessary to the public health; and such inquiry must include notice to the person whose property or liberty is involved, and the opportunity to him to be heard, unless the emergency appears to be so great that such notice and hearing could be had only at the peril of the public safety."). But the Supreme Court of Appeals of West Virginia relied primarily on state law to reach this conclusion. *See Greene*, 164 W. Va. at 327–29. And cases from both the Supreme Court and our Court make clear that the federal procedural due process guarantee does *not* require state officials to inform individuals of all the procedural guarantees they enjoy under state law. *See City of W. Covina v. Perkins*, 525 U.S. 234, 240-41 (1999) (holding that a city that seizes an owner's property must inform the owner that "his property has been seized" but "need not take other steps to inform him of his [legal] options" because he "can turn to . . . public sources to learn about the remedial procedures available to him"); *United States v. Lopez*, 445 F.3d 90, 95 (2d Cir. 2006) (Sotomayor, *J.*) (holding that failure to inform an alien in deportation proceedings of his right to seek habeas review did not deny him meaningful judicial review because "where judicial remedies are readily available

in case law and statutes, due process is not offended where no notice of those remedies is provided").

The rationale of *Perkins* and *Lopez* has at least arguable purchase here, where Boyko, Skrip, and the Mensah-Siehs all did receive notice that they were subject to a mandatory quarantine, and where post-quarantine hearings were available to them under Connecticut law, *see* Conn. Gen. Stat. § 19a-131b. While the full panoply of their rights under state law was not immediately conveyed to them in writing, nor was a hearing convened, Appellants point to no case that clearly establishes that Dr. Mullen violated the Constitution by failing to undertake these measures.

C. The Fourth Amendment

Finally, Appellants assert that "Dr. Mullen's over-inclusive sweep was not reasonable under the Fourth Amendment," Appellants Br. 48, because in quarantining Boyko, Skrip, and the Mensah-Siehs, she "depart[ed] from what is scientifically justified for a particular disease," Appellants Reply Br. 9 (quotation marks omitted). According to Appellants, "all Plaintiffs had no known exposure to Ebola," Appellants Br. 39, Boyko had undergone several blood tests confirming that he did not have the disease, and Boyko and Skrip had been assured by CDC

representatives that any interactions with a person in their hotel who later developed symptoms posed no risk. This claim is essentially the same as their substantive due process claim but is recast in Fourth Amendment terms.

Qualified immunity affords especial protection to state officials in the Fourth Amendment context. *See Wesby*, 138 S. Ct. at 590 (holding that the "specificity" requirement is "especially important in the Fourth Amendment context") (quoting *Mullenix*, 136 S. Ct. at 308). The Supreme Court has observed, for instance, that "[p]robable cause 'turn[s] on the assessment of probabilities in particular factual contexts' and cannot be 'reduced to a neat set of legal rules.'" *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). Therefore, a plaintiff must "identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment." *Id.* (quoting *Pauly*, 137 S. Ct. at 522).

Appellants have cited no case in which a court has invalidated a quarantine order under the Fourth Amendment. And although they characterize their quarantines as "scientifically unjustified," Appellants Br. 58, a number of factors could support a determination that the quarantines were at least arguably reasonable as a matter of Fourth Amendment law. *Cf. Camara v. Mun. Ct. of City & Cty. of S.F.*, 387 U.S. 523, 538 (1967) ("Where considerations of health and safety

are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken." (quoting *Frank v. Maryland*, 359 U.S. 360, 383 (1959) (Douglas, *J.*, dissenting)). Put simply, it was not clearly established that it was *unreasonable*, pursuant to the Fourth Amendment, for Appellees to quarantine individuals traveling from a nation suffering from an Ebola epidemic for the duration of the disease's incubation period. And in such circumstances, Dr. Mullen is entitled to qualified immunity.

To be clear, we need not and do not reach the merits of Appellants' constitutional claims. We conclude simply that the district court did not err in determining that no clearly established law existed at the time of Dr. Mullen's actions such that every reasonable official would have known that her conduct fell outside the boundaries of due process and Fourth Amendment constraints. No significant precedent had previously articulated the requirements of substantive due process, procedural due process, or the Fourth Amendment in the quarantine or infectious diseases contexts, as urged by Appellants here. In such circumstances, the district court properly concluded that Dr. Mullen is entitled to qualified immunity.

CONCLUSION

We have considered Appellants' remaining arguments and find them to be without merit. For the foregoing reasons, we AFFIRM the judgment of the district court but REMAND with instructions to amend the judgment to clarify that the state law claims were dismissed without prejudice.

CHIN, *Circuit Judge*, concurring in part and dissenting in part:

I concur in the majority's decision to affirm the dismissal of the claims for prospective or injunctive relief for lack of standing and the denial of class certification, but I dissent as to its holding that the claims for damages are barred by qualified immunity.

As we have seen most strikingly with the current epidemic, the government surely has a compelling interest in preventing the spread of disease. At the same time, however, the government's power to protect the community may not be exercised in an unreasonable or arbitrary manner. While intrusions on personal liberties will of course be necessary to safeguard public health and safety, they must be based on scientific and not political considerations. In my view, plaintiffs-appellants Ryan Boyko and Laura Skrip and Louise Mensah-Sieh, Nathaniel Sieh, and their children (collectively, "plaintiffs") plausibly alleged that defendant-appellee Dr. Jewel Mullen, then-Commissioner of Public Health, violated their constitutional rights by ordering them, in connection with the Ebola outbreak in 2014, into quarantine for two weeks in the case of Boyko and Skrip and three weeks in the case of the Mensah-Sieh family, when quarantine was not scientifically or medically warranted or justified. Moreover, in my view,

plaintiffs plausibly alleged violations of clearly established rights such that, at the pleadings stage of the case, it was error for the district court to dismiss these claims based on qualified immunity. Accordingly, I would reverse as to plaintiffs' claims for damages.

I.

A.

More than a century ago, the Supreme Court recognized the need to balance the government's interest in protecting the public health and safety by controlling the spread of disease against the rights of individuals to be free from unreasonable restraint. In *Jacobson v. Massachusetts*, in upholding the authority of states to require vaccinations in response to an outbreak of smallpox, the Supreme Court acknowledged that a state's power to fight the spread of disease is not without limit:

> [I]t might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.

197 U.S. 11, 28 (1905). The Court also emphasized that:

> if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Id. at 31. This reasoning, of course, applies not just to statutes but to any governmental restriction on individual rights taken ostensibly to protect public health and safety.

It has long been established that the Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the government from infringing on "'fundamental' liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). Indeed, "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause," *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992), and "[i]t is clear that 'commitment *for any purpose* constitutes a significant deprivation of liberty that requires due process protection,'" *Jones v. United States*,

463 U.S. 354, 361 (1983) (emphasis added) (quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979)); *accord Project Release v. Prevost*, 722 F.2d 960, 971 (2d Cir. 1983) ("Civil commitment for *any purpose* requires due process protection.") (emphasis added). Hence, a government-imposed quarantine implicates the Constitution, as mandatory quarantine is a form of civil detention -- an involuntary confinement and a deprivation of liberty.

Courts have applied these due process concepts to quarantine or similar isolation orders and considered whether the restrictions were reasonable in relation to the goal of protecting the health of others. In *Jolly v. Coughlin*, for example, this Court upheld a preliminary injunction barring prison officials from keeping an inmate in "medical keeplock" after he refused, for religious reasons, to take a tuberculosis test, where he did not have active tuberculosis and could be monitored for tuberculosis by other means. 76 F.3d 468, 479-80 (2d Cir. 1996). In two cases involving the detention of individuals with tuberculosis who were either unwilling or unable to comply with medical directives, the courts applied due process principles. While the courts ultimately determined that isolation was the best option in both cases, they considered whether less restrictive means were available. *See City of Newark v. J.S.*, 279 N.J. Super. Ct. Law Div. 178, 184-85

(1993); *Matter of City of New York v. Antoinette R.*, 630 N.Y.S.2d 1008, 1019 (N.Y. Sup. Ct. 1995). In an Ebola case in Maine, the court concluded that isolation was not required to protect others from the danger of infection, determining that a less restrictive monitoring order was sufficient. *See Mayhew v. Hickox*, No. CV-2014-36 (Dist. Ct., Fort Kent, ME Oct. 31, 2014); *cf. Hickox v. Christie*, 205 F. Supp. 3d 579, 593-94 (D.N.J. 2016) (dismissing federal claims brought by nurse who was subjected to mandatory quarantine, based on qualified immunity doctrine). And years ago, in *Jew Ho v. Williamson*, the court found that an ordinance sealing off an area of San Francisco in such a way as "to operate against the Chinese population only," purportedly to prevent the spread of the bubonic plague, 103 F. 10, 23 (Cir. Ct. N.D. Ca. 1900), was "unreasonable, unjust, and oppressive," *id.* at 26.[1]

In Connecticut, due process protections are expressly written into the statute governing quarantine. The Connecticut statute provides (and provided in 2014) that "[t]he commissioner . . . may order into quarantine or

[11] *See also Wong Wai v. Williamson*, 103 F. 1, 3, 7 (Cir. Ct. N.D. Ca. 1900) (striking down regulation requiring inoculation of "all the Chinese residents" of the city and county of San Francisco against the bubonic plague and restricting their ability to travel, as discriminatory and not supported by any evidence that "the Asiatic or Mongolian race . . . [was] more liable to the plague than any other").

isolation, as appropriate, any individual . . . or individuals . . . if the commissioner determines that such individual or individuals pose a significant threat to the public health and that quarantine or isolation is *necessary* and *the least restrictive alternative* to protect or preserve the public health." Conn. Gen. Stat. Ann. § 19a-131b(a) (emphasis added).

Even "[w]hen government action depriving a person of life, liberty, or property survives substantive due process scrutiny," procedural due process requires that the action "still be implemented in a fair manner." *United States v. Salerno*, 481 U.S. 739, 746 (1987). This generally requires consideration of three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Procedural due process applies to involuntary confinement. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004). This is because "[p]rocedural due process imposes constraints on governmental decisions which deprive

individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Eldridge*, 424 U.S. at 332. Although "the Court usually has held that the Constitution requires some kind of hearing *before* the State deprives a person of liberty," *Zinermon v. Burch*, 494 U.S. 113, 127 (1990), "post-deprivation hearings are appropriate and constitutionally permissible in emergency situations," *Bailey v. Pataki*, 708 F.3d 391, 406 (2d Cir. 2013). Notably, Connecticut law also guarantees a written quarantine order that informs the recipient of the right to a hearing and how to request it; an individuated assessment of risk; and an opportunity to seek post-deprivation judicial review. Conn. Gen. Stat. § 19a-131b(c), (d), (f).

B.

In my view, plaintiffs plausibly alleged both substantive and procedural due process violations.

First, the complaint alleges that Boyko and Skrip as well as the Mensah-Sieh family were involuntarily confined and deprived of their fundamental right to liberty, for two weeks as to Boyko and Skrip and three weeks as to the Mensah-Sieh family, after arriving in the United States from Liberia. Police officers were stationed outside their homes to enforce the

quarantine orders. As alleged in the complaint, the quarantine caused plaintiffs to suffer physically, emotionally, and financially. For example, Boyko was "cut off from family, friends, and colleagues," he was unable to spend time with his son, his girlfriend was prohibited by the quarantine order from entering their shared apartment, and he was unable to meet his employment obligations. J. App'x at 37. Skrip's research and work at Yale as well as her volunteer activities were adversely impacted. And the inability of the Mensah-Sieh family to leave their residence (a single room in a basement for six individuals) "severely diminish[ed] their everyday life activities including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." J. App'x at 48.

Second, the complaint alleges -- in great detail and with ample support -- that quarantine was not necessary in the circumstances here and that less restrictive alternatives existed to protect public health and safety. As alleged in the complaint, by the time the quarantine orders were issued in Fall 2014, doctors and scientists had been dealing with Ebola for some twenty-two months and the science was well-established. "The overwhelming consensus in the scientific community at the time was, and remains, that asymptomatic

individuals cannot transmit Ebola and do not require quarantine." J. App'x at 29. Rather, Ebola "is spread through direct physical contact with the bodily fluids of a symptomatic person, the body of a person who has died from Ebola, or objects contaminated with the virus, such as used needles." J. App'x at 26. Symptoms include fever, headache, joint and muscle pain, diarrhea, and vomiting. Unlike diseases such as tuberculosis (and COVID-19), Ebola cannot be spread through the air.

According to the complaint, on August 22, 2014, the Centers for Disease Control and Prevention (the "CDC") released guidance for monitoring "asymptomatic individuals returning from West Africa with 'no risk' or 'low risk' of exposure" to Ebola, and it "recommended only self-monitoring or active monitoring for twenty-one days and recommended no movement restrictions or quarantine." J. App'x at 27. The guidance did not recommend quarantine even for individuals with a high risk of exposure. As the public health experts point out in their amici brief, overly restrictive responses to epidemics have adverse consequences, as health care professionals, scientists and epidemiologists, and aid workers will be deterred from traveling to impacted countries to provide medical help and other assistance.

In October 2014, the CDC, in conjunction with the Department of Homeland Security ("DHS"), implemented a screening process for individuals arriving in the United States from Liberia, Guinea, and Sierra Leone, ensuring that they had no symptoms or a known history of exposure to Ebola before permitting them to exit the airport, and referring them to the appropriate state or local health authorities if circumstances warranted. Plaintiffs were asymptomatic when they arrived in the United States from Liberia, and they had not been in contact with symptomatic individuals. They went through the CDC screening procedures and were cleared to enter the country. While Boyko developed a fever at one point after returning to the United States, he was given a blood test which came back negative for Ebola (in fact, he was tested three times, with a negative result each time). The complaint alleges that Dr. Mullen and other state officials knew that plaintiffs were "not sick and not a risk to public health." J. App'x at 29 (quoting statement made by a Department of Public Health spokesperson in October 2014). Yet, the complaint alleges, they ordered plaintiffs into quarantine, even though they knew that quarantine was not necessary and that alternative, less restrictive measures -- such as monitoring -- were available to protect the public health and safety. Connecticut's quarantine

program did not provide for individual risk assessments of travelers from affected countries, and did not, for example, consider whether they had had past contact with Ebola-infected persons. Rather, the policy required that *all* asymptomatic individuals arriving from an affected country were to be quarantined at home for twenty-one days.

Moreover, the complaint further alleges that on October 27, 2014, the Connecticut officials revised their quarantine guidelines so that asymptomatic travelers arriving from affected areas were subject only to active monitoring, unless an individualized assessment determined quarantine was necessary. The officials did not, however, release plaintiffs from quarantine or review whether continued quarantine was necessary.

Third, the complaint alleges that the Mensah-Sieh family did not receive written notice of the quarantine order or any information about their right to challenge the quarantine order. It alleges that Skrip did not receive any such information either, until she requested it five days after she was orally informed of her quarantine. Moreover, the complaint alleges that plaintiffs did not receive individualized consideration of whether quarantine was warranted in their cases, either initially or after the state changed its policies.

In short, in my view the complaint alleges, plausibly and with great detail, that Dr. Mullen and the other state officials infringed on plaintiffs' fundamental right to liberty, without justification or individualized consideration, when alternative, less restrictive measures were available to protect the public health and safety.

II.

A.

Qualified immunity "protects government officials from suits seeking to impose personal liability for money damages based on unsettled rights or on conduct that was not objectively reasonable." *Tenenbaum v. Williams*, 193 F.3d 581, 595-96 (2d Cir. 1999). In assessing a qualified immunity defense, the court must "accept as true all well-pled factual allegations, and draw all reasonable inferences in the plaintiff's favor." *Warney v. Monroe Cty.*, 587 F.3d 113, 116 (2d Cir. 2009). "The defendant bears the burden of pleading and proving the affirmative defense of qualified immunity." *Blissett v. Coughlin*, 66 F.3d 531, 539 (2d Cir. 1995); *see also Jackler v. Byrne*, 658 F.3d 225, 242 (2d Cir. 2011).

To determine whether an individual is entitled to qualified immunity, the court must "engage in a two-part inquiry: whether the facts

shown 'make out a violation of a constitutional right,' and 'whether the right at issue was clearly established at the time of defendant's alleged misconduct.'" *Taravella v. Town of Wolcott*, 599 F.3d 129, 133 (2d Cir. 2010) (quoting *Pearson v. Callahan*, 55 U.S. 223, 232 (2009)). While there need not be "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 v. Pauly*, 137 S. Ct. 548, 551 (2017) (citation omitted).

As discussed above, in my view the facts alleged in the complaint make out a violation of plaintiffs' rights to substantive and procedural due process. Similarly, in my view these rights were clearly established when Dr. Mullen and the other state officials required plaintiffs to be quarantined. I believe it was error for the district court, on a motion to dismiss when it should have assumed the factual allegations of the complaint to be true, to sustain the affirmative defense of qualified immunity as a matter of law.

The district court held that Dr. Mullen's actions did not violate clearly established law because there is no case law regarding an individual's substantive and procedural due process rights in a quarantine scenario, and that, in any event, quarantine here was "objectively reasonable." *Liberian Cmty. Ass'n*

of Connecticut v. Malloy, No. 3:16-CV-00201(AVC), 2017 WL 4897048, at *9 (D. Conn. Mar. 30, 2017). As discussed above, however, there are some quarantine and other isolation cases, as well as other analogous cases, including, for example, civil commitment cases dealing with compulsory confinement to protect public safety. And while it may be true that there have been few epidemic cases over the years, the Supreme Court has noted that a "general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" *United States v. Lanier*, 520 U.S. 259, 271 (1997) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

The general constitutional rules discussed above are beyond debate. Freedom from physical restraint is a fundamental liberty interest that cannot be infringed upon by the government unless the restriction is narrowly tailored to further a compelling state interest and less restrictive alternatives to accomplish that goal are not available. *See, e.g.*, *Reno*, 507 U.S. at 301-02; *Shelton*, 364 U.S. at 488. Moreover, even assuming some ambiguity in the case law, the Connecticut statute -- which incorporates due process protections -- applies with obvious clarity here, as the statute specifically provides that quarantine may be ordered

only if *necessary* to protect the public health, and only if quarantine is the *least restrictive alternative* available. The complaint alleges in great detail that, given the nature of Ebola, the CDC, scientists, and health experts uniformly agreed that quarantine was not necessary for individuals like plaintiffs, who were asymptomatic and who were no-risk or low-risk for Ebola exposure, and that less restrictive alternatives, such as active monitoring, were available to protect the public. Hence, the complaint plausibly alleges that it was not objectively reasonable for Dr. Mullen and the other state officials to order plaintiffs into quarantine, and to have done so without proper notice or individualized assessment or other procedural safeguards.

Finally, I note that the complaint plausibly alleges that the Connecticut officials did not act in good faith, as they purportedly imposed quarantine on plaintiffs not based on scientific or medical reasons but for political reasons. The complaint alleges that Dr. Mullen and other state officials knew that quarantine was not necessary to protect the public health. But in October 2014, the Governor of Connecticut was "actively campaigning to be re-elected . . . [and p]ublic polling and media accounts at the time described the gubernatorial race as extremely close." J. App'x at 27. The Connecticut officials

adopted a policy, as the Governor's office apparently touted, that was "more stringent" than guidelines issued by the CDC, one that mandated quarantine even for asymptomatic individuals, when quarantine was not scientifically justified. J. App'x at 28-29. The complaint alleges that the state officials ordered plaintiffs to be quarantined and then continued them in quarantine, even though they knew plaintiffs did not present a risk to public health, because of "sensationalist news accounts [that] stoked public fear that travelers might bring Ebola across the ocean to [Connecticut]." J. App'x at 20.

These allegations, in my view, are plausible. Accordingly, I dissent from the majority's affirmance of the district court's dismissal of plaintiffs' claims for damages.

17-3817-cv
Muschette v. Gionfriddo

United States Court of Appeals for the Second Circuit

AUGUST TERM 2018
No. 17-3817-cv

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.

ARGUED: SEPTEMBER 13, 2018
DECIDED: DECEMBER 7, 2018

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

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.

ANDREW ROZYNSKI, EISENBERG & BAUM LLP, NEW YORK, NY, FOR THE PLAINTIFF-APPELLEE.

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

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 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. 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, 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. 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 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 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 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 (2014) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 735 (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, 135 S. Ct. 348, 350 (quoting Anderson v. Creighton, 483 U.S. 635, 640 (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 (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 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., 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 threat to officer safety"). Under A.M.'s theory of the case, this clearly established right was violated. A.M. alleges that

[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)).

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 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 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 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 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 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]

[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

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 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 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.

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).

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 instructions to enter judgment for Officer Gionfriddo on the ground of qualified immunity.

Trial Decisions

18-3775
Jones v. Treubig

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2019

(Argued: December 11, 2019 Decided: June 26, 2020)

No. 18-3775

MATTHEW JONES,

Plaintiff-Appellant,

— v. —

LIEUTENANT CHRISTOPHER TREUBIG,

Defendant-Appellee,

CITY OF NEW YORK, POLICE OFFICER ADAM MUNIZ, POLICE OFFICER MICHAEL VACCARO, UNDERCOVER OFFICER #349, POLICE OFFICER JOHN DOE #1, POLICE OFFICER JOHN DOE #2, POLICE OFFICER JANE DOE, OFFICER JOHN DOE #2,

Defendants.

Before: CABRANES, BIANCO, *Circuit Judges,* and REISS, *District Judge*.[*]

Plaintiff-appellant Matthew Jones appeals from a judgment of the United States District Court for the Southern District of New York (Koeltl, *J.*). The complaint, brought under 42 U.S.C. § 1983, alleged that defendant-appellee

[*] Judge Christina Reiss, of the United States District Court for the District of Vermont, sitting by designation.

Lieutenant Christopher Treubig and other police officers used excessive force during the course of an arrest. The jury found that Lt. Treubig used excessive force against Jones when he deployed two taser cycles against him, but found that the other officers were not liable. On November 21, 2018, the district court granted Lt. Treubig's motion for judgment as a matter of law on qualified immunity grounds. Because we conclude that at the time of the incident, the law was clearly established that a police officer cannot use significant force against an individual who is no longer resisting arrest and poses no safety threat, and the evidence allowed the jury to reasonably conclude that Jones was no longer resisting arrest and was not a safety threat to the officers or others at the time of Lt. Treubig's second use of the taser against him, we **REVERSE** the district court's judgment and **REMAND** for proceedings consistent with this opinion.

AMIR ALI, Roderick & Solange MacArthur Justice Center, Washington, DC (David Zelman, The Law Office of David Zelman, Brooklyn, NY, and Alexis Padilla, The Law Office of Alexis Padilla, Brooklyn, NY, *on the brief*) *for Plaintiff-Appellant*.

SUSAN PAULSON (Richard Dearing, Devin Slack, and Eric Lee, *on the brief*) *for* James E. Johnson, Corporation Counsel of the City of New York, New York, NY, *for Defendant-Appellee*.

JOSEPH F. BIANCO, *Circuit Judge*:

Matthew Jones ("Jones") appeals from the judgment entered on November 27, 2018 in the United States District Court for the Southern District of New York in favor of Lieutenant Christopher Treubig ("Lt. Treubig"). After a jury found that

Lt. Treubig used excessive force against Jones, the district court granted his motion for judgment as a matter of law on qualified immunity grounds.

The underlying claims stem from an arrest that occurred on April 7, 2015 in Jones's apartment building in East Harlem, New York, during which Jones was subjected to force by the police, including the use of a taser by Lt. Treubig. Jones filed the instant lawsuit under 42 U.S.C. § 1983, alleging that Lt. Treubig and other police officers (collectively, "defendants") deprived him of his rights under the Fourth and Fourteenth Amendments by using excessive force against him during the arrest. At the close of evidence at trial, defendants made a motion for judgment as a matter of law, pursuant to Federal Rule of Civil Procedure 50(a), on qualified immunity grounds. The district court denied the motion without prejudice and submitted the case to the jury. The jury returned a verdict, holding Lt. Treubig liable for excessive force, awarding nominal and punitive damages against Lt. Treubig, and finding in favor of the remaining defendants. After Lt. Treubig renewed his Rule 50(b) motion for judgment as a matter of law, the district court granted the motion, finding Lt. Treubig was entitled to qualified immunity because, at the time of the arrest, there was no clearly established law that using a taser two times in rapid succession constituted excessive force under the particular

circumstances of this case. Jones appeals from the judgment. Because we conclude that it was clearly established at the time of the incident that an officer could not use significant force against an individual who was no longer resisting arrest and posing no threat to the safety of officers or other individuals, and the evidence allowed the jury to reasonably conclude that Jones was no longer resisting arrest and was not a safety threat at the time of Lt. Treubig's second use of the taser against him, we reverse the judgment of the district court and remand for proceedings consistent with this opinion.

BACKGROUND

I. Factual Background

The following facts are drawn from the record on appeal and are construed in the light most favorable to Jones unless otherwise noted. *See Kerman v. City of New York*, 374 F.3d 93, 114 (2d Cir. 2004). Jones lives in an apartment building in East Harlem, New York. On the evening of April 7, 2015, he was descending the stairs of his apartment building to meet his uncle to return a bottle of prescription medication and $70 in cash. As Jones met his uncle in the stairwell, New York Police Department ("NYPD") Officers Michael Vaccaro and Adam Muniz encountered them while patrolling the building. The officers instructed Jones and

his uncle to step from the stairwell into the building hallway, and both men complied. Jones then consented to be searched, and the officers found the bottle of medication that Jones was returning to his uncle. According to Jones, Officer Vaccaro said "jackpot" upon finding the pill bottle, and arrested Jones. J. App'x at 26. At that point, Jones's uncle ran, and the officers handcuffed Jones's right arm as Jones questioned what he did wrong. The officers asserted that Jones then "tried to turn around" and "take a swing at" Officer Vaccaro, and Officer Vaccaro conducted a "sweep kick" in response, bringing Jones to the ground. J. App'x at 49-50. As Jones was on the floor, Officer Vaccaro was on top of him, keeping Jones pinned to the ground face down. Jones's left arm remained uncuffed during the incident, despite the officers' attempts to handcuff it.

Other police officers quickly arrived at the scene in response to a radio call from Officer Vaccaro, including Undercover Officer #349 ("UC #349") and her partner. As Jones remained pinned down by Officer Vaccaro, another officer hit Jones with an expandable metal baton (referred to as an "asp") until Jones's left arm went numb. Officer Vaccaro testified that, as the officers attempted to secure Jones's left arm for cuffing, Jones stated, "I'm not going to jail." J. App'x at 51. One of the officers then pepper-sprayed Jones in his face. The officer who used

the asp and the officer who used the pepper spray were never identified. Although the officers testified that Jones was actively resisting arrest and refusing to produce his arms for handcuffing, Jones disputed those facts at trial, testifying that he was beaten with a baton and sprayed in the face with pepper spray after he had fallen to the ground and could not give them his left arm for handcuffing because it was under his body.

Lt. Treubig and his partner then arrived on the scene, and Lt. Treubig announced that he was going to use his taser. Jones claimed that he did not hear the warning, and managed to "force [himself] up off the ground" when he heard someone say, "hit him." J. App'x at 28, 42. At that point, Lt. Treubig used his taser against Jones in "cartridge mode."[1] J. App'x at 87, 89. When Lt. Treubig deployed the taser the first time, two metal prongs struck Jones in his lower back, and an

[1] Lt. Treubig explained "cartridge mode" as follows:

> When you want to deploy it you put the "on" switch on. Depress the trigger. The prongs come out of the cartridge and then into the subject and then there's an electrical current that goes through and from the two prongs and it completes a circuit so the electric charges [enter] into the subject's body.

J. App'x at 87. Lt. Treubig further testified that the taser model that he deployed would result in approximately 1,200 to 1,600 volts of electricity entering Jones's body when he pressed the trigger.

electric charge cycled through him for five seconds. Jones testified that, as a result, "[he] fell back on the ground with [his] arms sprayed out in the air."[2] J. App'x at 28.

According to Lt. Treubig, the initial tasing "didn't stabilize [Jones] enough to the point where the officers were able to grab his hands." J. App'x at 84. Lt. Treubig then "[r]eassess[ed] the situation" and depressed the trigger of the taser again, thereby re-cycling the taser and sending another electrical charge into Jones's body.[3] J. App'x at 54, 84. After the second tasing cycle, Jones was handcuffed and brought to the hospital by ambulance. Approximately three minutes passed between the time that Officer Vaccaro radioed for assistance and the time that Lt. Treubig called for an ambulance. Jones was later charged with a controlled substance offense and resisting arrest. He was released without bond, and all charges were ultimately dismissed.

II. Procedural History

[2] Although Officer Vaccaro asserted that Jones was still trying to pull his arm under his body to prevent handcuffing, he agreed that Jones was on the ground face down after the first tasing.

[3] Re-cycling the taser in cartridge mode did not entail deploying the taser a second time because the taser prongs were already in Jones's back; rather, Lt. Treubig only had to press the trigger of the taser again.

On October 16, 2016, Jones commenced this action in the United States District Court for the Southern District of New York, alleging that the police officers used excessive force in beating him, pepper-spraying him, and tasing him, in violation of 42 U.S.C. § 1983. The officers did not claim qualified immunity at either the motion to dismiss or summary judgment stage.[4]

A jury trial commenced on May 21, 2018, and the jury reached a verdict on May 24, 2018. At trial, Jones and the police officers vigorously disputed the degree of resistance that Jones offered during the incident; Jones claimed that he repeatedly inquired why he was under arrest, did nothing to resist, and was unable to provide his arm for cuffing because it was pinned under him on the ground, while the officers who testified claimed that he resisted arrest "aggressively and actively." J. App'x at 82. Defendants argued to the jury that they should not be held liable for two principal reasons. First, they contended that Jones could not identify which specific officer beat him with the asp and pepper-sprayed him, so no one could be held accountable for the force that preceded the tasing. Second, defendants urged the jury to credit their version of events in which

[4] "The absence of a motion for summary judgment is not a defect, however, as the absence of a motion for a directed verdict would be." *Krause v. Bennett*, 887 F.2d 362, 368 n.3 (2d Cir. 1989).

Jones was actively resisting arrest and such resistance justified their reasonable use of force.

a. Jury Trial and Verdict

Following deliberations, the jury found that only Lt. Treubig used excessive force in violation of Jones's constitutional rights.[5] It found that Officers Vaccaro, Muniz, and UC #349 did not use excessive force against Jones. The jury did not award compensatory damages, and initially awarded Jones solely punitive damages against Lt. Treubig in the amount of $30,000. After the district court instructed the jury to reconsider the award of nominal damages, the jury awarded Jones twenty-five cents.

At the close of evidence, Lt. Treubig had requested that the district court dismiss the excessive force claim on qualified immunity grounds, and he renewed that motion after the jury returned its verdict. Over Jones's objection, the district court asked the following questions to the jury in a special verdict form to assist the district court in resolving the qualified immunity issue, and the jury provided the following answers:

1. Did Lieutenant Treubig say he would use the taser before he used it?

[5] On appeal, Lt. Treubig does not contest the jury's finding that he used excessive force.

A: Yes.

2. Was a second taser cycle needed to gain control of the plaintiff's arms?

   A: No.

3. Did Lieutenant Treubig believe that a second taser cycle was needed to gain control of the plaintiff's arms?

   A: Yes.

4. Was the plaintiff resisting arrest when Lieutenant Treubig used the taser the first time?

   A: Yes.

5. Did Lieutenant Treubig believe that the plaintiff was resisting arrest when Lieutenant Treubig used the taser the first time?

   A: Yes.

6. Was the plaintiff resisting arrest when Lieutenant Treubig used the taser the second time?

   A: No.

7. Did Lieutenant Treubig believe that the plaintiff was resisting arrest when Lieutenant Treubig used the taser the second time?

   A: Yes.

J. App'x at 137-38, 185-88. In short, the jury found that Jones was resisting arrest at the time that Lt. Treubig first used the taser. The jury also found that Jones was not resisting when Lt. Treubig used the taser the second time and that the second taser cycle was not needed to gain control of Jones's arms for handcuffing, but that Lt. Treubig believed the opposite to be true as to both facts.

As to his renewed motion for judgment as a matter of law, Lt. Treubig argued that the jury's answers demonstrated that he was entitled to qualified immunity. Given his belief that Jones was resisting arrest throughout the entire

incident, Lt. Treubig asserted that the district court should find that his mistaken belief was reasonable under the circumstances even as it related to the second use of the taser. In response, Jones argued, in part, that subjective beliefs were not relevant to qualified immunity; rather, the reasonableness of any perceived facts related to whether Lt. Treubig used excessive force in the first place—a question already answered against Lt. Treubig by the jury. Moreover, even though the jury found that Jones was resisting before the first taser cycle, Jones asserted that it was not clear from the verdict form whether "resisting arrest" meant passive resistance, in line with Jones's theory, or active resistance, in line with defendants' theory. In particular, Jones highlighted a portion of Lt. Treubig's testimony when he was asked for details of Jones's "active" resistance, to which Lt. Treubig responded that Jones had refused to "comply with the officers' orders" and "to place his hands behind his back and he was refusing those orders." J. App'x at 82. Such passive resistance, according to Jones, did not justify the use of force applied. Jones further contended that, even if qualified immunity applied to the first use of the taser, it did not apply to the re-cycling of the taser when Jones (as the jury found in the special interrogatory) was no longer resisting.

b. The District Court's Ruling

On November 21, 2018, the district court granted Lt. Treubig's motion for judgment as a matter of law on qualified immunity grounds. The district court stated that the "operative question" was whether "the law was clearly established" at the time of the incident in April 2015 "such that his use of a taser two times in rapid succession while assisting in the arrest of the plaintiff constituted excessive force in violation of the Fourth and Fourteenth Amendments, so that any reasonable officer in the defendant's position would have understood that the officer was violating the plaintiff's rights." J. App'x at 159-60. As to the first taser cycle, the district court found that Lt. Treubig did not violate clearly established law because he had "no 'fair warning' that the first use of the taser violated the plaintiff's constitutional rights" given Jones's resistance. J. App'x at 163 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

Turning to the second tasing, the district court held that Lt. Treubig was entitled to qualified immunity because "there is nothing in the cases from the Supreme Court or the Court of Appeals for the Second Circuit that gave 'fair warning' that the second use of the taser was unconstitutional at the time of the plaintiff's arrest." J. App'x at 164. First, the district court found that the re-cycling of the taser was reasonable because the first tasing did not "subdue the plaintiff

sufficiently to finish placing handcuffs on him" and "[t]he plaintiff was rising from the floor at the time." J. App'x at 164. Moreover, although the jury found in a special interrogatory that Jones was not resisting arrest, the district court noted that the jury also found in those interrogatories that Lt. Treubig mistakenly believed otherwise. The district court further concluded that Lt. Treubig's mistaken view of resistance at the point when he re-cycled the taser was "reasonably believed," and did not preclude his entitlement to qualified immunity. J. App'x at 174. Thus, after examining the record and the case law, the district court concluded that "[t]here is no basis to find that Lt. Treubig was an unreasonable officer." J. App'x at 165.

After reaching this reasonableness conclusion, the district court explained that the punitive damages award did not prevent the court from granting judgment as a matter of law. Specifically, the district court stated that qualified immunity is a question of law for courts that pertains to the conduct of reasonable officers, while punitive damages pertain to the "subjective motivation of a defendant's actions." J. App'x at 177-78.

This appeal followed.

DISCUSSION

Jones appeals the district court's order granting judgment as a matter of law to Lt. Treubig on qualified immunity grounds. Jones argues on appeal that, in its decision, the district court incorrectly drew inferences in favor of Lt. Treubig, despite the standard of review that applies to motions for judgment as a matter of law. For example, Jones asserts that the district court erred when it stated that "[t]he parties agree that despite being tased, the plaintiff was not incapacitated." J. App'x at 153. Jones contends that the parties agreed that Jones attempted to push himself off the ground at the time of the *first* tasing, but "whether the initial deployment of the taser incapacitated Mr. Jones was a hotly disputed issue." Appellant Br. at 18 n.6. The district court further stated that, after the first tasing, "[t]he plaintiff maintained control of his arms and began pushing himself off the ground." J. App'x at 153. However, Jones highlights portions of the testimony in which he asserted that he was lying face down at the time of the second tasing. Jones argues accordingly that, when the jury's findings and the evidence supporting those findings are correctly construed in the light most favorable to him, Lt. Treubig is not entitled to qualified immunity because he violated clearly established law by (1) using his taser the first time even though Jones was only

engaged in "passive resistance," and by (2) re-cycling his taser when Jones had already been subdued on the ground and could not be reasonably perceived as continuing to resist arrest.

We review *de novo* a district court's decision on a Rule 50(a) motion for judgment as a matter of law, as well as its decision to grant qualified immunity, *Dancy v. McGinley*, 843 F.3d 93, 105 (2d Cir. 2016), and we apply the "same standard as the district court itself was required to apply," *Diesel v. Town of Lewisboro*, 232 F.3d 92, 103 (2d Cir. 2000). Accordingly, in the context of a Rule 50(a) motion, we must "consider the evidence in the light most favorable to the party against whom the motion was made and . . . give that party the benefit of all reasonable inferences that the jury might have drawn in his favor from the evidence." *Black v. Finantra Capital, Inc.*, 418 F.3d 203, 209 (2d Cir. 2005) (quotation marks omitted).

I. The Qualified Immunity Standard

Qualified immunity protects government officials from civil damages liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818

(1982)). Thus, pursuant to the two-step framework articulated by the Supreme Court in *Saucier v. Katz*, 533 U.S. 194 (2001), when an official raises qualified immunity as a defense, the court must consider whether: "(1) . . . the official violated a statutory or constitutional right, and (2) . . . the right was 'clearly established' at the time of the challenged conduct." *Ricciuti v. Gyzenis*, 834 F.3d 162, 167 (2d Cir. 2016) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)).

As it relates to the second step, the focus is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202.[6] The Supreme Court has explained that the "clearly established right," particularly in excessive force cases, "must be defined with specificity." *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019). Indeed, "[a]n 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.'" *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 778-79 (2014)). Although the Supreme Court "do[es] not require a case directly on point, . . .

[6] We have noted that this question is not a separate inquiry, but rather part of the second step of the qualified immunity analysis. *See Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 433 n.11 (2d Cir. 2009); *see also Southerland v. City of New York*, 680 F.3d 127, 142 (2d Cir. 2012).

existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. The immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* at 743 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)); *see also Francis v. Fiacco*, 942 F.3d 126, 145-46 (2d Cir. 2019). In determining whether a right is clearly established at the time of the conduct in question, we can consider Supreme Court decisions and our own decisions, as well as "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

The Second Circuit has set forth the procedure by which district courts should resolve disputes on factual issues at trial that are relevant to the qualified immunity analysis. In particular, "[i]f there are unresolved factual issues which prevent an early disposition of the defense [of qualified immunity], the jury should decide these issues on special interrogatories." *Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir. 1990); *see also Stephenson v. Doe*, 332 F.3d 68, 81 (2d Cir. 2003) ("We believe that use of special interrogatories in this case resolves the difficulty of requiring the jury to decide what the facts were that the officer faced or perceived and

requiring the court to make the ultimate legal determination of whether qualified immunity attaches on those facts." (quotation marks omitted)).

II. Clearly Established Law and the Use of Tasers

The first step of the qualified immunity test—namely, whether the defendant violated a statutory or constitutional right—was determined by the jury in this case, which found that Lt. Treubig used excessive force against Jones in violation of the Fourth and Fourteenth Amendments. As stated above, Lt. Treubig does not appeal this finding. Accordingly, our task here is to determine whether the right at issue was "clearly established"—that is, whether "it was objectively reasonable for [Lt. Treubig] to believe [his] acts did not violate those rights." *See Oliveira v. Mayer*, 23 F.3d 642, 648 (2d Cir. 1994).

Before the incident at issue here in April 2015, it was clearly established in this Circuit that it is a Fourth Amendment violation for a police officer to use significant force against an arrestee who is no longer resisting and poses no threat to the safety of officers or others. *Tracy v. Freshwater*, 623 F.3d 90, 98-99 (2d Cir. 2010). In *Tracy*, we confronted an arrest that occurred in 2000 and involved the use of pepper spray against an individual who asserted that he was already in handcuffs and "offering no further active resistance." *Id.* at 98. We concluded that

disputed issues of fact regarding the timing and circumstances of the officer's use of pepper spray precluded summary judgment on the excessive force claim. *See id*. ("[W]e conclude that a reasonable juror could find that the use of pepper spray deployed mere inches away from the face of a defendant already in handcuffs and offering no further active resistance constituted an unreasonable use of force."). With respect to step two of the qualified immunity analysis, even though that issue was not raised by the defendant officer, we "note[d] that it was well established at the time of the underlying altercation that the use of entirely gratuitous force is unreasonable and therefore excessive, and in light of this precedent, we presume[d] that no reasonable officer could have believed that he was entitled to use pepper spray gratuitously against a restrained and unresisting arrestee." *Id*. at 99 n.5 (citation omitted).

Notwithstanding that the focus of this appeal is the use of a taser, not pepper spray, we have warned that "[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury." *Terebesi v. Torreso*, 764 F.3d 217, 237 (2d Cir. 2014) (quoting *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994)); *see also Hope*, 536 U.S. at 741 ("[O]fficials can still be on notice that their conduct violates [clearly] established

law even in novel factual circumstances."). To that end, we have observed that "[s]ome measure of abstraction and common sense is required with respect to police methods and weapons in light of rapid innovation in hardware and tactics." *Terebesi*, 764 F.3d at 237 n.20; *see also Muschette ex rel. A.M. v. Gionfriddo*, 910 F.3d 65, 69 n.1 (2d Cir. 2018) ("[N]ovel technology, without more, does not entitle an officer to qualified immunity." (quoting *Edrei v. Maguire*, 892 F.3d 525, 542 (2d Cir. 2018))).

It is beyond doubt that any reasonable police officer would know that the use of a taser, like pepper spray, constitutes significant force. *See, e.g.*, *Abbott v. Sangamon Cty.*, 705 F.3d 706, 726 (7th Cir. 2013) ("[T]he use of a taser, like the use of pepper spray or pain-compliance techniques . . . falls somewhere in the middle of the nonlethal-force spectrum."); *Bryan v. MacPherson*, 630 F.3d 805, 825 (9th Cir. 2010) ("The physiological effects, the high levels of pain, and foreseeable risk of physical injury lead us to conclude that the [Taser] X26 and similar devices are a greater intrusion than other non-lethal methods of force we have confronted" including, among other things, pepper spray.). This obvious fact was known to Lt. Treubig, who testified that he was trained to "deploy the taser on individuals that are actively resisting, active aggression" or for "perceived violent threats." J.

App'x at 87. It follows then that, after *Tracy*, any reasonable officer would understand that, because it violated clearly established law to use pepper spray against a non-resisting and non-threatening individual, the same would be true for the use of a taser.

In fact, *Tracy* itself made the broad scope of its holding abundantly clear. For example, in addressing the Fourth Amendment issue in *Tracy*, we did not only refer to pepper spray, but rather noted that the use of such a weapon constitutes a "significant degree of force" and emphasized that "a number of our sister circuits have made clear that [pepper spray] should not be used lightly or gratuitously against an arrestee who is complying with police commands or otherwise poses no immediate threat to the arresting officer." 623 F.3d at 98 (collecting cases). Thus, the language in *Tracy* left no question that, on the issue of significant force against an arrestee no longer posing an immediate threat, we joined our sister circuits in concluding that summary judgment on the excessive force claim relating to the use of pepper spray was unwarranted for the defendant officer. *See id.* at 99. Moreover, in briefly addressing the second step of the qualified immunity analysis, we restated our holding "that the use of entirely gratuitous force is unreasonable and therefore excessive," *id*. at 99 n.5, and then, in *dicta*, noted that

our holding "was well established at the time of the underlying altercation,"[7] i*d*. In other words, the explicit focus of *Tracy*'s Fourth Amendment analysis was on the officer's significant use of force in a gratuitous and excessive manner during an arrest, rather than the particular mode of that force. Therefore, following *Tracy*, it was clearly established that an officer's significant use of force against an arrestee who was no longer resisting and who posed no threat to the safety of officers or others—whether such force was by pepper spray, taser, or any other similar use of significant force—violates the Fourth Amendment. *See generally Garcia v. Dutchess Cty.*, 43 F. Supp. 3d 281, 297 (S.D.N.Y. 2014) (concluding, after analyzing *Tracy* and other case authority, that "[i]t was . . . clearly established law in the Second Circuit as of April 2000 that it was a Fourth Amendment violation to use 'significant' force against arrestees who no longer actively resisted arrest or posed a threat to officer safety, regardless of whether that significant force

[7] We emphasize that we do not rely on any *dicta* in *Tracy* for the purpose of determining clearly established law; rather, we cite to this portion of the opinion, which reiterated the Court's holding under the Fourth Amendment, only to highlight the pervasive and clear nature of that holding throughout the opinion.

emanated from a pepper spray canister or the trigger of a taser"), *aff'd in part, dismissed in part sub nom. Garcia v. Sistarenik*, 603 F. App'x 61 (2d Cir. 2015).

In light of *Tracy*, we have held, as it relates to tasers, that it was clearly established before April 2015 that "officers may not use a taser against a compliant or non-threatening suspect." *Muschette*, 910 F.3d at 69-70 (citing *Tracy*, 623 F.3d at 96-98); *see also Soto v. Gaudett*, 862 F.3d 148, 158 (2d Cir. 2017) ("Though the use of force may be reasonable against a suspect who is fleeing, it may be objectively unreasonable against that suspect when he has been stopped and no longer poses a risk of flight." (citing *Tracy*, 623 F.3d at 96-98)). Although Lt. Treubig argues that these decisions are inapposite because they were issued after the conduct at issue here in April 2015, we disagree. For this argument, Lt. Treubig relies on the Supreme Court's decision in *Kisela*, which emphasized that cases published after the incident should not be considered in determining clearly established law "because a reasonable officer is not required to foresee judicial decisions that do not yet exist." *Kisela*, 138 S. Ct. at 1154. However, the Supreme Court's concern specifically related to opinions published after the officer's conduct at issue that establish the right *in the first instance*. *See id*. Consistent with the holding in *Kisela*, we have considered cases published after the conduct at issue that do not establish

a right in the first instance, but rather address whether a right was clearly established by case authority *before* the time of such conduct. *See Cobb v. Pozzi*, 363 F.3d 89, 111 (2d Cir. 2004) (concluding that the law "was clearly established in 1999" by relying on a 2002 decision that reaffirmed "a clearly established constitutional right" based on "conduct that had taken place *in 1998*" (quotation marks omitted)); *see also Terebesi*, 764 F.3d at 237 (relying in part on a 2010 decision that addressed the clearly established law as of 2005, although the conduct at bar occurred in 2008). In other words, we can rely on decisions that post-date Jones's arrest if they address whether the law concerning the use of a taser against a non-resisting individual was already established by *Tracy* in connection with police conduct that occurred prior to April 2015. Therefore, because both *Muschette* and *Soto* concluded that the right of a non-resisting, non-threatening arrestee to be free from an officer's use of a taser was clearly established for conduct in 2013 (in *Muschette*) and in 2008 (in *Soto*)—which are both prior to Lt. Treubig's conduct in 2015—those decisions have precedential force on this issue. In any event, we

independently reach the same conclusion regarding clearly established law under *Tracy* for the reasons already discussed.

III. Clearly Established Law in the Particular Context of this Case

Our holding regarding *Tracy* as it applies to tasers, however, does not end our analysis. The Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *al-Kidd*, 563 U.S. at 742. Instead, "[t]he dispositive question is whether the violative nature of *particular* conduct is clearly established," and, thus, "[t]his inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quotations marks omitted). Accordingly, we now turn to whether the right articulated in *Tracy* was clearly established in the more particular context in which the challenged conduct regarding the taser occurred in this case.

With respect to the second tasing cycle, the district court concluded that "there is nothing in the cases from the Supreme Court or the Court of Appeals for the Second Circuit that gave 'fair warning' that the second use of the taser was unconstitutional at the time of the plaintiff's arrest." J. App'x at 164. As discussed below, in reaching this conclusion, the district court erroneously relied upon a

factual finding—namely, that Jones was continuing to resist after the first tasing—that was rejected by the jury in a special interrogatory and is inconsistent with the trial evidence as construed most favorably to Jones, which is the applicable standard on a Rule 50 motion. Moreover, the district court relied upon the fact that "[t]he jury found that Lt. Treubig believed—although incorrectly—that the plaintiff was resisting arrest and that the second use of the taser was needed to gain control of the plaintiff's arms." *Id*. A mistake of fact, however, in the absence of an additional jury finding that the mistake was reasonable (when there are disputed material facts on that question) is insufficient to support an officer's claim that he is entitled to qualified immunity, and no such finding of reasonableness was made by the jury here. Similarly, for the reasons provided below, the fact that the re-cycling of the taser followed in rapid succession after the first tasing and that Jones was unhandcuffed at the time of the re-cycled taser does not undermine our qualified immunity analysis in this case. For the reasons explained below, we hold that, after considering the jury's factual findings in the special interrogatories and construing the evidence regarding the remaining factual disputes most

favorably to Jones, Lt. Treubig's second use of the taser under the particular circumstances he confronted violated clearly established law.[8]

a. The Level of Resistance Before the Second Tasing

A critical fact for purposes of qualified immunity in this case is whether Jones was resisting arrest in any way at the time of the second tasing, because there was no clearly established law that would fairly warn police officers that a taser could not be used against a resisting arrestee. Indeed, to the contrary, "[o]ur precedents suggest that it is *not* excessive force to deploy tasers, after a warning, against arrestees who are dangerous or resisting arrest." *Penree by Penree v. City of Utica*, 694 F. App'x 30, 33 (2d Cir. 2017) (addressing a 2012 incident); *see also 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 that [the plaintiff] return to the ground"); *Crowell v. Kirkpatrick*, 400 F. App'x 592, 595 (2d

[8] Jones also argues that the district court erred in holding that Lt. Treubig was entitled to qualified immunity with respect to the first tasing. Given our conclusion that there is no qualified immunity for the second tasing and that the jury's verdict on the excessive force claim should be reinstated, we need not address this alternative argument.

Cir. 2010) (concluding that the use of taser was reasonable where protestors "were actively resisting their arrest" when they chained themselves to a barrel drum and the "apparently imminent arrival of some number of their compatriots added a degree of urgency" to the situation). On the other hand, if Jones was no longer resisting arrest and posed no threat to the safety of police officers or others after the first tasing, then qualified immunity would not protect Lt. Treubig when he re-cycled the taser in violation of the clearly established law under *Tracy*.

Thus, a factual lynchpin to the district court's qualified immunity analysis was its post-trial conclusion, with respect to the second tasing cycle, that "[t]he plaintiff was rising from the floor at the time." J. App'x at 164. In connection with this factual finding, the district court suggested that Jones conceded that he still exhibited a certain level of ongoing resistance after the first tasing:

> The parties agree that despite being tased, the plaintiff was not incapacitated. The taser did not stabilize the plaintiff enough for the officers to be able to grab his hands. The plaintiff continued to try to pull his right arm away from the officers and under his body after the first taser cycle. The plaintiff maintained control of his arms and began pushing himself off the ground. The defendant reassessed the situation and believed that the plaintiff was still resisting arrest. The defendant then recycled the taser.

J. App'x at 153 (citations omitted).

There was no such concession, however, to these facts by Jones. It is correct that the parties agreed that Jones was pushing himself off the ground at the time of the *first* tasing. *See* J. App'x at 148 (defense counsel conceding that "[a]t least with respect to the initial taser cycle, the record is clear that, from the stipulated facts, . . . the plaintiff was pushing up off of the ground"). In contrast to the first tasing, Jones asserts on appeal, and argued to the jury below, that he was already "subdued face down, arms spread" at the time of the *second* tasing. Appellant Br. at 22; *see also* J. App'x at 107 (plaintiff's counsel arguing to the jury that Jones was "lying face down on the ground unarmed posing no threat" at the time of the second tasing). Thus, there was no agreement by the parties regarding the circumstances immediately prior to the second tasing; rather, Jones's level of resistance at the time of the second tasing, if any, was a disputed key issue at trial.

Even in the absence of an agreement on this factual issue, Lt. Treubig suggests that the uncontroverted evidence still demonstrated that Jones continued to resist arrest at the time of the second tasing. Lt. Treubig supports his position by pointing to Jones's own trial testimony in which he stated that, after the first tasing, though he felt the muscles in his legs and his back "lock[] up," the muscles in his arms did not. J. App'x at 43. Accepting Lt. Treubig's argument, the district

court failed to view that fact, and the other evidence surrounding the circumstances of the second tasing, in the light most favorable to Jones. As an initial matter, there was testimony that a single taser use has the capacity to completely incapacitate an individual. *See, e.g.*, J. App'x at 53-54 (explaining that the electricity from a single taser cycle can contract the victim's muscles or "lock up a person" to make them "go stiff"); J. App'x at 84 (Lt. Treubig affirming that a single tasing can "fully incapacitate a grown man"). More importantly, consistent with that capacity, Jones specifically testified that, after the first tasing, he "fell out" and dropped "on the ground with [his] arms sprayed out." J. App'x at 28. Testimony from Officer Vaccaro also established that Jones was face down at the time of the second tasing (although Officer Vaccaro disputed other aspects of Jones's account).

Although Lt. Treubig places great weight on the fact that Jones also testified that his arm muscles did not lock up when he was on the ground after the first tasing, that alone cannot possibly establish that he was resisting arrest in any way at the time of the second tasing. Indeed, Jones counters that "the jury plainly could have inferred that a man lying face down with his back and legs locked up is incapacitated irrespective of the sensation he recalled in his arms." Reply Br. at 8.

We agree with Jones's assertion regarding this permissible inference by the jury from the record. In other words, the question is not how Jones's arms felt, but rather what, if anything, his arms were doing as he lay on the ground after the first tasing, and what Lt. Treubig reasonably observed in that regard. On that issue, Jones testified that his arms were "sprayed out" as he dropped to the ground, J. App'x at 28, and thus doing nothing, which would not have provided a reasonable officer with any basis to conclude from the outward appearance of Jones's arms that he was resisting arrest or posing any ongoing threat to the officers after the initial tasing.[9]

Not only was there evidence in the record to support that Jones was no longer resisting arrest at the time of second tasing, but the jury made that specific factual finding in a special interrogatory. Because that jury finding was rationally supported by the above-referenced evidence in the record (if credited), it must be accepted for purposes of the qualified immunity analysis utilizing, to the extent any other factual issues remain, the underlying evidence in the light most favorable to Jones. *See Kerman*, 374 F.3d at 114. Upon doing so here, our qualified

[9] In addition, the testimony at trial established that there were six officers on the scene when Lt. Treubig used his taser both the first and second time, thus allowing for the reasonable inference that even if the charge did not fully incapacitate Jones's arms, there was a sufficient number of officers present to effect the arrest.

immunity analysis must assume that, even though Jones may have been resisting arrest during the initial parts of the police encounter up to the time of the first tasing, when Lt. Treubig re-cycled his taser and sent another electric shock through Jones, he was no longer trying to get off the ground, no longer actively resisting arrest, and no longer posing a threat to the police officers. Instead, construing the evidence most favorably to Jones, at that point, he was face down on the ground with his arms spread. On those facts, no reasonable officer could believe that the use of the taser a second time against Jones was lawful.

b. Lt. Treubig's Belief Regarding the Level of Resistance Before the Second Tasing

In reaching this conclusion, we have also carefully considered the second ground for qualified immunity articulated by the district court—namely, even though the jury found that Jones was not resisting arrest at the time of the second tasing, Lt. Treubig is still entitled to qualified immunity because the jury also found Lt. Treubig mistakenly believed that Jones was continuing to resist. The district court explained that Lt. Treubig's mistaken belief in that regard "does not preclude a determination that Lt. Treubig is entitled to qualified immunity." J. App'x at 164. However, in the absence of more detailed findings by the jury, we conclude that this mistaken belief does not shield Lt. Treubig from liability because

the evidence in the record, when construed most favorably to Jones, would have allowed the jury to rationally find that Lt. Treubig's subjective belief regarding ongoing resistance at the time of the second tasing was unreasonable.

The Supreme Court has made clear that "[t]he protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson*, 555 U.S. at 231 (quotation marks omitted). However, qualified immunity only protects "reasonable mistakes." *Saucier*, 533 U.S. at 206; *Moore v. Vega*, 371 F.3d 110, 117 (2d Cir. 2004) ("[D]efendants believed they were entering the residence of an absconded parolee. If such belief was reasonable, qualified immunity protects them from liability, even if that belief was mistaken."); *accord Singh v. Cordle*, 936 F.3d 1022, 1033 (10th Cir. 2019) ("A mistake of fact must, of course, be a reasonable one."); *Henry v. Purnell*, 652 F.3d 524, 532 (4th Cir. 2011) ("[I]t is not the honesty of [the police officer's] intentions that determines the constitutionality of his conduct; rather it is the objective reasonableness of his actions. It is certainly true that mistaken, but reasonable, decisions do not transgress constitutional bounds. All actions, however, mistaken or otherwise, are subject to an objective test." (citation omitted)).

Here, after finding in a special interrogatory that Jones was not resisting arrest at the time of the second tasing, the jury also found that Lt. Treubig believed that Jones was resisting arrest. J. App'x at 187. The jury was not asked, however, whether that mistaken belief was reasonable. Instead, the district court, in its post-trial Rule 50 decision, independently concluded that Lt. Treubig "reasonably believed that the plaintiff was still actively resisting arrest when he cycled the taser the second time," J. App'x at 174, without any additional findings by the jury in the special interrogatories to support the reasonableness determination. That was error.

As a threshold matter, we have explained that the reasonableness of a mistake of fact regarding the use of force does not pertain to the ultimate qualified immunity determination, but rather whether there was a constitutional violation in the first instance—which is "step one" of the *Saucier* inquiry. *See Stephenson*, 332 F.3d at 78 ("[A]s the Supreme Court clarified in *Saucier*, claims that an officer made a reasonable mistake of fact that justified the use of force go to the question of whether the plaintiff's constitutional rights were violated, not the question of whether the officer was entitled to qualified immunity."); *see also Saucier*, 533 U.S. at 205 ("If an officer reasonably, but mistakenly, believed that a suspect was likely

to fight back, for instance, the officer would be justified in using more force than in fact was needed."). This question is in contrast to an officer's mistaken belief about the legality of the conduct, which is analyzed at "step two" in the *Saucier* framework. *See Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756, 762 (2d Cir. 2003) ("Whether the officer is entitled to qualified immunity is resolved by the latter part of the *Saucier* analysis, which looks at an 'officer's mistake as to what the law requires[.]'" (quoting *Saucier*, 533 U.S. at 205)); *see also Stephenson*, 332 F.3d at 80 n.15 ("Qualified immunity is a difficult concept; it looks to the reasonableness of an officer's belief that he acted lawfully after the officer is found to have been unreasonable in his conduct.").

And, importantly, disputed material issues regarding the reasonableness of an officer's perception of the facts (whether mistaken or not) is the province of the jury, while the reasonableness of an officer's view of the law is decided by the district court. *See Green v. City of New York*, 465 F.3d 65, 83 (2d Cir. 2006) ("If there is a material question of fact as to the relevant surrounding circumstances, the question of objective reasonableness is for the jury. If there is no material question of fact, the court decides the qualified immunity issue as a matter of law." (citations omitted)); *see also Cugini v. City of New York*, 941 F.3d 604, 614 n.6 (2d Cir.

2019) (concluding that, with respect to an excessive force claim regarding handcuffing, "[a] reasonable jury could also find that it was unreasonable for [the officer] to assume that the plaintiff was all right based on her silence following the handcuffing").

For example, in *Wilkins v. City of Oakland*, 350 F.3d 949, 953, 956 (9th Cir. 2003), the Ninth Circuit held that summary judgment on qualified immunity grounds was unwarranted, where officers mistakenly shot a fellow plain-clothes officer, because the jury needed to decide the reasonableness of that mistake. The court explained:

> The objective reasonableness of the officers' conduct in this case turns on their mistake of fact with regard to [the plain-clothes officer's] status and purpose at the scene that night. In turn, whether this mistake of fact was reasonable depends on which version of the facts is accepted by a jury. . . . The only question for resolution is whether their belief in the necessity of their actions was objectively reasonable. That is, was it reasonable for them not to understand that the person they were shooting was another police officer? Because the answer to that question depends on disputed issues of material fact, it is not a legal inquiry, but rather a question of fact best resolved by a jury.

Id. at 955; *see also Curley v. Klem*, 499 F.3d 199, 214 (3d Cir. 2007) ("At the risk of understating the challenges inherent in a qualified immunity analysis, we think the most helpful approach is to consider the constitutional question as being whether the officer made a reasonable mistake of fact, while the qualified

immunity question is whether the officer was reasonably mistaken about the state of the law.").

Therefore, in determining whether Lt. Treubig used excessive force with respect to tasering Jones, it was the jury's role to consider the reasonableness of Lt. Treubig's stated belief regarding Jones's continued resistance at the time of the second tasing. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene . . . at the moment" the force is used. (citations omitted)). In the instant case, consistent with that legal framework, the district court specifically instructed the jury on the need to consider the evidence at the arrest scene from the perspective of a reasonable officer. *See* J. App'x at 116 (instructing the jury that, "[b]ecause police officers are often forced to make split-second judgments about the amount of force that is necessary in a given situation, the reasonableness of a particular use of force must be judged from the perception of a reasonable officer on the scene rather than with the 20/20 vision of hindsight"). Given that the jury reached its verdict under the correct instructions, the district court cannot "substitute its view for adequately supported findings that were

implicit in the jury's verdict." *Zellner v. Summerlin*, 494 F.3d 344, 371 (2d Cir. 2007) (quoting *LeBlanc–Sternberg v. Fletcher*, 67 F.3d 412, 430 (2d Cir. 1995)).

Although it is the jury's province to resolve the reasonableness of an officer's perception of the facts that confronted him, we recognize that those same facts, or some portion thereof, can also sometimes be critical in deciding the qualified immunity analysis at step two of *Saucier*. Put another way, the reasonableness of a particular mistake of fact may dictate whether any reasonable officer would have understood that his conduct was unlawful. In situations where the court may not be able to discern from the general verdict how the jury may have resolved a particular disputed issue that is a dispositive part of the step-two *Saucier* analysis, it is necessary (as the district court did here) to ask additional questions to the jury through special interrogatories. *See Stephenson*, 332 F.3d at 81.

Jones argues that, in finding in his favor on the excessive force claim, the jury necessarily implied that it found unreasonable any mistaken belief by Lt. Treubig about the facts (including additional resistance after the first taser) that allegedly prompted him to re-cycle the taser. Jones further asserts that any conceivable doubt about the jury's view on the reasonableness of Lt. Treubig's beliefs was eliminated by its award of punitive damages which required the jury

to conclude, at the very least, Lt. Treubig acted with "reckless disregard" for Jones's constitutional rights. J. App'x at 117; *see also id.* at 183. In the proceedings below, Jones thus objected to the district court even posing questions on this issue to the jury in the form of special interrogatories following the jury's general verdict in Jones's favor on the excessive force claim.[10] *See* J. App'x at 131 (plaintiff's counsel arguing, with respect to submitting special interrogatories to the jury, that "[i]t seems to me that those questions have already been answered through the jury's verdict, your Honor. All of those questions were part of this trial. They were all put to the jury. . . . So to the extent that I can object to those questions, I do. They're unnecessary.").

Jones's argument goes too far. In particular, Jones overlooks the fact that the jury was considering multiple uses of force by Lt. Treubig as part of one excessive force claim (i.e., an initial tasing and a re-cycling of the taser), and the

[10] Although the verdict form returned here by the jury on liability and damages was labeled as a "Special Verdict Form," J. App'x at 181, it was in reality a general verdict because it did not ask the jury for specific findings on any particular issue of fact on the excessive force claim, but rather simply asked whether the plaintiff proved the claim as to each defendant, *see* Fed. R. Civ. P. 49 (distinguishing between special and general verdicts); *see also Babcock v. Gen. Motors Corp.*, 299 F.3d 60, 63 (1st Cir. 2002) (noting that, "[a]lthough the Verdict Form is entitled 'Special Verdict Form,' it seems clear that it was not a true 'special verdict,' as described in Rule 49(a) of the Federal Rules of Civil Procedure" because it contained no questions regarding specific findings of fact).

jury's general verdict against Lt. Treubig did not necessarily find that both acts violated the Fourth Amendment. Similarly, even assuming the general verdict against Lt. Treubig related to the second tasing, we would still not necessarily know from the general verdict how the jury resolved particular disputed issues, including the reasonableness of Lt. Treubig's belief that Jones was resisting arrest after the first tasing. For example, based upon the general verdict alone, the jury could have concluded that Lt. Treubig reasonably believed Jones was continuing to resist arrest, but that the re-cycling of the taser was an unreasonable amount of additional force given the level of resistance.

Here, for purposes of determining whether Lt. Treubig should have known that he violated clearly established law under *Tracy* as it relates to the second tasing, the critical issues at step two of *Saucier* are whether: (1) Jones was still resisting arrest at that time, or (2) even if Jones was no longer resisting arrest at that point, Lt. Treubig reasonably believed he was still resisting. Thus, in order to ensure that the jury decided both of those issues against Lt. Treubig within its general verdict, it was entirely appropriate to utilize special interrogatories to address those precise questions. As to the first issue, the jury's special interrogatory made clear that the jury concluded that Jones was not resisting arrest

at the time of the second tasing. However, as to the second issue regarding any reasonable mistaken belief as to that fact, the question was incorrectly phrased to the jury. The jury was asked, "Did Lieutenant Treubig believe that the plaintiff was resisting arrest when Lieutenant Treubig used the taser the second time?" J. App'x at 138, 187. Although the jury answered affirmatively to that question, such an answer is insufficient to shield Lt. Treubig with qualified immunity because his subjective mistake of fact, like a mistake of law, must be reasonable. *See generally Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (stating that, for purposes of qualified immunity, the officer's "subjective beliefs about the [circumstances] are irrelevant"); *see also Outlaw v. City of Hartford*, 884 F.3d 351, 369 (2d Cir. 2018) ("[T]he federal standard for qualified immunity is what a reasonable officer in [the officer's] position would have believed, not what [the officer] himself believed.").

Thus, the jury should have been asked, "Did Lieutenant Treubig *reasonably* believe that the plaintiff was resisting arrest when Lieutenant Treubig used the taser the second time?" In fact, when considering how to frame these questions following the jury's general verdict, defense counsel framed the proposed question to include the word "reasonable." *See* J. App'x at 127 (defense counsel proposing the question: "[D]id Lieutenant Treubig reasonably believe, even if

mistakenly, the plaintiff was resisting arrest when the taser was used?"). In addition, during discussions with the district court regarding the phrasing of the questions to submit to the jury, defense counsel stressed the importance of the jury being asked not only about Lt. Treubig's subjective belief, but also determining the reasonableness of that belief. *See* J. App'x at 131 (defense counsel noting: "And whether [Lt. Treubig] had a reasonable, even if mistaken, belief is a question of fact. So the jury could say you were mistaken. He is pushing himself up but you know perhaps that was some kind of active [resistance]—perhaps you could say that. . . . He could reasonably, even if mistakenly, interpret that as more resistance and so it is a fact that needs to be determined."); *see also* J. App'x at 134 (defense counsel noting, after the district court suggested it would decide the reasonableness of the mistake of fact rather than the jury, that "we do maintain that the language needs to be reasonable even if mistaken"). Nevertheless, defense counsel ultimately agreed with the district court that the word "reasonable" should be removed from the question to the jury.

Because qualified immunity is an affirmative defense, "[t]o the extent that a particular finding of fact is essential to a determination by the court that the defendant is entitled to qualified immunity, it is the responsibility of the defendant

to request that the jury be asked the pertinent question." *Zellner*, 494 F.3d at 368. Having agreed to submit the non-pertinent question to the jury, Lt. Treubig cannot then have the district court, in addressing a Rule 50 motion, usurp the jury's role by substituting its own finding on the pertinent question. *See Outlaw*, 884 F.3d at 371 ("[T]he court accordingly made findings as to facts about which the jury was deliberately not asked. We cannot allow [the officer] now to put words in the jury's mouth."); *Zellner*, 494 F.3d at 368 ("If the defendant does not make such a request, he is not entitled to have the court, in lieu of the jury, make the needed factual finding.").

In other words, in light of Jones's testimony that he offered no resistance after the first tasing because he was on the ground with his arms spread, the district court could only find that Lt. Treubig's mistaken belief regarding continued resistance was reasonable by construing the conflicting evidence in the light most favorable to Lt. Treubig rather than Jones, which the district court was not permitted to do. *See Zellner*, 494 F.3d at 371 (emphasizing that the district court is not "permitted to make findings on factual questions not submitted to the jury where those findings take the evidence in the light most favorable to the moving party, rather than the opposing party"); *Stephenson*, 332 F.3d at 78 (refusing to

"reweigh the evidence in [the officer's] favor" where the officer argued that the jury may have concluded that "[the plaintiff] did not objectively pose a threat of harm to [the officer] but that [the officer's] subjective belief of threatened harm was a mistake of fact that, in view of the evidence, the jury credited as reasonable"); *see also Curley*, 499 F.3d at 213 (noting that, on a Rule 50(a) motion, "any ambiguity in the interrogatories and the answers to them must, at this stage, be interpreted against [the moving party]").[11]

Accordingly, given the absence of any finding by the jury as to the reasonableness of the mistaken factual belief by Lt. Treubig regarding resistance

[11] We emphasize that, in connection with a summary judgment or Rule 50 motion, a district court is not required to have the jury make this reasonableness determination if no rational jury could find the officer's belief regarding the facts at issue to be unreasonable even when the evidence is construed in the light most favorable to the plaintiff, and that such facts—reasonably perceived by the defendant—establish the reasonableness of the use of force under the Fourth Amendment. *See Tracy*, 623 F.3d at 97 (concluding that the officer's use of flashlight before the arrest was reasonable as a matter of law based upon the uncontroverted facts relating to the officer's perspective, and warranted summary judgment in his favor on that particular claim); *see also Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1261 (10th Cir. 2008) (affirming grant of summary judgment where the undisputed facts demonstrated that, "even if [the officer's] assessment of the threat was mistaken, it was not objectively unreasonable"). Such is not the case here because, as discussed *supra*, the jury could have rationally found Lt. Treubig's belief regarding ongoing resistance to be unreasonable if, crediting Jones's version of events, it determined that Jones was face down on the ground with his arms spread out at the time of the second tasing.

by Jones after the first tasing, and given that a jury could find such a mistaken belief unreasonable when the facts are construed most favorably to Jones, any such mistake cannot be a proper basis for affording Lt. Treubig qualified immunity on the Rule 50 motion.[12]

c. Two Taser Cycles in Rapid Succession

Lt. Treubig also contends, and the district court agreed, that the two taser cycles occurred within rapid succession of each other, and as a result, it was reasonable for Lt. Treubig to act in the heat of the moment as he did with respect to re-cycling the taser against Jones. However, we conclude that, in light of the undisputed facts in this record, the rapid succession of the two taser cycles does not change the qualified immunity analysis.

We certainly recognize 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. As the Supreme Court has emphasized, it

[12] We note that the jury's separate finding in the special interrogatories that Lt. Treubig also mistakenly believed that a second taser cycle was needed to gain control of Jones's arm suffers from the same legal defect for purposes of a qualified immunity defense. That is, the lack of a finding of the reasonableness of that belief by the jury, and the evidence presented at trial on that issue, would have allowed the jury to find that subjective belief was unreasonable. Thus, that mistaken fact similarly cannot be a basis for qualified immunity here.

is extremely important to evaluate the record "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396; *see also id*. ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." (quotation marks and citation omitted)). It is equally important that courts not isolate a particular act of force by an officer if it was intertwined with other acts of force in rapid succession where there was no reasonable opportunity to re-assess. However, where such an opportunity to re-assess reasonably exists, officers must consider whether additional force is necessary under the circumstances confronting the officer—a point made clear under the circumstances in *Tracy*. *See Tracy*, 623 F.3d at 97-99 (granting summary judgment on, *inter alia*, the use of force while the fugitive plaintiff was still resisting arrest, but denying summary judgment regarding the use of pepper spray because it was disputed whether the plaintiff was actively resisting arrest at that point).

This is not a case where a police officer did not have a reasonable opportunity to re-assess the circumstances before utilizing additional force. Notwithstanding the fact that Lt. Treubig's two uses of the taser occurred in rapid succession, there was clear evidence that he had enough time to re-assess the

situation between the first and second use of the taser. Specifically, Lt. Treubig testified that, after the first use of the taser for five seconds, he "[r]eassess[ed] the situation" and then re-cycled the taser. J. App'x at 84; *see also id*. ("You had to depress the trigger for five cycles and then re-assess and then press the trigger again for five seconds.").

It was clearly established at the time of the incident here that, under the Fourth Amendment, the reasonableness of the amount of force used is assessed "at the moment" the force is used. *Graham*, 490 U.S. at 396; *see also Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) ("The reasonableness inquiry depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force."). Thus, any reasonable officer would have understood in April 2015 that, if he or she has an opportunity to re-assess a situation after firing a taser, any additional force (such as re-cycling the taser) must be justified under the Fourth Amendment based upon the totality of the circumstances that existed at the time of the re-assessment.

This fundamental Fourth Amendment rule of law was not only clear at the time of Lt. Treubig's conduct from Supreme Court cases and this Court's decisions, but also was reinforced by a compelling consensus of cases in our sister circuits,

including cases where courts held that additional tasing(s) in a rapidly evolving situation could violate the Fourth Amendment if the prior tasing(s) of the suspect would have been sufficient in light of the circumstances.[13] *See Meyers v. Baltimore Cty.*, 713 F.3d 723, 733 (4th Cir. 2013) ("Our conclusion that [the officer's] first three uses of the taser were objectively reasonable does not resolve our inquiry into the reasonableness of the seven additional taser shocks that he administered, because force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated." (quotation marks omitted)); *Abbott*, 705 F.3d at 729, 731, 733 (holding, in a "rapidly unfolding situation," that qualified immunity did not protect an officer who squeezed the taser trigger a second time after the tased suspect, prone on the ground, did not

[13] Although Lt. Treubig objects to reliance on cases outside this Circuit for purposes of the qualified immunity, we have previously held that "[e]ven if this or other circuit courts have not explicitly held a law or course of conduct to be unconstitutional, the unconstitutionality of that law or course of conduct will nonetheless be treated as clearly established if decisions by this or other courts 'clearly foreshadow a particular ruling on the issue.'" *Scott v. Fischer*, 616 F.3d 100, 105 (2d Cir. 2010) (quoting *Varrone v. Bilotti*, 123 F.3d 75, 79 (2d Cir. 1997)); *see also Terebesi*, 764 F.3d at 231 n.12 ("Though not directly binding on this Court, the decisions of other circuits may reflect that the contours of the right in question are clearly established."). Therefore, we are permitted to consider this consensus of authority outside the Circuit although, as noted above, we conclude that the right was clearly established by Supreme Court and Second Circuit precedent independent of this consensus of other circuits.

follow an order to roll over, and emphasizing that "the fact that an initial use of force may have been justified does not mean that all subsequent uses of that force were similarly justified"); *Mattos v. Agarano*, 661 F.3d 433, 445 (9th Cir. 2011) (finding that reasonable factfinder could conclude force was excessive because "[t]hree tasings in such rapid succession provided no time for [the plaintiff] to recover from the extreme pain she experienced, gather herself, and reconsider her refusal to comply"); *see also Goodwin v. City of Painesville*, 781 F.3d 314, 324 (6th Cir. 2015) ("Even if a jury were to credit the Officers' assertions that [the suspect] posed a danger to them and that he had resisted at the apartment door, the force used against him could still be found to be excessive. We have held that even previously-resisting suspects have a constitutional right to be free of a gratuitous application of a Taser once they have stopped all resistance.").

Accordingly, because there was evidence (from Lt. Treubig himself) that he had time to re-assess whether Jones was still resisting arrest before using the taser a second time against Jones, the rapidly evolving nature of the situation as a whole does not cloak Lt. Treubig with qualified immunity for the unreasonable use of force following that re-assessment.

d. The Need to Handcuff Jones

Lt. Treubig's argument that qualified immunity should also attach here because Jones was still uncuffed at the time of the second use of the taser is similarly flawed. In making this assertion, Lt. Treubig points to the fact that the holding in *Tracy* addressed a situation where there was evidence that the plaintiff was already handcuffed at the time the pepper spray was used. Thus, Lt. Treubig suggests that a reasonable officer would not understand from *Tracy* that the officer could violate the Fourth Amendment by re-cycling a taser into an arrestee who had been resisting and was still uncuffed. As discussed earlier, such a narrow reading of *Tracy* is simply incompatible with the language in *Tracy* which, while referencing the evidence that the plaintiff was handcuffed when pepper sprayed, made clear that it was relying on a broader Fourth Amendment principle that "a significant degree of force . . . should not be used lightly or gratuitously against an arrestee who is complying with police commands or otherwise poses no immediate threat to the arresting officer." *Tracy*, 623 F.3d at 98. It was established long before *Tracy* that, although the fact that an individual initially resists arrest "no doubt justifies the officer's use of *some* degree of force, . . . it does not give the

officer license to use force without limit." *Sullivan v. Gagnier*, 225 F.3d 161, 165-66 (2d Cir. 2000).

Thus, although the fact that a previously resisting arrestee had not yet been handcuffed may be an important factor in assessing the reasonableness of an officer's force, we have never held that the need to complete the arrest authorizes an additional level of force which would not be reasonably necessary to allow the officers to handcuff that arrestee safely and without further incident. *See generally Brown v. City of New York*, 798 F.3d 94, 102 (2d Cir. 2015) ("The officers could be entitled to a summary judgment only if there existed a *per se* rule that an arrestee's refusal to submit to the easy application of handcuffs always permitted police officers to use substantial force, including taking a person to the ground and incapacitating her with pepper s[p]ray, to accomplish handcuffing. We know of no such rule.").

Here, even though Jones's hands were not yet cuffed at the time of the second tasing, there was more than sufficient evidence for a rational jury to conclude that he was no longer resisting arrest after the first tasing or posing an ongoing threat to the safety of the officers or others. Thus, any belief by Lt. Treubig that the second tasing was necessary to effectuate handcuffing Jones was

unreasonable. Accordingly, we conclude that, at the time of Lt. Treubig's conduct in April 2015, no reasonable officer would believe that, if an arrestee was no longer resisting and face down on the ground with his arms spread after the first tasing (as Jones testified here), the Fourth Amendment would permit an additional use of the taser simply because the arrestee still needed to be handcuffed by the surrounding officers. Therefore, construing the evidence most favorably to Jones, the fact that he was not yet handcuffed at the time of the second tasing provides no grounds for the doctrine of qualified immunity to disturb the jury's finding of excessive force relating to Lt. Treubig's conduct in this case.

This Court's analysis as it relates to the scope of *Tracy*'s holding for purposes of qualified immunity, as applied to the particular factual circumstances of this case (including the need to handcuff an arrestee who had been resisting), is completely consistent with our decision in *Soto v. Gaudett*, 862 F.3d 148 (2d Cir. 2017). In *Soto*, we held that one officer, who tased a fleeing suspect, was entitled to qualified immunity as a matter of law. *Id.* at 156. On the other hand, the Court found that two different officers who tased the suspect a second time after he fell "flat on his face" were not entitled to qualified immunity as a matter of law at the summary judgment stage because of disputed issues of material fact. *Id.* at 153,

156, 161. With respect to the latter officers, the complaint alleged that Officer Robinson "tased Soto '[w]hen Mr. Soto, who posed no physical threat to the officers pursuing him, attempted to return to his feet.'" *Id.* at 159 (alteration in original). Although *Soto* was decided after the events in this case, the incident in *Soto* occurred in 2008, seven years before the incident here, and we held it was clearly established at that time that officers violated the Fourth Amendment when they tased a subject who was already "on the ground, completely entangled in taser wires," in close proximity to the officers, and "struggling even to get into a push-up position." *Id.* at 160. In so holding, citing *Tracy*, we emphasized that "[t]hough the use of force may be reasonable against a suspect who is fleeing, it may be objectively unreasonable against that suspect when he has been stopped and no longer poses a risk of flight." *Id.* at 158 (citing *Tracy*, 623 F.3d at 96-98). Therefore, in *Soto*, as is the situation here, we concluded that qualified immunity would not immunize an officer for tasing an uncuffed arrestee a second time where the arrestee was no longer resisting and was not posing a threat to the safety of officers or others.

Lt. Treubig seeks to distinguish *Soto* because, unlike the plaintiff there, "Jones suffered no injuries from the taser at all." Appellee Br. at 32. We find that

argument unpersuasive. Jones testified to temporary injury—that is, he felt numb for 30 to 40 minutes after being tased by Lt. Treubig. And, in any event, it is well established that, although the absence of significant injury is relevant to the question of excessive force, it is not dispositive under a Fourth Amendment analysis. *See Amato v. City of Saratoga Springs*, 170 F.3d 311, 317 (2d Cir. 1999) ("While the main purpose of a § 1983 damages award is to compensate individuals for injuries caused by the deprivation of constitutional rights, a litigant is entitled to an award of nominal damages upon proof of a violation of a substantive constitutional right even in the absence of actual compensable injury."); *Robison v. Via*, 821 F.2d 913, 923-24 (2d Cir. 1987) (concluding that excessive force claim survived summary judgment where bruising resulted from the arrest, but required no medical treatment). Thus, if the jury rationally finds that a constitutional violation occurred because the officer's significant use of force was excessive and awards nominal damages (as the jury did here), the absence of a compensable injury does not alone provide a ground for qualified immunity.

Although we hold that Lt. Treubig had fair warning of this clearly established law based upon our decision in *Tracy* years before his conduct, we again note the additional warning provided by the overwhelming persuasive

authority in other circuits that, prior to Lt. Treubig's conduct in April 2015, consistently reached the same conclusion with respect to the use of a taser, even where a formerly resisting suspect had not yet been handcuffed. *See, e.g.*, *Smith v. Conway Cty.*, 759 F.3d 853, 860-61 (8th Cir. 2014) (holding that, even though the first tasing of the prisoner was justified because he had just kicked a guard, the second tasing would be unreasonable if he was no longer actively resisting, posing a security concern, or disobeying orders); *Abbott*, 705 F.3d at 732 (concluding that "it was clearly established on June 25, 2007, that it is unlawful to deploy a taser in dart mode against a nonviolent misdemeanant who had just been tased . . . and made no movement when, after the first tasing, the officer instructed her to turn over"); *Meyers*, 713 F.3d at 735 (concluding, in a case involving ten tasing incidents against mentally ill man initially holding a baseball bat, that, although the first three tasings were reasonable because of the threat the man posed, it was clearly established in 2007 that it was excessive force to use a taser against a suspect once he was "unarmed and effectively . . . secured with several officers sitting on his back"); *Bryan*, 630 F.3d at 828, 830 (finding it unreasonable to use a taser against an uncuffed suspect who was unarmed, non-threatening, and not resisting); *Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009) ("[T]he law was sufficiently

clear to inform a reasonable officer that it was unlawful to Taser a nonviolent, suspected misdemeanant who was not fleeing or resisting arrest, who posed little to no threat to anyone's safety, and whose only noncompliance with the officer's commands was to disobey two orders . . . ."). Accordingly, existing precedent from this Court, as well as the overwhelming consensus of cases from other circuits, "placed the . . . constitutional question beyond debate," such that it was "'sufficiently clear' that every 'reasonable official would [have understood] that what he [was] doing violate[d] that right,'" *al-Kidd*, 563 U.S. at 741 (first alteration in original) (quoting *Anderson*, 483 U.S. at 640), under the factual circumstances that we must assume for purposes of the Rule 50 motion in this case.

In sum, upon a review of the relevant legal authority, we hold that it was clearly established as of April 2015 that a police officer cannot use significant force, such as a taser, against an individual who is no longer resisting or posing a threat to the officers or others. In light of the jury's findings and viewing the record on the remaining factual disputes in the light most favorable to Jones, we must assume for the qualified immunity analysis that Jones was subdued when Lt. Treubig re-cycled his taser, in that Jones was no longer resisting arrest or posing a threat to the officers or others, but rather lying face down on the ground with his

arms spread. No qualified immunity can thus exist on those facts. As a result, we reverse the district court's grant of judgment as a matter of law, and instruct that the jury verdict against Lt. Treubig should be reinstated.

CONCLUSION

Based on the foregoing, we conclude that Lt. Treubig is not entitled to qualified immunity for the second tasing of Jones. Accordingly, the judgment of the district court is **REVERSED**, and this case is **REMANDED** for proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court's Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation "Summary Order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of September, two thousand seventeen.

Present:

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

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, 16-1366-cv

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.

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

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.*).

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

[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.

Defendant-Appellee 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.

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 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, 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 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 under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

Initially, the district court denied summary judgment, concluding that Dr. Sullivan's 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 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 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. Cty. of Erie*, 654 F.3d 324, 340 (2d Cir. 2011) (citation omitted).

III. DISCUSSION

A. Qualified Immunity

Qualified immunity 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 (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 (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 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 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 follow commands, his close proximity to a lethal weapon, and his behavior up to that point, the arresting 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.

[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.

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 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 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.C. 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 Flores fired the final shot, the jury was able to conclude that Officer Flores 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 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 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 plainly erroneous. *Id.*

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 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 judgment of the district court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

Verdict Sheets

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

(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.*]

Legislative Materials

I

117TH CONGRESS
1ST SESSION

H. R. 288

To amend the Revised Statute to codify the defense of qualified immunity in the case of any action under section 1979, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 13, 2021

Mr. BANKS (for himself and Mr. STEUBE) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the Revised Statute to codify the defense of qualified immunity in the case of any action under section 1979, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Qualified Immunity Act of 2021''.

SEC. 2. FINDINGS.

Congress finds the following:

(1) Qualified immunity is intended for all but the plainly incompetent or those who knowingly violate the law and is meant to give government offi-

cials breathing room to make reasonable mistakes of fact and law.

(2) The Supreme Court has observed that qualified immunity balances two important interests, the need to hold law enforcement officers accountable when they exercise power irresponsibly and the need to shield officers from harassment, distraction, and liability when they perform their duties reasonably.

SEC. 3. CODIFICATION OF QUALIFIED IMMUNITY.

(a) IN GENERAL.—Section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended—

(1) by inserting ''(a) IN GENERAL—'' before ''Every person''; and

(2) by adding at the end the following new subsection:

''(b) APPLICABILITY TO LAW ENFORCEMENT OFFICERS.—

''(1) A law enforcement officer subject to an action under this section in their individual capacity shall not be found liable if such law enforcement officer establishes that—

''(A) the right, privilege, or immunity secured by the Constitution or Federal law was not clearly established at the time of their dep-

rivation by the law enforcement officer, or that at this time, the state of the law was not sufficiently clear that every reasonable law enforcement officer would have understood that the conduct alleged constituted a violation of the Constitution or Federal law; or

''(B) a court of competent jurisdiction had issued a final decision on the merits holding, without reversal, vacatur, or preemption, that the specific conduct alleged to be unlawful was consistent with the Constitution and Federal laws.

''(2) A law enforcement agency or unit of local government who employed a law enforcement officer subject to an action under subsection (a), shall not be liable for such action if the law enforcement officer is found not liable under paragraph (1) and was acting within the scope of their employment.

''(c) DEFINITIONS.—In this section:

''(1) LAW ENFORCEMENT OFFICER.—The term 'law enforcement officer' means any Federal, State, Tribal, or local official who is authorized by law to engage in or supervise the prevention, detection, investigation, or the incarceration of any person for any violation of law, and has statutory powers of ar-

rest or apprehension, including police officers and other agents of a law enforcement agency.

''(2) LAW ENFORCEMENT AGENCY.—The term 'law enforcement agency' means any Federal, State, Tribal, or local public agency engaged in supervision, prevention, detection, investigation, or the incarceration of any person for any violation of law, and has statutory powers of arrest or apprehension.''.

(b) EFFECTIVE DATE.—The amendments made under subsection (a) shall take effect on the date that is 180 days after the date of the enactment of this Act.

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I

117TH CONGRESS
1ST SESSION

H. R. 1470

To amend the Revised Statutes to remove the defense of qualified immunity in the case of any action under section 1979, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 1, 2021

Ms. PRESSLEY (for herself, Mrs. BEATTY, Mr. ESPAILLAT, Ms. NORTON, Ms. ADAMS, Mr. GARCÍA of Illinois, Mr. KHANNA, Ms. PINGREE, Mr. BLUMENAUER, Mr. MEEKS, Mr. LEVIN of Michigan, Ms. TLAIB, Mr. TAKANO, Mr. RUSH, Mrs. KIRKPATRICK, Mrs. CAROLYN B. MALONEY of New York, Ms. SCHAKOWSKY, Mr. TORRES of New York, Ms. DEGETTE, Mr. JOHNSON of Georgia, Mr. JONES, Mr. HASTINGS, Ms. CLARK of Massachusetts, Ms. VELÁZQUEZ, Mr. GOMEZ, Ms. LEE of California, Mr. SMITH of Washington, Mr. MCGOVERN, Mrs. WATSON COLEMAN, Ms. KAPTUR, Ms. WILLIAMS of Georgia, Ms. DELBENE, Mr. MOULTON, Ms. BUSH, Ms. BONAMICI, Ms. JAYAPAL, and Mr. DAVID SCOTT of Georgia) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend the Revised Statutes to remove the defense of qualified immunity in the case of any action under section 1979, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Ending Qualified Immunity Act''.

SEC. 2. FINDINGS.

The Congress finds as follows:

(1) In 1871, Congress passed the Ku Klux Klan Act to enforce the Fourteenth Amendment and combat rampant violations of civil and constitutionally secured rights across the Nation, particularly those of newly freed slaves and other Black Americans in the post-Civil War South

(2) Included in the Act was a provision, now codified at section 1983 of title 42, United States Code, which provides a cause of action for persons to file lawsuits against people acting under color of State law, including State or local officials, who violate their Federal legal and constitutionally secured rights.

(3) Under section 1979 of the Revised Statutes (42 U.S.C. 1983) a person may be held liable for acting under color of State or local law, even if they are not acting in accordance with State law.

(4) Section 1979 has never included a defense or immunity for government officials who act in good faith when violating rights, nor has it ever had a defense or immunity based on whether the right was ''clearly established'' at the time of the violation.

(5) From the law's beginning in 1871, through the 1960s, government actors were not afforded qualified immunity for violating rights.

(6) In 1967, the Supreme Court in Pierson v. Ray, 386 U.S. 547, suddenly found that government actors had a good faith defense for making arrests under unconstitutional statutes based on a common law defense for the tort of false arrest.

(7) The Court later extended this beyond false arrests, turning it into a general good faith defense for government officials.

(8) Finally, in Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Court found the subjective search for good faith in the government actor unnecessary, and replaced it with an ''objective reasonableness'' standard that requires that the right be ''clearly established'' at the time of the violation for the defendant to be liable.

(9) This doctrine of qualified immunity has severely limited the ability of many plaintiffs to recover damages under section 1983 when their rights have been violated by State and local officials. As a result, the intent of Congress in passing the law has been frustrated, and Americans' rights secured by

the Constitution have not been appropriately protected.

SEC. 3. SENSE OF THE CONGRESS.

It is the sense of the Congress that we must correct the erroneous interpretation of section 1979 of the Revised Statutes which provides for qualified immunity, and reiterate the standard found on the face of the statute, which does not limit liability on the basis of the defendant's good faith beliefs or on the basis that the right was not ''clearly established'' at the time of the violation.

SEC. 4. REMOVAL OF QUALIFIED IMMUNITY.

Section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended by adding at the end the following: ''In any suit pending on, or filed after, the effective date of the Ending Qualified Immunity Act of 2021, it shall not be a defense or immunity to any action brought under this section that the defendant was acting in good faith, or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time when it was committed. Nor shall it be a defense or immunity that the rights, privileges, or immunities secured by the Constitution or Federal laws were not clearly established at the time of their deprivation by the defendant, or that the state of the law was otherwise such that the defendant

could not reasonably have been expected to know whether his or her conduct was lawful.''.

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AN ACT

RELATING TO CIVIL RIGHTS; ENACTING THE NEW MEXICO CIVIL RIGHTS ACT; PERMITTING AN INDIVIDUAL TO BRING A CLAIM AGAINST A PUBLIC BODY OR PERSON ACTING ON BEHALF OF OR UNDER THE AUTHORITY OF A PUBLIC BODY FOR A VIOLATION OF THE INDIVIDUAL'S RIGHTS, PRIVILEGES OR IMMUNITIES ARISING PURSUANT TO THE BILL OF RIGHTS OF THE CONSTITUTION OF NEW MEXICO; PROHIBITING THE USE OF THE DEFENSE OF QUALIFIED IMMUNITY; PERMITTING ATTORNEY FEES; LIMITING RECOVERY; PROVIDING A THREE-YEAR STATUTE OF LIMITATIONS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. SHORT TITLE.--This act may be cited as the "New Mexico Civil Rights Act".

SECTION 2. DEFINITION.--As used in the New Mexico Civil Rights Act, "public body" means a state or local government, an advisory board, a commission, an agency or an entity created by the constitution of New Mexico or any branch of government that receives public funding, including political subdivisions, special tax districts, school districts and institutions of higher education, but not including an acequia or community ditch, a soil and water conservation district, a land grant-merced, a mutual domestic water consumers association or other association organized pursuant to the Sanitary Projects Act or a water users' association.

SECTION 3. CLAIM FOR VIOLATION OF RIGHTS ESTABLISHED PURSUANT TO THE BILL OF RIGHTS OF THE CONSTITUTION OF NEW MEXICO.--

A. A public body or person acting on behalf of, under color of or within the course and scope of the authority of a public body shall not subject or cause to be subjected any resident of New Mexico or person within the state to deprivation of any rights, privileges or immunities secured pursuant to the bill of rights of the constitution of New Mexico.

B. A person who claims to have suffered a deprivation of any rights, privileges or immunities pursuant to the bill of rights of the constitution of New Mexico due to acts or omissions of a public body or person acting on behalf of, under color of or within the course and scope of the authority of a public body may maintain an action to establish liability and recover actual damages and equitable or injunctive relief in any New Mexico district court.

C. Claims brought pursuant to the New Mexico Civil Rights Act shall be brought exclusively against a public body. Any public body named in an action filed pursuant to the New Mexico Civil Rights Act shall be held liable for conduct of individuals acting on behalf of, under color of or within the course and scope of the authority of the public body.

D. Individuals employed by a public body shall be prohibited from using the New Mexico Civil Rights Act to pursue a claim arising from the individual's employment by the public body.

E. The remedies provided for in the New Mexico Civil Rights Act are not exclusive and shall be in addition to any other remedies prescribed by law or available pursuant to common law.

SECTION 4. PROHIBITING THE USE OF THE DEFENSE OF QUALIFIED IMMUNITY.--In any claim for damages or relief under the New Mexico Civil Rights Act, no public body or person acting on behalf of, under color of or within the course and scope of the authority of a public body shall enjoy the defense of qualified immunity for causing the deprivation of any rights, privileges or immunities secured by the bill of rights of the constitution of New Mexico.

SECTION 5. ATTORNEY FEES.--In any action brought under the New Mexico Civil Rights Act, the court may, in its discretion, allow a prevailing plaintiff or plaintiffs reasonable attorney fees and costs to be paid by the defendant.

SECTION 6. LIMITATION ON RECOVERY.--

A. In any action for damages against a public body pursuant to the New Mexico Civil Rights Act, the liability per occurrence shall not exceed the sum of two million

dollars ($2,000,000) per claimant, inclusive of the claimant's costs of action and reasonable attorney fees. In jury cases, the jury shall not be given any instructions dealing with this limitation. Interest shall be allowed on judgments against a public body at a rate equal to two percentage points above the bank prime loan rate published by the board of governors of the federal reserve system on the last business day of the month preceding entry of the judgment. Interest shall be computed daily from the date of the entry of the judgment until the date of payment.

B. As of July 1, 2022 and on July 1 of each successive year, the maximum recovery limit shall be increased for the cost of living as provided in Subsection C of this section.

C. On July 1, 2022 and on July 1 of each successive year, the maximum recovery limit shall be increased by the increase in the cost of living. The increase in the cost of living shall be measured by the percentage increase as of August of the immediately preceding year over the level as of August of the previous year of the consumer price index for all urban consumers, United States city average for all items, or its successor index, as published by the United States department of labor or its successor agency, with the amount of the increase rounded to the nearest multiple of ten thousand dollars ($10,000);

however, the maximum recovery limit shall not be adjusted downward as a result of a decrease in the cost of living. The risk management division of the general services department shall publish by May 1 of each year the adjusted maximum recovery limit that shall take effect the following July 1.

SECTION 7. STATUTE OF LIMITATIONS AND ABATEMENT.--A claim made pursuant to the New Mexico Civil Rights Act shall be commenced no later than three years from the date a claim can be brought for the deprivation of a right, privilege or immunity pursuant to the bill of rights of the constitution of New Mexico unless a longer statute of limitations is otherwise provided by state law.

SECTION 8. INDEMNIFICATION BY PUBLIC BODY.--A judgment awarded pursuant to the New Mexico Civil Rights Act against a person acting on behalf of, under color of or within the course and scope of the authority of the public body shall be paid by the public body. The public body shall also pay for all litigation costs for the public body and for any person acting on behalf of, under color of or within the course and scope of the authority of the public body, including attorney fees.

SECTION 9. WAIVER OF SOVEREIGN IMMUNITY.--The state shall not have sovereign immunity for itself or any public body within the state for claims brought pursuant to the New

Mexico Civil Rights Act, and the public body or person acting on behalf of, under color of or within the course and scope of the authority of the public body provided pursuant to the New Mexico Civil Rights Act shall not assert sovereign immunity as a defense or bar to an action.

SECTION 10. COMMON LAW JUDICIAL, LEGISLATIVE OR OTHER ESTABLISHED IMMUNITY.--The prohibition on the use of the defense of qualified immunity pursuant to Section 4 of the New Mexico Civil Rights Act and the waiver of sovereign immunity pursuant to Section 9 of that act shall not abrogate judicial immunity, legislative immunity or any other constitutional, statutory or common law immunity.

SECTION 11. RECORDS OF CLAIMS.--Each public body shall maintain a record of all final judgments and settlements paid by the public body for claims made pursuant to the New Mexico Civil Rights Act and attach a copy of the complaint to each record. All judgments, settlements and complaints are subject to disclosure pursuant to the Inspection of Public Records Act.

SECTION 12. PROSPECTIVE APPLICATION.--Claims arising solely from acts or omissions that occurred prior to July 1, 2021 may not be brought pursuant to the New Mexico Civil Rights Act.

SECTION 13. NOTICE OF CLAIMS.--

A. Every person who claims damages from an act or

omission of a certified law enforcement officer under the New Mexico Civil Rights Act shall cause to be presented to the certified law enforcement officer's agency or department, within one year after an occurrence giving rise to a claim under the New Mexico Civil Rights Act, a written notice stating the time, place and circumstances of the loss or injury.

B. No suit or action for which immunity has been waived under the New Mexico Civil Rights Act shall be maintained, and no court shall have jurisdiction to consider any suit or action against the state or any local public body, unless notice has been given as required by this section or unless the governmental entity had actual notice of the occurrence. The time for giving notice does not include the time, not exceeding one year, during which the injured person is incapacitated from giving the notice by reason of injury.

C. When a claim for which immunity has been waived under the New Mexico Civil Rights Act is one for wrongful death, the required notice may be presented by, or on behalf of, the personal representative of the deceased person or any person claiming benefits of the proceeds of a wrongful death action, or the consular officer of a foreign country of which the deceased was a citizen, within one year and six months after the date of the occurrence of the injury that resulted

in the death; but if the person for whose death the claim is made has presented a notice that would have been sufficient had the person lived, an action for wrongful death may be brought without any additional notice.

SECTION 14. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2021.

Scholarly Perspectives

AFTER QUALIFIED IMMUNITY

*Joanna C. Schwartz**

Courts, scholars, and advocacy organizations across the political spectrum are calling on the Supreme Court to limit qualified immunity or do away with the defense altogether. They argue—and offer compelling evidence to show—the doctrine bears little resemblance to defenses available when Section 1983 became law, undermines government accountability, and is both unnecessary and ill-suited to shield government defendants from the burdens and distractions of litigation. Some Supreme Court Justices appear to share critics' concerns. Indeed, in 2017, Justice Thomas wrote that "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence." If the Court does reconsider qualified immunity, it will find compelling reasons to abolish or greatly limit the defense. Yet the Court may be reluctant to take this type of dramatic action for fear that doing so would harm government and society as a whole.

This Article offers five predictions about how constitutional litigation would function in a world without qualified immunity that should assuage these concerns. First, there would be clarification of the law but modest, if any, adjustment to the scope of constitutional rights. Second, plaintiffs' and defendants' litigation success rates would remain relatively constant. Third, the average cost, time, and complexity associated with litigating constitutional claims would decrease. Fourth, more civil rights lawsuits would likely be filed, but other doctrines and financial considerations would mean that attorneys would continue to have strong incentives to decline insubstantial cases. Fifth, indemnification and budgeting practices would continue to shield most government agencies and officials from the financial consequences of damages awards.

If these predictions are correct, abolishing qualified immunity would clarify the law, reduce the costs of litigation, and shift the focus of Section 1983 litigation to what should be the critical question at issue in these cases—whether government officials have exceeded their constitutional authority. But eliminating qualified immunity would not significantly alter the scope of constitutional protections, dramatically increase plaintiffs' success rates, or transform government practices that currently dampen the effects of lawsuits on officers' and officials' decisionmaking. Doomsday scenarios imagined by some commentators—of courthouses flooded with

* Professor of Law, UCLA School of Law. Thanks to Karen Blum, Alan Chen, Richard Fallon, Barry Friedman, Aziz Huq, Jim Pfander, Jack Preis, Richard Re, Alex Reinert, Fred Smith, and Chris Walker for comments on earlier drafts. Thanks also to Blake Berich and Hannah Pollack for excellent research assistance, and thanks to Oluwatumise Asebiomo, Grace Assaye, Rebecca Arno, Tyler Becker, Benjamin Covington, Michael Fetterman, Stephen Piotrkowski, and the editors of the *Columbia Law Review* for excellent editorial assistance.

frivolous claims—would not come to pass. And constitutional litigation would often still fail to hold government officials accountable when they exercise power irresponsibly.

The Supreme Court should not avoid reconsidering qualified immunity for fear that doing so would dramatically magnify the effects of lawsuits against government officials. And government accountability advocates should recognize that eliminating qualified immunity would not fundamentally shift dynamics that make it difficult for plaintiffs to redress constitutional violations and deter government wrongdoing.

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INTRODUCTION

In this Article, I imagine a world without qualified immunity.[1] This may seem like a purely academic exercise. After all, the Supreme Court has been downright bullish about qualified immunity doctrine in recent years.[2] Since 2005, when John Roberts became Chief Justice, the Court has granted certiorari to consider twenty qualified immunity denials, and ruled in the government's favor every time.[3] The Court has repeatedly

1. Qualified immunity shields law enforcement officers and other executive officials from damages liability so long as they have not violated "clearly established law." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). For an overview of qualified immunity, what constitutes clearly established law, and the ways in which the doctrine has developed, see generally Joanna C. Schwartz, The Case Against Qualified Immunity, 93 Notre Dame L. Rev. 1797 (2018) [hereinafter Schwartz, Case Against].

2. See Schwartz, Case Against, supra note 1, at 1798 (describing the Supreme Court's recent qualified immunity decisions). For other descriptions and assessments of the Court's recent qualified immunity jurisprudence, see generally Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, Qualified Immunity Developments: Not Much *Hope* Left for Plaintiffs, 29 Touro L. Rev. 633 (2013) [hereinafter Blum et al., Qualified Immunity Developments]; Karen M. Blum, Qualified Immunity: Time to Change the Message, 93 Notre Dame L. Rev. 1887 (2018) [hereinafter Blum, Time to Change].

3. See William Baude, Is Qualified Immunity Unlawful?, 106 Calif. L. Rev. 45, 88–90 (2018) (listing the Supreme Court's qualified immunity decisions since 1982). Note that Baude "omits some additional cases concerning qualified immunity that were decided only on procedural grounds and without application of the clearly established standard." Id. at 82 n.219. By Karen Blum's count, the Court has "confronted the issue of qualified immunity

chastised lower courts for failing to use qualified immunity to shield government officials from damages liability.[4] And the Court's recent decisions have further expanded qualified immunity's reach.[5]

But there have been growing calls by courts,[6] as well as by a number of

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in over thirty cases" since *Harlow*. Blum, Time to Change, supra note 2, at 1887 & n.2. For the three most recent Supreme Court decisions postdating Baude's analysis that reversed local court denials of qualified immunity, see City of Escondido v. Emmons, 139 S. Ct. 500, 503–04 (2019); Kisela v. Hughes, 138 S. Ct. 1148, 1152–55 (2018); District of Columbia v. Wesby, 138 S. Ct. 577, 589–93 (2018).

4. See, e.g., *Emmons*, 139 S. Ct. at 503 ("The Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances. Instead, . . . [it] defined the clearly established right at a high level of generality . . . saying . . . the 'right to be free of excessive force' was clearly established."); White v. Pauly, 137 S. Ct. 548, 551–52 (2017) (noting the Supreme Court has "revers[ed] federal courts in qualified immunity cases . . . both because qualified immunity is important to 'society as a whole,' and because as 'an immunity from suit,' qualified immunity 'is effectively lost if a case is erroneously permitted to go to trial'" (citations omitted) (internal quotation marks omitted) (quoting City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015); Pearson v. Callahan, 555 U.S. 223, 231 (2009))); *Sheehan*, 135 S. Ct. at 1774 n.3 ("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*, 457 U.S. at 814)).

5. See, e.g., Baude, supra note 3, at 48 (explaining that the Supreme Court has recently given qualified immunity "pride of place on the Court's docket"); Kit Kinports, The Supreme Court's Quiet Expansion of Qualified Immunity, 100 Minn. L. Rev. Headnotes 62, 64 (2016) (observing that in recent qualified immunity decisions, the Court "has engaged in a pattern of covertly broadening the defense, describing it in increasingly generous terms and inexplicably adding qualifiers to precedent that then take on a life of their own").

6. See, e.g., Zadeh v. Robinson, 928 F.3d 457, 480–81 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part) (observing that "a growing, cross-ideological chorus of jurists and scholars" are calling for reconsideration of qualified immunity). For other decisions critical of qualified immunity see, e.g., Horvath v. City of Leander, No. 18-51011, 2020 WL 104345, at *10–13 (5th Cir. Jan. 9, 2020) (Ho., J., concurring in the judgment in part and dissenting in part) (explaining that he would "welcome a principled re-evaluation of our precedents" related to qualified immunity); Ventura v. Rutledge, 398 F. Supp. 3d 682, 697 n.6 (E.D. Cal. 2019) ("[T]his judge joins with those who have endorsed a complete re-examination 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 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, *18 n.174 (D. Kan. Aug. 7, 2018) ("[T]he court is 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 *6–7 (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 *4–5 (N.D. Ohio Dec. 6, 2017) (criticizing the Supreme Court for allowing interlocutory appeals of qualified immunity denials).

commentators[7] and advocacy organizations across the political spectrum,[8] to reconsider qualified immunity or do away with the defense altogether. The Supreme Court originally described qualified immunity as an extension of common law defenses in existence when Section 1983 became law and later justified the doctrine on policy grounds—as a means of balancing an interest in government accountability against an interest in shielding government officials from the burdens of suit in insubstantial cases.[9] Yet critics contend that the doctrine bears little resemblance to the common law immunities in existence when Congress enacted Section 1983, undermines government accountability, and is both unnecessary and ill-suited to shield government officials from the burdens and distractions of being sued.[10]

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7. See, e.g., Matt Ford, Should Cops Be Immune from Lawsuits?, New Republic (Sept. 12, 2018), https://newrepublic.com/article/151168/legal-revolt-qualified-immunity [https://perma.cc/TSJ9-B9HX] (highlighting examples of the "broad, cross-ideological push against qualified immunity" and the need for the Supreme Court to reform the doctrine); David French, End Qualified Immunity, Nat'l Rev. (Sept. 13, 2018), https://www.nationalreview.com/2018/09/end-qualified-immunity-supreme-court/ [https://perma.cc/5ZWC-93HD] ("Judges created qualified immunity, and they can end it. It's past time to impose true accountability on public servants who violate citizens' constitutional rights."); George Leef, Qualified Immunity—A Rootless Doctrine the Court Should Jettison, Forbes (Mar. 21, 2018), https://www.forbes.com/sites/georgeleef/2018/03/21/qualified-immunity-a-rootless-doctrine-the-court-should-jettison [https://perma.cc/NC7K-8WT9] (arguing that "[t]he [Supreme] Court should go back to its original understanding of Section 1983—that it imposes strict liability on government officials for violations of citizens' constitutional rights"); see also Blum, Time to Change, supra note 2, at 1892 (concluding that "the doctrine of qualified immunity is beyond repair" and urging "the [Supreme] Court to make the reformation of its qualified immunity doctrine unnecessary by revisiting and revamping another of its confusing creations, the doctrine of municipal liability under Section 1983"); Schwartz, Case Against, supra note 1, at 1800 (arguing that "[t]he Justices can end qualified immunity in a single decision, and they should end it now").

8. See, e.g., Emma Andersson, The Supreme Court Gives Police a Green Light to 'Shoot First and Think Later,' ACLU (Apr. 9, 2018), https://www.aclu.org/blog/criminal-law-reform/reforming-police/supreme-court-gives-police-green-light-shoot-first-and [https://perma.cc/TJ9B-VV3M] (explaining that a recent Supreme Court qualified immunity decision "contributes to the deep deficit in police accountability throughout our country"); Jay Schweikert, Openings in the Front in the Campaign Against Qualified Immunity, Cato Inst. (June 12, 2018), https://www.cato.org/blog/openings-front-campaign-against-qualified-immunity [https://perma.cc/GQ66-XA75] (describing "Cato's ongoing campaign to challenge the doctrine of qualified immunity"); see also infra note 16 and accompanying text.

9. See Wyatt v. Cole, 504 U.S. 158, 170–71 (1992) (Kennedy, J., concurring) ("Our immunity doctrine is . . . based on the existence of common-law rules in 1871, rather than in 'freewheeling policy choice[s].' . . . [H]owever, we have diverged to a substantial degree from the historical standards. . . . The transformation was justified by the special policy concerns arising from public officials' exposure to repeated suits." (first alteration in original) (quoting Malley v. Briggs, 475 U.S. 335, 342 (1986))); Anderson v. Creighton, 483 U.S. 635, 644–45 (1987) (explaining that the Court's immunity decisions were "made in light of the 'common-law tradition,'" but that the doctrine was "completely reformulated" in *Harlow* "along principles not at all embodied in the common law" (quoting *Malley*, 475 U.S. at 342)); see also Schwartz, Case Against, supra note 1, at 1801–03 (describing these various justifications for the doctrine).

10. See supra notes 6–8.

Some Supreme Court Justices appear sympathetic to these critiques. Justice Sotomayor, sometimes joined by Justice Ginsburg, has criticized the Court's qualified immunity decisions for undermining government accountability by "sanctioning a 'shoot first, think later' approach to policing."[11] Justice Breyer concluded that qualified immunity was unnecessary for private defendants because they were likely to be indemnified by their employers[12]—a rationale that would apply to government defendants who almost never satisfy settlements and judgments entered against them.[13] And Justice Thomas has criticized the doctrine for straying from its common law foundations and recommended to his colleagues that "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence."[14]

The Court has yet to accept Justice Thomas's invitation to reconsider qualified immunity, but it seems like only a matter of time until it does. Petitions for certiorari in qualified immunity cases are now regularly invoking Justice Thomas's language in *Ziglar v. Abbasi*.[15] An ideologically

11. Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting); see also 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").

12. Richardson v. McKnight, 521 U.S. 399, 411 (1997) (explaining that private employment "increases the likelihood of employee indemnification and to that extent reduces the employment-discouraging fear of unwarranted liability potential applicants face").

13. See Joanna C. Schwartz, Police Indemnification, 89 N.Y.U. L. Rev. 885, apps. A–B at 962–66 (2014) [hereinafter Schwartz, Police Indemnification] (finding that law enforcement officers almost never contribute to settlements and judgments entered against them).

14. Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and in the judgment).

15. See, e.g., Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit at 27, Echols v. Lawton, No. 18-1358 (Apr. 24, 2019), 2019 WL 1916157; Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit at 34, Baxter v. Bracey, No. 18-1287 (Apr. 8, 2019), 2019 WL 1569711; Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit at 25, I.B. v. Woodard, No. 18-1173 (Mar. 8, 2019), 2019 WL 1126159; Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit at 2, Brennan v. Dawson, No. 18-913 (Jan. 11, 2019), 2019 WL 193913; Reply Supporting Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit at 6–7, Spencer v. Abbott, No. 17-1397 (Aug. 8, 2018), 2018 WL 3778553; Reply Brief on Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit at 1, Pauly v. White, No. 17-1078 (May 31, 2018), 2018 WL 2684548; Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit at 17–18, Shafer v. Padilla, No. 17-1396 (Apr. 3, 2018), 2018 WL 1705603; Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit at 23, Apodaca v. Raemisch, No. 17-1284 (Mar. 9, 2018), 2018 WL 1315085; Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit at 34, Melton v. Phillips, No. 17-1095 (Feb. 2, 2018), 2018 WL 722531; Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit at 17–18, Noonan v. County of Oakland, No. 17-473 (Sept. 27, 2017), 2017 WL 4386875; Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Eighth Circuit at 19, Doe v. Olson, No. 17-296 (Aug. 23, 2017), 2017 WL 3701814; Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit at 33–34, Walker v. Farnan, No. 17-53 (July 10, 2017), 2017 WL 2954392; see also Brief in Opposition to Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit at 34, S.C. Dep't of Corr. v. Booker, No. 17-307 (Nov. 21, 2017), 2017 WL 5714616 (arguing in opposition to a grant of

diverse collection of organizations—including the ACLU, the Cato Institute, and the Law Enforcement Action Partnership—have submitted multiple amicus briefs to the Supreme Court, 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."[16] The Court has yet to grant certiorari in any of these cases, but there is every reason to believe this coalition of critics will continue to find opportunities to bring their arguments to the Court.

If the Court decides to take a closer look at qualified immunity, it will find compelling reasons to greatly restrict or abolish the defense. Yet the Court may be reluctant to take the type of dramatic action compelled by the record. As others have observed, one cause for hesitation may be stare decisis.[17] This Article focuses on another possible concern that has received far less attention but may be giving the Court even more pause:

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certiorari, but stating that "if the Court decides to grant certiorari it should add a question presented permitting it to revisit the doctrine of qualified immunity as a potential alternate ground for affirmance").

16. 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 (U.S. July 11, 2018), 2018 WL 3388317 [hereinafter *Allah* Cross-Ideological Amicus Brief]; see also 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 4–5, Baxter v. Bracey, No. 18-1287 (U.S. May 31, 2019), 2019 WL 2370285; 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, I.B. v. Woodard, No. 18-1173 (U.S. Apr. 10, 2019), 2019 WL 1596323. The Cato Institute has been filing separate amicus briefs arguing in favor of reconsidering qualified immunity. See, e.g., Brief of the Cato Institute as Amicus Curiae Supporting Petitioner at 2–3, Baxter v. Bracey, No. 18-1287 (U.S. May 30, 2019), 2019 WL 2354727; Brief of the Cato Institute as Amicus Curiae Supporting Petitioners at 2–3, I.B. v. Woodard, No. 18-1173, (U.S. Apr. 10, 2019), 2019 WL 1596319. Scholars, myself included, have also submitted amicus briefs to the Court, urging reconsideration of qualified immunity doctrine. See, e.g., Brief for Scholars of the Law of Qualified Immunity as Amici Curiae Supporting Petitioner at 4–5, Almighty Supreme Born Allah v. Milling, No. 17-8564 (U.S. July 11, 2018), 2018 WL 3388318; Brief of Legal Scholars as Amici Curiae in Support of Petitioner at 3–5, Baxter v. Bracey, No. 18-1287 (U.S. May 31, 2019), 2019 WL 2354728; Brief of Scholars for the Law of Qualified Immunity as Amici Curiae Supporting Petitioners at 2–4, I.B. v. Woodard, No. 18-1173 (U.S. Apr. 10, 2019), 2019 WL 1596321.

17. For arguments that stare decisis should not impede reconsideration of qualified immunity, see Baude, supra note 3, at 80–82; Scott Michelman, The Branch Best Qualified to Abolish Qualified Immunity, 93 Notre Dame L. Rev. 1999, 2006–18 (2018). For arguments that the Supreme Court's decisions reflect a deep commitment to the doctrine that cannot easily be disturbed, see generally Aaron L. Nielson & Christopher J. Walker, A Qualified Defense of Qualified Immunity, 93 Notre Dame L. Rev. 1853 (2018) [hereinafter Nielson & Walker, Qualified Defense].

how constitutional litigation would function in a world without qualified immunity.

The Court has repeatedly described qualified immunity as critically important to government officials and "society as a whole," suggesting a fear that restricting or eliminating the doctrine will do significant harm.[18] To date, the strongest defenses of qualified immunity have been various predictions that the world would be worse off without it: Plaintiffs would file many more frivolous suits, plaintiffs would recover much more money against government defendants, and these suits and costs would imperil individual defendants' pocketbooks and the government fisc, chill officer behavior on the street, and discourage people from accepting government jobs.[19] Faced with these bleak prognoses, the Court may be reluctant to reconsider qualified immunity doctrine, despite its many flaws.

I do not share these predictions. Of course, it is impossible to know for certain what impact eliminating or restricting qualified immunity might have. We cannot know for certain whether or how eliminating qualified immunity tomorrow would change the litigation and disposition of cases filed today. We also cannot know for certain whether or how eliminating qualified immunity tomorrow might change plaintiffs' decisions about whether to file cases next week. Eliminating qualified immunity might also cause judges and legislators to tinker in unforeseen ways with rights and remedial design. But uncertainty should not be a barrier to prediction. Courts and commentators have made strong claims about the anticipated effects of eliminating qualified immunity fleetingly and without empirical support.[20] In contrast, my views about a post–qualified immunity world are informed by the most comprehensive examination to date of the role

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18. White v. Pauly, 137 S. Ct. 548, 551 (2017); City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015); Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

19. See, e.g., Richard H. Fallon, Jr., Bidding Farewell to Constitutional Torts, 107 Calif. L. Rev. 933, 975 (2019) [hereinafter Fallon, Bidding Farewell] (predicting that eliminating qualified immunity could result in "frivolous and distracting litigation" and impose "unanticipated financial drains on the public fisc [that] could upset budgetary planning and withdraw resources from other needful programs"); Hillel Y. Levin & Michael L. Wells, Qualified Immunity and Statutory Interpretation: A Response to William Baude, 9 Calif. L. Rev. Online 41, 41 (2018) (eliminating qualified immunity would subject "police officers and other officials who deprive citizens of their constitutional rights . . . to much more liability than the current law permits"); Nielson & Walker, Qualified Defense, supra note 17, at 1881 ("[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 . . . ."); Michael L. Wells, Qualified Immunity After *Ziglar v. Abbasi*: The Case for a Categorical Approach, 68 Am. U. L. Rev. 379, 391 (2018) ("If officers were liable for every constitutional violation, they might hesitate before taking a step that produces a public benefit because an error would lead to personal liability."); Andrew King, Keep Qualified Immunity . . . For Now, Mimesis (July 1, 2016), http://mimesislaw.com/fault-lines/keep-qualified-immunity-for-now/11010 [https://perma.cc/8LCT-GZCX] ("Mostly, but for qualified immunity, it's a bonanza for plaintiff's lawyers.").

20. See supra notes 18–19 and accompanying text.

qualified immunity plays in Section 1983 litigation—combining the results of a study examining the dockets in almost 1,200 federal civil rights cases filed in five federal districts over a two-year period[21] with surveys of almost 100 attorneys who entered appearances in these cases and in-depth interviews of thirty-five of these attorneys[22]—in conjunction with my studies of police indemnification practices and government budgeting for settlement and judgment costs,[23] and other studies of district and circuit court qualified immunity decisions.[24] These data offer valuable insights about the role qualified immunity currently plays, and also can be used credibly to imagine constitutional litigation in a world without qualified immunity.

Based upon this evidence, this Article offers five predictions about constitutional litigation after qualified immunity that differ markedly from conventional wisdom. First, there would be additional clarification of constitutional rights, but the scope of those rights would not dramatically change. Second, plaintiffs' and defendants' litigation success rates would remain relatively constant. Third, the overall cost and time associated with litigating constitutional claims would decrease. Fourth, more civil rights lawsuits would be filed, but other considerations would continue to discourage attorneys from filing insubstantial cases. Fifth, settlements and judgments would continue to have a limited impact on officers' and municipalities' dollars and decisionmaking.

If these predictions are correct, abolishing qualified immunity would clarify the law, make litigation more efficient, increase the number of suits filed, and shift the focus of civil rights litigation to what should be the critical question at issue in these cases—whether government officials exceeded their constitutional authority. But eliminating qualified immunity would not significantly change the scope of constitutional protections,

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21. See generally Joanna C. Schwartz, How Qualified Immunity Fails, 127 Yale L.J. 2 (2017) [hereinafter Schwartz, How Qualified Immunity Fails] (examining "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").

22. See generally Joanna C. Schwartz, Qualified Immunity's Selection Effects, 114 Nw. U. L. Rev. (forthcoming 2020) (on file with the *Columbia Law Review*) [hereinafter Schwartz, Selection Effects] (describing an anonymous twenty-question survey asking about various aspects of respondents' civil rights practice, as well as follow-up interviews with participating attorneys probing their views about qualified immunity and its effect on their case-selection decisions).

23. See generally Joanna C. Schwartz, How Governments Pay: Lawsuits, Budgets, and Police Reform, 63 UCLA L. Rev. 1144 (2016) [hereinafter Schwartz, How Governments Pay] (examining the impact of lawsuit payouts on law enforcement agencies' budgets); Schwartz, Police Indemnification, supra note 13 (examining the frequency with which law enforcement officers personally satisfy settlements and judgments entered against them).

24. See Aaron L. Nielson & Christopher J. Walker, The New Qualified Immunity, 89 S. Cal. L. Rev. 1, 27–51 (2015); Aaron L. Nielson & Christopher J. Walker, Strategic Immunity, 66 Emory L.J. 55, 95–117 (2016) [hereinafter, Nielson & Walker, Strategic Immunity].

dramatically increase the rate at which plaintiffs prevail, or alter government indemnification, budgeting, and risk-management practices that dampen the effects of lawsuits on officers' and officials' behavior. Doomsday scenarios imagined by some commentators—of courthouses flooded with meritless claims—would not come to pass. And constitutional litigation would still be subject to the criticism that it fails to hold government officials accountable when they exercise power irresponsibly.

These predictions should offer some comfort to the Justices on the Court who fear that doing away with qualified immunity could somehow jeopardize policing or "society as a whole."[25] But these predictions should also temper the optimism of the doctrine's critics. Those who argue that qualified immunity allows government officials to act with impunity may believe that doing away with the doctrine will usher in a new age of government accountability.[26] Although eliminating qualified immunity would increase access to the courts, clarity about the law, and transparency about the conduct of government officials, it would not fundamentally shift dynamics that make it difficult for plaintiffs to redress constitutional violations and deter official misconduct.

The remainder of this Article proceeds as follows. The first three Parts explore how the universe of civil rights cases that are currently being filed might proceed differently in the absence of qualified immunity: Part I predicts how courts' interpretations of the scope of constitutional rights might change; Part II predicts how the dispositions of cases might change; and Part III predicts how the litigation of constitutional claims might change. Part IV considers how eliminating qualified immunity might impact the types and number of cases that are filed. Part V explores how eliminating qualified immunity might alter the deterrent effect of civil rights suits. Finally, the Conclusion summarizes these predictions and offers preliminary thoughts about how they might influence Supreme Court doctrine, scholarly commentary, and efforts to strengthen government accountability.

I. RIGHTS

Qualified immunity doctrine has been defended on the ground that it encourages courts to engage in constitutional innovation. Were qualified immunity eliminated, some scholars fear, courts would restrict the scope of constitutional rights.[27] But this view overstates the extent to which courts are currently innovating and incorrectly assumes that courts would respond in lockstep to qualified immunity's elimination. Absent qualified immunity,

25. White v. Pauly, 137 S. Ct. 548, 551 (2017) (quoting City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015)).

26. See, e.g., supra notes 7–8.

27. See infra notes 38–45, 58–60 and accompanying text (describing these concerns).

courts would almost certainly clarify constitutional law, but the scope of constitutional rights would not dramatically shift.

Qualified immunity doctrine, in its current form, obscures the contours of constitutional rights. Qualified immunity protects government defendants from damages liability, even if they have violated the Constitution, so long as they have not violated "clearly established law."[28] Courts considering qualified immunity motions are faced with two questions—whether a defendant has violated the Constitution, and whether the constitutional right was clearly established. In its 2001 *Saucier v. Katz* decision, the Supreme Court instructed lower courts deciding qualified immunity motions to answer both questions as a means of allowing "the law's elaboration from case to case."[29] But, in 2009, in *Pearson v. Callahan*, the Court reversed itself and held that lower courts could grant qualified immunity without first ruling on the constitutionality of a defendant's behavior.[30]

The Court's decision in *Pearson* has been widely criticized for creating confusion about the scope of constitutional rights. Commentators observe that when courts grant qualified immunity without first ruling on the scope of the underlying constitutional right, their decisions "often leave[] important, recurring, and non-fact-bound constitutional questions needlessly floundering in the lower courts."[31] This concern is particularly acute for constitutional claims regarding novel practices and technologies, like Tasers and drones, for which there are few pre-*Pearson* decisions, and it can take many cases over many years for circuits to issue clarifying rulings.[32] Studies of circuit court decisionmaking after *Pearson* support fears of constitutional obscurity: Approximately one-quarter of circuit court decisions grant defendants qualified immunity without first ruling on the constitutionality of defendants' behavior.[33]

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28. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

29. 533 U.S. 194, 201 (2001).

30. 555 U.S. 223, 227 (2009).

31. Blum, Time to Change, supra note 2, at 1897. For one powerful example, see Barry Friedman, Unwarranted: Policing Without Permission 74–75 (2017) [hereinafter Friedman, Unwarranted] (describing several decisions finding strip searches of students to be unconstitutional, but granting qualified immunity). For similar concerns about the exclusionary rule, see Aziz Z. Huq, Judicial Independence and the Rationing of Constitutional Remedies, 65 Duke L.J. 1, 51–52, 78–79 (2015).

32. See Schwartz, Case Against, supra note 1, at 1817; see also Zadeh v. Robinson, 902 F.3d 483, 499 (5th Cir. 2018) (Willett, 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."); Blum, Time to Change, supra note 2, at 1897–98 (describing the law regarding the First Amendment right to record the police, which has developed over several years in circuit courts).

33. See Nielson & Walker, The New Qualified Immunity, supra note 24, at 33–34 (finding that 26.7% of post-*Pearson* circuit court decisions declared a right not clearly established without resolving the constitutional question); cf. Colin Rolfs, Comment, Qualified Immunity After *Pearson v. Callahan*, 59 UCLA L. Rev. 468, 491–93 (2011) (finding that 22.6% of district and circuit court decisions issued after *Pearson* granted qualified immunity

In a world without qualified immunity, it would be more difficult for district and appellate courts to avoid ruling on the merits of plaintiffs' constitutional claims. Instead of limiting their analysis to whether the facts of a prior case were similar enough to "clearly establish" the unconstitutionality of defendants' conduct,[34] courts would more regularly explore and explicate the boundaries of constitutional protections. Such rulings could provide guidance to governments as they create policies and trainings for government officials,[35] and begin dialogue with other branches of government and the body politic about shared constitutional principles.[36]

Although courts' decisions would almost certainly offer more clarity about constitutional rights, there is more uncertainty about how eliminating qualified immunity would affect their scope.[37] The prevailing scholarly view is that courts would narrow constitutional protections absent qualified immunity.[38] Because qualified immunity doctrine allows courts

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without ruling on the merits). Studies examining appellate rulings before and after *Saucier* found that *Saucier* decreased the frequency with which courts declined to reach constitutional questions in their qualified immunity decisions. See, e.g., Paul W. Hughes, Not a Failed Experiment: *Wilson–Saucier* Sequencing and the Articulation of Constitutional Rights, 80 U. Colo. L. Rev. 401, 423 tbl.1 (2009) (finding appellate courts declined to reach constitutional questions in 25.8% of cases in 1995 and 1.2% of cases in 2005); Nancy Leong, The *Saucier* Qualified Immunity Experiment: An Empirical Analysis, 36 Pepp. L. Rev. 667, 711 tbl.4 (2009) (finding that appellate courts declined to reach constitutional questions in 22.2% of cases pre-*Saucier* and just 4.5% of cases post-*Saucier*).

34. See infra note 146 and accompanying text (describing the qualified immunity standard).

35. For further discussion of the relationship between court rulings and government policies and trainings, see infra note 262 and accompanying text.

36. See Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 654 (1993).

37. There is similar disagreement about whether *Saucier* caused courts to constrict the scope of constitutional rights. Compare Leong, supra note 33, at 670 (arguing that *Saucier*'s mandatory sequencing "leads to the articulation of more constitutional law, but not the expansion of constitutional rights" because courts do not want to issue decisions finding constitutional violations but granting qualified immunity), with John C. Jeffries, Jr., Reversing the Order of Battle in Constitutional Torts, 2009 Sup. Ct. Rev. 115, 121–22 (rejecting the assumption that *Saucier* makes courts "*more* likely to rule against constitutional claims in damages actions than those same courts would be to rule against those same claims if raised in other contexts").

38. See, e.g., Richard H. Fallon, Jr., Asking the Right Questions About Officer Immunity, 80 Fordham L. Rev. 479, 480 (2011) [hereinafter Fallon, Right Questions] ("In the absence of official immunity, even some currently well-established constitutional rights and authorizations to sue to enforce them would likely *shrink*, and sometimes appropriately so."); John C. Jeffries, Jr., The Liability Rule for Constitutional Torts, 99 Va. L. Rev. 207, 248 (2013) [hereinafter Jeffries, Liability Rule] ("[Without qualified immunity,] every extension of constitutional rights, whether revolutionary or evolutionary, would trigger money damages. In some circumstances, that prospect might not matter. In others, it surely would. The impact of inhibiting constitutional innovation in this way is impossible to quantify, but I think it would prove deleterious."); Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 Colum. L. Rev. 857, 914–15 (1999) (imagining that, if Congress expanded Section 1983 liability and eliminated qualified immunity, there "would be a wholesale rewriting of constitutional rights" and "while it is impossible to predict just how various rights would be transfigured, drastically increasing the cost of rights would surely result in some curtailment"

to announce a new constitutional right while shielding the government official who is a defendant in the case from damages, "Judges contemplating an affirmation of constitutional rights need not worry about the financial fallout."[39] Without qualified immunity, John Jeffries has observed, "[E]very extension of constitutional rights, whether revolutionary or evolutionary, would trigger money damages."[40] This prospect might cause judges to rule against plaintiffs as a way of protecting defendants from financial liability.[41] To hit the point home, both John Jeffries and Richard Fallon have argued that if plaintiffs in *Brown v. Board of Education*[42] and *Miranda v. Arizona*[43] had sought monetary damages, and qualified immunity was not available to shield individual defendants from damages liability, the Supreme Court might not have issued either landmark ruling.[44] Accordingly, they suggest, those arguing to eliminate qualified immunity should be prepared to sacrifice decisions like *Brown* and *Miranda*.[45]

This is a powerful thought experiment, but it creates a false choice. Eliminating qualified immunity would not have imperiled *Brown* and *Miranda* because qualified immunity is a defense available only to individual officers in damages cases;[46] neither *Brown* nor *Miranda* was brought against individual officers or sought damages.[47] Indeed, it is hard to imagine a lawsuit that would seek constitutional innovation of the scope requested by *Brown* and *Miranda* that would not also include a claim for injunctive relief or a claim against a municipality (for which qualified immunity would be unavailable); Fallon and Jeffries have not offered examples of such cases, and I know of none.

Perhaps this reading of Fallon and Jeffries is too constrained. Both may believe that the Court would not issue landmark rulings like *Brown* and *Miranda*—even if such cases sought only injunctive relief—for fear that

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(citation omitted)); Wells, supra note 19, at 406 ("[E]liminating qualified immunity could result in dilution of the content of substantive constitutional rights.").

39. Jeffries, Liability Rule, supra note 38, at 247.

40. Id. at 248.

41. See id.

42. 347 U.S. 483 (1954).

43. 384 U.S. 436 (1966).

44. Fallon, Bidding Farewell, supra note 19, at 968; John C. Jeffries, Jr., The Right–Remedy Gap in Constitutional Law, 109 Yale L.J. 87, 98–102 (1999) [hereinafter Jeffries, Right–Remedy Gap]; see also Jeffries, Liability Rule, supra note 38, at 248.

45. See Fallon, Bidding Farewell, supra note 19, at 968 ("[W]e are better off with a package that couples decisions such as *Brown* and *Miranda* with immunity doctrines than with a package that omits immunity doctrines but would have made the Supreme Court's *Brown* and *Miranda* rulings pragmatic impossibilities."); Jeffries, Right–Remedy Gap, supra note 44, at 101–02 ("Might *Brown* have come out differently if the decision had come with a huge pricetag? . . . Might the prospect of crippling judgments and school district bankruptcies have altered the terms of the debate? Or delayed the decision even further? Or stiffened the resolve of the initial dissenters . . . ?").

46. See Schwartz, How Qualified Immunity Fails, supra note 21, at 13.

47. See *Miranda*, 384 U.S. at 477–79; *Brown*, 349 U.S. at 299–301.

plaintiffs would subsequently bring damages actions for violations of those newly articulated rights that would impose significant financial liability on individual defendants.[48] But this iteration of the argument creates a false choice for a different reason. Individual defendants almost never contribute to settlements and judgments entered against them, and lawsuit payouts represent a modest percentage of most municipal and state budgets.[49] Moreover, today's Court is highly unlikely—even with the protections of qualified immunity—to issue expansive constitutional decisions like *Brown* and *Miranda*.[50] Perhaps the Court could issue such decisions again in the future—anything is possible.[51] But eliminating qualified immunity has little risk of imperiling these types of decisions any time soon.

Qualified immunity does not appear to encourage expansive rulings by lower courts, either. Jeffries observes that qualified immunity allows courts to extend constitutional rights (by finding constitutional violations) while shielding defendants from financial liability (by granting qualified immunity).[52] But courts infrequently rule on qualified immunity motions in this manner.[53] Far more often, courts rule on the constitutional right and whether it was clearly established and reach the same conclusion on both, or grant qualified immunity without deciding the constitutional

48. See, e.g., Fallon, Bidding Farewell, supra note 19, at 968 ("[I]f . . . *Brown* . . . and *Miranda* . . . had included damages remedies against school officials who had maintained racially segregated classrooms or against judges who had allowed the admission of confessions obtained without *Miranda* warnings, the Court might have felt unable to decide *Brown* and *Miranda* as it did." (footnotes omitted)); Jeffries, Right–Remedy Gap, supra note 44, at 103 (asking if the Supreme Court might have decided *Green v. County School Board* differently "if announcing an 'affirmative duty' to eliminate racially identifiable schools had meant huge damages judgments against Southern school districts").

49. See Schwartz, Police Indemnification, supra note 13, at 913 (reporting that officers rarely contribute to settlements and judgments); see also infra notes 240–243 and accompanying text (describing the financial burdens lawsuits place on the government fisc).

50. See generally Erwin Chemerinsky, The Case Against the Supreme Court (2014) (describing the progressive jurisprudence of the Warren Court and the Court's more constrained view of constitutional rights under Chief Justices Burger, Rehnquist, and Roberts).

51. E.g., Fallon, Bidding Farewell, supra note 19, at 975 ("One might counter that the era of revolutionary constitutional holdings such as those in *Brown* and *Miranda* has concluded. But the mid- and long-term future are unknowable.").

52. See generally Jeffries, Right–Remedy Gap, supra note 44 ("[Qualified immunity] allows courts to embrace innovation without the potentially paralyzing cost of full remediation for past practice.").

53. See Nielson & Walker, The New Qualified Immunity, supra note 24, at 37 (finding that, post-*Pearson*, 3.6% of circuit court qualified immunity decisions found constitutional violations but granted qualified immunity); Rolfs, supra note 33, at 493 & fig.2 (finding that, post-*Pearson*, approximately 2.5% of qualified immunity decisions found constitutional violations but granted qualified immunity); Ted Sampsell-Jones & Jenna Yauch, Note, Measuring *Pearson* in the Circuits, 80 Fordham L. Rev. 623, 628 (2011) (finding that, post-*Pearson*, 7.9% of published circuit court decisions found constitutional violations but granted qualified immunity). The Hughes and Leong studies, supra note 33, did not include findings relevant to this question because they did not study cases post-*Pearson*.

question.[54] Even when courts do find a constitutional violation but grant qualified immunity, most decisions do not appear to dramatically expand the law. When I reviewed all of the circuit court decisions issued over a three-year period that ruled on qualified immunity in this manner, I found that almost ten percent had not developed the law at all.[55] Instead, they merely recognized that the constitutional right had been clearly established in another opinion issued after the conduct at issue in the case. The remainder appeared to "apply[] well-established constitutional principles to slightly different factual scenarios."[56] There is no reason to conclude that the protections of qualified immunity are what motivated judges to find constitutional violations in these cases.[57] But, to the extent that qualified immunity did encourage courts to announce new constitutional rights in these cases, the doctrine exerted a modest pressure in this direction.

Qualified immunity could conceivably encourage constitutional innovation in a broader sense. Both Richard Fallon and Daryl Levinson imagine that courts use qualified immunity, substantive laws, and other doctrines and rules to create "the best overall bundle of rights and correspondingly calibrated remedies within our constitutional system."[58] When one component of the bundle is restricted or expanded, courts may adjust other components to maintain equilibrium in the relationship between rights and remedies.[59] Accordingly, both predict, were qualified immunity eliminated, courts would respond by restricting the scope of constitutional rights.[60] There are isolated examples of this type of equilibration. In a 2009 case limiting the circumstances in which an officer could conduct a warrantless vehicle search, the Supreme Court appeared to take comfort in the fact that "qualified immunity will shield officers from liability for searches conducted in reasonable reliance" on prior law.[61] Perhaps the Court would not have reached this decision absent qualified immunity. But, overall, the Court does not appear to be adjusting qualified immunity and other doctrines to create equilibrium. Instead, over the past fifty years, the Supreme Court has progressively strengthened qualified immunity's

54. See Nielson & Walker, The New Qualified Immunity, supra note 24, at 37 (canvassing several studies regarding the frequency with which courts post-*Pearson* find no qualified immunity (22.6%–37.9% of cases); find no constitutional violation and that the law was not clearly established (34.7%–55.3% of cases); or grant qualified immunity without reaching the constitutional question (18.9%–26.7% of cases)).

55. See Schwartz, Case Against, supra note 1, at 1827 (reviewing forty-three cases, four of which concluded that other decisions had clearly established the law).

56. Id.

57. See infra notes 65–70 and accompanying text (describing a range of beliefs, interests, and affiliations that are believed to guide judicial decisionmaking).

58. Fallon, Right Questions, supra note 38, at 480; see also Levinson, supra note 38, at 858 (describing the ways in which constitutional "rights and remedies are inextricably intertwined").

59. See Fallon, Right Questions, supra note 38, at 480 (describing his "Equilibration Thesis"); Levinson, supra note 38, at 857–60 (describing his theory of "remedial equilibration").

60. See supra note 38 (describing this concern).

61. Arizona v. Gant, 556 U.S. 332, 349 n.11 (2009).

protections for defendants on the one hand,[62] and weakened plaintiffs' substantive constitutional protections on the other.[63] The Court's interpretations of related doctrines and rules have similarly favored government defendants.[64] Far from creating equilibrium, the Supreme Court's qualified immunity, justiciability, procedural, and substantive constitutional decisions have acted as a one-way ratchet.

Although qualified immunity has encouraged little in the way of constitutional innovation, it may still be true that eliminating qualified immunity will cause some courts to weaken constitutional protections further, as Jeffries, Fallon, and Levinson predict. Even if so, courts are unlikely to respond uniformly to this type of doctrinal shift. Studies have shown that judges' decisions are guided by a variety of beliefs, interests, and affiliations.[65] In studies of judicial decisionmaking perhaps most relevant to this question, Aaron Nielson and Christopher Walker found that circuit judges approach qualified immunity decisions in ways that appear guided by their circuit and by the political affiliation of the president who appointed them and other members of their panel.[66] Nielson and Walker found that the Fifth Circuit is more likely than circuit courts, on average, to rule on the merits of constitutional claims in its qualified immunity decisions and less likely than the average circuit to

62. See supra notes 2–5 and accompanying text.

63. See Chemerinsky, supra note 50, at 6 (describing the Supreme Court's tendency to "side[] with big business and government power" and limit the rights of smaller, less powerful plaintiffs). For exploration of the Court's restrictive Fourth Amendment rulings, see Friedman, Unwarranted, supra note 31, at 74–76 (describing the Supreme Court's ineffectual regulation of law enforcement); Devon W. Carbado, From Stop and Frisk to Shoot and Kill: *Terry v. Ohio*'s Pathway to Police Violence, 64 UCLA L. Rev. 1508, 1515 (2017) (describing how the doctrine governing stop-and-frisk is "one of the factors that cause African Americans to have repeated interactions with the police in ways that overexpose them to the possibility of violence"); Devon W. Carbado, From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence, 105 Calif. L. Rev. 125, 129 (2017) ("[T]he Supreme Court has interpreted the Fourth Amendment to enable and sometimes expressly legalize racial profiling.").

64. See, e.g., Chemerinsky, supra note 50, at 197–228 (describing the Court's restrictive standing requirements for injunctive relief, heightened pleading and summary judgment standards, limitations on civil rights plaintiffs' entitlement to attorneys' fees, and limitations on the availability of *Bivens* remedies).

65. See, e.g., Lee Epstein, William M. Landes & Richard A. Posner, The Behavior of Federal Judges: A Theoretical & Empirical Study of Rational Choice 26–30 (2013) (arguing that ideology plays a role in judicial decisionmaking); Cass R. Sunstein, David Schkade, Lisa M. Ellman & Andres Sawicki, Are Judges Political? An Empirical Analysis of the Federal Judiciary 24–40 (2006) (identifying differences in the ways that judges appointed by Democrats and Republicans interpret the law). But see Harry T. Edwards & Michael A. Livermore, Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking, 58 Duke L.J. 1895, 1928 (2009) (arguing that law, precedent, and deliberation primarily influence judicial decisionmaking); Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, Judicial Politics and Decisionmaking: A New Approach, 70 Vand. L. Rev. 2051, 2097 (2017) ("[P]olitical attitudes have exhibited a weak effect on judicial decisionmaking.").

66. See Nielson & Walker, The New Qualified Immunity, supra note 24, at 39–49; Nielson & Walker, Strategic Immunity, supra note 24, at 101–10.

recognize new constitutional rights.[67] The Ninth Circuit is equally unusual but in the opposite way—less likely than circuit courts, on average, to rule on the merits of constitutional claims in its qualified immunity decisions and more likely to recognize new constitutional rights.[68] Nielson and Walker have also found circuit court differences in the application of qualified immunity that correlate with the political affiliation of the president(s) who appointed the members of the panel.[69] Among their findings is that circuit panels with three Democratic appointees "are more likely . . . to exercise their *Pearson* discretion to recognize new constitutional rights" than other panel compositions, and panels with three Republican appointees "are more likely . . . to exercise their *Pearson* discretion to find no constitutional violation."[70]

Just as circuit and political differences may influence the frequency with which courts exercise their *Pearson* discretion and the frequency with which they announce new constitutional rights, these differences would likely influence whether or not courts would contract the scope of constitutional protections in response to the elimination of qualified immunity. Some judges might restrict constitutional rights—as Jeffries, Fallon, and Levinson have predicted[71]—in order to shield defendants from assumed financial liability for novel constitutional claims or to maintain what they consider to be equilibrium between rights and remedies. Other judges might not change the substance of their rulings—either because they recognize government officials are virtually never held personally responsible for settlements and judgments entered against them,[72] or because they do not believe it is their job to constrict the scope of constitutional rights in order to equilibrate.

For judges disinclined to change the substance of their constitutional rulings, eliminating qualified immunity might actually hasten the expression of new constitutional rights. Studies have found that when courts were required to answer both the constitutional question and whether the law was clearly established—during the *Saucier* regime—they were more likely to find constitutional violations that were not clearly established than they are now, post-*Pearson*, when they can jump straight to the second question.[73] Nielson and Walker surmise that courts may

67. See Nielson & Walker, The New Qualified Immunity, supra note 24, at 39–42.

68. See id.

69. See id. at 43–49; Nielson & Walker, Strategic Immunity, supra note 24, at 101–10.

70. Nielson & Walker, Strategic Immunity, supra note 24, at 109–10.

71. See supra note 38 and accompanying text.

72. See Schwartz, Police Indemnification, supra note 13, at 912–17 (finding officers rarely contribute to settlements and judgments).

73. See, e.g., Nielson & Walker, The New Qualified Immunity, supra note 24, at 37–38 (reporting that circuit courts post-*Pearson* announced constitutional violations that were not clearly established in 2.5%–7.9% of cases, while circuit courts during the *Saucier* regime announced constitutional violations that were not clearly established in 6.5%–13.9% of

prefer not to answer "difficult constitutional questions," but that, when *Saucier* forced them to do so, they were somewhat more likely to find constitutional violations.[74] Following this logic, one could imagine that, absent qualified immunity, some courts would be quicker to announce new constitutional rights. For example, every circuit that has considered the question has concluded that there exists a First Amendment right to record the police.[75] But, in some circuits, it took many cases litigated over many years to establish that principle because courts repeatedly granted qualified immunity without reaching the constitutional question.[76] In a world without qualified immunity, courts could not have avoided this difficult constitutional question and might have announced the right exists sooner.

Eliminating qualified immunity might hasten the articulation of new rights for another reason—plaintiffs might be more willing to file cases alleging novel constitutional claims. Some plaintiffs' attorneys decline cases alleging novel claims for fear that courts will grant defendants qualified immunity.[77] If attorneys are reluctant to bring cases alleging novel claims—for example, cases alleging violations of a First Amendment right to record the police in jurisdictions where the right has not been clearly established—plaintiffs and their attorneys will bring fewer such cases, and it will take even longer to get rulings delineating the scope of those rights.[78] Eliminating qualified immunity would make it more likely for plaintiffs' attorneys to accept cases with novel claims, and would make it more likely that courts would issue rulings clarifying the scope of these rights. Some courts might construe the scope of the First Amendment more narrowly than they would have were qualified immunity available. But other judges would find a constitutional right to record with or without qualified immunity and would do so more quickly absent qualified immunity than they would had qualified immunity remained in existence.

Taken together, available evidence suggests that eliminating qualified immunity would almost certainly clarify constitutional rights, but would not dramatically curtail their scope—and might sometimes hasten the articulation of new rights. Few cases present courts with a painful choice between imposing significant damages on officers and extending important constitutional rights. When such cases arise in a post–qualified immunity world, judges are unlikely to have a uniform response. Some judges might view

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cases). But see Leong, supra note 33, at 693 (arguing that *Saucier* may have caused courts to restrict the scope of rights).

74. Nielson & Walker, The New Qualified Immunity, supra note 24, at 38.

75. See Blum, Time to Change, supra note 2, at 1897.

76. See id.

77. See infra Part IV; see also Schwartz, Selection Effects, supra note 22 (manuscript at 41–44).

78. For similar arguments about attorney incentives in the context of the exclusionary rule, see Orin S. Kerr, Good Faith, New Law, and the Scope of the Exclusionary Rule, 99 Geo. L.J. 1077, 1111–12 (2011).

constitutional rights more restrictively, and others might announce new constitutional rights more quickly than they would have otherwise. Given Nielson and Walker's research, it appears that Democrat-appointed judges and panels would be more likely to announce new constitutional rights, and Republican-appointed judges and panels would be more likely to limit constitutional protections.[79] It also may be that courts' responses to the elimination of qualified immunity would vary by circuit, with the Fifth Circuit further restricting constitutional rights and the Ninth Circuit further expanding them. Such regional variation may be concerning but could not be blamed on the elimination of qualified immunity. There is already regional variation in the interpretation of qualified immunity doctrine and other substantive and procedural laws relevant to civil rights litigation.[80] Those concerned about the constriction of constitutional rights absent qualified immunity overstate the extent to which qualified immunity currently spurs constitutional innovation and the harms that would befall constitutional innovation absent qualified immunity, and they additionally overlook the benefits of greater constitutional clarity that eliminating qualified immunity would provide.

II. DISPOSITIONS

Commentators and courts appear to believe that most civil rights cases are dismissed on qualified immunity grounds, and that eliminating qualified immunity would dramatically increase the frequency with which civil rights plaintiffs win.[81] Some view this prospective expansion of liability in a positive

79. See supra note 70 and accompanying text.

80. See, e.g., Blum, Time to Change, supra note 2, at 1918–22 (describing the Fifth Circuit's summary judgment decisions in police misconduct cases, in which the circuit has overlooked material factual disputes and granted defendants qualified immunity); Alexander A. Reinert, Qualified Immunity at Trial, 93 Notre Dame L. Rev. 2065, 2071 (2018) (describing variation across circuits regarding the burdens of establishing qualified immunity); 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 regional variation in the interpretation and application of qualified immunity doctrine). For further discussion of regional variation in courts' interpretations of relevant procedural and substantive rules, see Joanna C. Schwartz, Civil Rights Ecosystems, 118 Mich. L. Rev. (forthcoming 2020) (manuscript at 38–41), https://ssrn.com/abstract=3435911 (on file with the *Columbia Law Review*).

81. See, e.g., 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." (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982))); see also, e.g., Martin A. Schwartz, Fed. Judicial Ctr., Section 1983 Litigation 143 (Kris Markarian ed., 3d ed. 2014), https://www.fjc.gov/sites/default/files/2014/Section-1983-Litigation-3D-FJC-Schwartz-2014.pdf [https://perma.cc/44MG-G3HG] ("[C]ourts decide a high percentage of § 1983 personal-capacity claims for damages in favor of the defendant on the basis of qualified immunity."); John C. Jeffries, Jr., What's Wrong with Qualified Immunity?, 62 Fla. L. Rev. 851, 852 (2010) [hereinafter Jeffries, What's Wrong] ("The Supreme Court's effort to have more immunity determinations resolved on summary judgment or a motion to dismiss—in

light, imagining it would create greater incentives for government officials to comply with the law.[82] Others take a more negative view. As one commentator has written: "[B]ut for qualified immunity, it's a bonanza for plaintiff's lawyers."[83] Regardless of whether they welcome or decry the prospect of expanded liability, those who believe eliminating qualified immunity would dramatically increase plaintiffs' rate of success overlook the fact that most civil rights cases fail for reasons other than qualified immunity, and those other barriers to relief would continue to exist in qualified immunity's absence.[84] There are, unquestionably, plaintiffs whose cases are dismissed on qualified immunity grounds and would have prevailed in a world without qualified immunity. But their numbers are far smaller than commentators and courts assume. There would likely be more plaintiff successes in absolute terms, because more suits would be filed,[85] but civil rights plaintiffs' rates of success would not significantly change in a world without qualified immunity.

In making these and other predictions, I take, as a starting point, my study of Section 1983 litigation against law enforcement agencies and officers in five federal districts across the country.[86] I examined the dockets, briefs, and decisions in 1,183 cases filed in these five districts over a two-year period, and tracked the frequency with which qualified immunity was raised, successful, and dispositive.[87] I then surveyed almost one hundred plaintiffs'

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other words, to create immunity from *trial* as well as from *liability*—has been largely successful." (footnotes omitted)); Levin & Wells, supra note 19, at 41 (predicting that eliminating qualified immunity could cause "police officers and other officials who deprive citizens of their constitutional rights [to] be subject to much more liability than the current law permits"); 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 Some Particularly Unfortunate Consequences, 113 Mich. L. Rev. 1219, 1245 (2015) (arguing that the Supreme Court's 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").

82. See, e.g., Levin & Wells, supra note 19, at 41 (predicting that doing away with qualified immunity would "incentivize officials acting under the color of law to better respect and protect individuals' rights, which is more than the Court's § 1983 doctrine currently encourages").

83. King, supra note 19.

84. See infra notes 92–121 and accompanying text (describing data supporting these conclusions).

85. For further discussion of the effects of eliminating qualified immunity on case filing decisions, see infra Part IV.

86. My study focuses on suits against law enforcement both because law enforcement officials are often defendants in the Supreme Court's qualified immunity cases, and because limiting the study to cases against one type of government official creates some substantive consistency across cases. See Schwartz, How Qualified Immunity Fails, supra note 21, at 22. I chose the five districts—the Southern District of Texas, Middle District of Florida, Northern District of Ohio, Northern District of California, and Eastern District of Pennsylvania—because I expected judges from these districts would vary in their approaches to qualified immunity, and because the districts have a large number of cases and "a range of small, medium, and large law enforcement agencies." See id. at 19–20.

87. For further discussion of the study's methodology, see id. at 19–25.

attorneys who entered appearances in these cases and interviewed thirty-five of these attorneys about the role of qualified immunity in their case selection and litigation practice, among other areas of inquiry.[88] All empirical studies have limitations, and this study is no exception. It focuses on Section 1983 cases brought against one type of government defendant, in a handful of districts, over a limited period of time.[89] Nevertheless, it presents the most comprehensive picture to date of the role qualified immunity plays in constitutional litigation and therefore offers the best starting place to begin imagining constitutional litigation in a world without qualified immunity.

Qualified immunity was rarely the reason that the cases in the docket dataset were dismissed. If one adopts the standard measure of success—as split or full jury verdicts, settlements, and voluntary or stipulated dismissals[90]—plaintiffs succeeded in 682 (57.7%) of the 1,183 cases, and failed in 467 (39.5%) cases.[91] Of the 467 cases in which plaintiffs "failed"—meaning plaintiffs' cases were dismissed without payment—just thirty-six were dismissed on qualified immunity grounds: seven at the motion to dismiss stage, twenty-six at summary judgment, and three on appeal.[92] The remaining 431 cases failed for various other reasons. Approximately 37% of the cases that failed (173) were dismissed sua sponte before defendants answered, dismissed as a sanction, or dismissed for failure to prosecute.[93] Approximately 40% of the cases that failed (191) were dismissed on

88. See Schwartz, Selection Effects, supra note 22 (manuscript at 11–15) (describing the survey and interviews).

89. For further discussion of these methodological limitations, see Schwartz, How Qualified Immunity Fails, supra note 21, at 23–25; Schwartz, Selection Effects, supra note 22 (manuscript at 13–15).

90. See Alexander A. Reinert, Measuring the Success of *Bivens* Litigation and Its Consequences for the Individual Liability Model, 62 Stan. L. Rev. 809, 812–13 n.13 (2010) [hereinafter Reinert, Measuring *Bivens* Success] (describing the common definition of plaintiff "success" in similar studies of civil rights litigation).

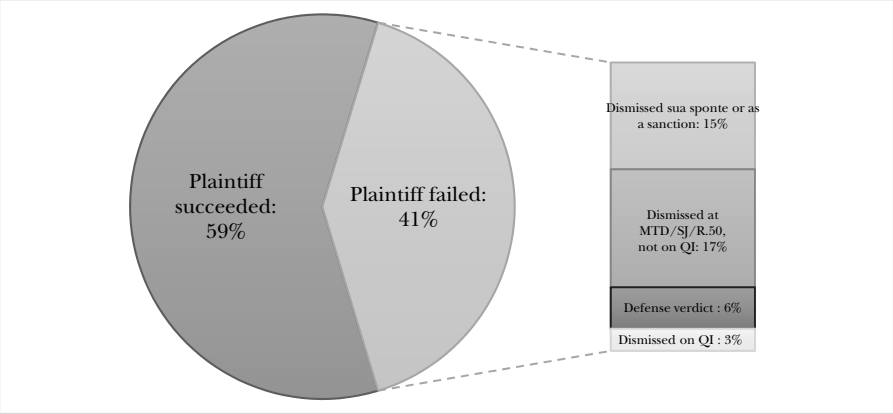
91. See Schwartz, How Qualified Immunity Fails, supra note 21, at 46 tbl.12. In line with this definition of "success," the 682 number is the sum of cases coded as Settlement/R. 68 Judgment (490); Voluntary/stipulated dismissal (182); Trial—plaintiff verdict (7); and Split verdict (3). Id. Note that there were thirty-four cases in the dataset that were remanded to state court (and I do not have information about what happened to the cases in state court); remained open, stayed, or are currently on appeal; or fell into a miscellaneous category and so are counted neither as successes nor failures for the purposes of this discussion. Id.

92. See id. Reinert reached similar findings regarding the frequency with which Bivens claims are dismissed on qualified immunity grounds. See Reinert, Measuring *Bivens* Success, supra note 90, at 843 (finding qualified immunity to be "the basis for a dismissal in only 5 out of the 244 complaints studied"). Note that I previously reported thirty-eight cases that were dismissed on qualified immunity grounds, see Schwartz, How Qualified Immunity Fails, supra note 21, at 46 tbl.12, but when reviewing these thirty-eight opinions for inclusion in this Article's Appendix I realized I had mischaracterized the dispositions of two cases from the Eastern District of Pennsylvania. I had improperly coded one case as dismissed on qualified immunity grounds at the summary judgment stage and one dismissed on qualified immunity grounds on appeal.

93. Schwartz, How Qualified Immunity Fails, supra note 21, at 46 tbl.12.

motions to dismiss or for judgment on the pleadings, at summary judgment, or on motions for judgment as a matter of law at or after trial on grounds other than qualified immunity.[94] Another 14% of cases (67) resulted in defense verdicts after trial.[95] For every one case dismissed by a court on qualified immunity grounds, another twelve failed for other reasons.

FIGURE 1: DISTRIBUTION OF CASE DISPOSITIONS



Although there was regional variation in the frequency with which qualified immunity was raised, granted, and dispositive, qualified immunity was not the primary basis for dismissal even in the districts most sympathetic to the defense.[96] Among the districts in my dataset, courts dismissed the highest percentage of cases on qualified immunity grounds in the Southern District of Texas. There, twelve (9.2%) cases were dismissed at the motion to dismiss and summary judgment stages on qualified immunity grounds.[97] But twenty-eight (21.4%) were dismissed at the motion to dismiss and summary judgment stages on other grounds, and thirteen (9.9%) were dismissed

94. Id. I did not track the causes for dismissal of these cases, but at the motion to dismiss stage, many claims were dismissed because plaintiffs had not pled their claims plausibly or because a criminal conviction barred the claims, and at the summary judgment and directed verdict stages, courts often found that the plaintiffs had not presented sufficient evidence to create a material factual dispute about the existence of a constitutional violation. See id. at 34, 57.

95. Id. at 46 tbl.12. I did not assess whether qualified immunity played some role in these defense verdicts, but Alex Reinert has examined the role of qualified immunity at trial and found that "qualified immunity rarely plays a significant role in jury trials." Reinert, Qualified Immunity at Trial, supra note 80, at 2088.

96. See Schwartz, How Qualified Immunity Fails, supra note 21, at 46 tbl.12, 49–50 (setting out the bases for the dispositions in all five districts and discussing regional variation in the findings).

97. Id. at 46 tbl.12.

sua sponte by the court, as a sanction, or for failure to prosecute.[98] The same was true in each of the four other districts—no matter how many cases district courts dismissed on qualified immunity grounds, many more failed for other reasons.[99]

To be sure, qualified immunity can cause a plaintiff to fail even if it is not the formal reason for dismissal. A plaintiff's strongest claims could be dismissed on qualified immunity grounds, leading to failure at a later stage of litigation. Or the cost of defending against a qualified immunity motion might expend all of a plaintiff's resources, causing her to abandon her case.[100] I have previously recognized that qualified immunity could play an indirect role in case dispositions,[101] and Aaron Nielson and Chris Walker have suggested that qualified immunity's "core effectiveness" may lie in these types of informal effects.[102]

But the data do not bear out this theory. A closer look at the docket dataset makes clear that there were only a few cases in which qualified immunity could have caused plaintiffs to fail. Defendants never raised qualified immunity in 294 of the 431 cases that "failed" but were not formally dismissed on qualified immunity grounds.[103] In another ninety-four cases, defendants raised qualified immunity as one of several arguments at the motion to dismiss or summary judgment stage, and courts dismissed plaintiffs' claims on other grounds.[104] In nineteen cases, defendants raised qualified immunity at some point during litigation, lost those motions in their entirety, and then prevailed at trial.[105] So, in 407 (94.4%) of the 431

98. See id.

99. See id.

100. For further discussion of the costs associated with defending against qualified immunity motions, see infra Part III; see also Alexander A. Reinert, Does Qualified Immunity Matter?, 8 U. St. Thomas L.J. 477, 492–94 (2011) (exploring the role qualified immunity plays in attorneys' decisions to file *Bivens* claims, and finding that qualified immunity increases the time and cost of litigation).

101. See Schwartz, How Qualified Immunity Fails, supra note 21, at 51 (providing data suggesting that qualified immunity defenses, once raised, could encourage settlement and also noting that the doctrine could discourage filing lawsuits in the first place).

102. Nielson & Walker, Qualified Defense, supra note 17, at 1881 ("[Qualified immunity's] main influence could be in discouraging plaintiffs to file Section 1983 lawsuits at all or encouraging plaintiffs to settle before discovery or trial and/or for far less than they would in a world without qualified immunity.").

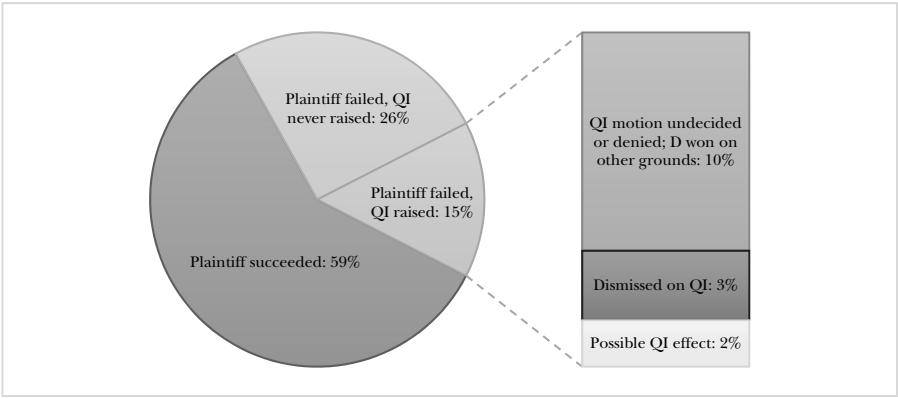
103. See Joanna C. Schwartz, Five Districts Dataset (2018) (on file with the *Columbia Law Review*) [hereinafter Schwartz, Five Districts Dataset]. I arrived at this figure using my dataset first by isolating the cases where plaintiffs "failed"—meaning plaintiffs' cases were dismissed without payment. For the case dispositions counted as "successes," see supra note 90 and accompanying text. My data shows that plaintiffs "failed" in 431 cases across the five districts over a two-year period. Then, I examined whether qualified immunity was ever raised in those 431 cases, whether in a motion for dismissal, motion for summary judgement, or Rule 50 motion. I found that qualified immunity was never raised in 294 of the 431 cases in which plaintiffs failed and was raised in the remaining 137 cases.

104. Id.

105. Id.

cases dismissed on grounds other than qualified immunity, it appears that qualified immunity did not play even an informal role in the plaintiffs' failures.

FIGURE 2: INFLUENCE OF QUALIFIED IMMUNITY ON CASE DISPOSITIONS



The remaining twenty-four cases were not dismissed on qualified immunity grounds, but it is conceivable that the doctrine played some role. Eleven resulted in defense verdicts after defendants' qualified immunity motions were granted in whole or part.[106] Perhaps the claims with more sympathetic facts were dismissed on qualified immunity grounds, leaving the remaining claims to fail at trial. Thirteen cases were dismissed as a sanction or dismissed for failure to prosecute.[107] Perhaps responding to defendants' qualified immunity motions depleted plaintiffs' resources, or concern that the motions might be granted caused plaintiffs to abandon their claims. If the eleven defense verdicts and the thirteen other dismissals were attributable to the informal effects of qualified immunity, then qualified immunity would have contributed to the failure of a total of sixty cases (including the thirty-six cases formally dismissed on qualified immunity grounds). That is a pretty small number of cases, in the scheme of things. Assuming, for the purposes of argument, that all sixty cases failed because of qualified immunity and plaintiffs would have "succeeded" in all sixty cases in a world without qualified immunity, plaintiffs' success rate would only increase about five percentage points, to 62.7% across the five districts in my study.

But there is good reason to believe that many if not most of the plaintiffs in these sixty cases would have failed even absent qualified

106. Id.
107. Id.

immunity. First, consider the thirty-six cases dismissed on qualified immunity grounds. In only one of these thirty-six cases did the court find a jury could reasonably conclude the defendants violated the Constitution.[108] In twenty-five of the thirty-six cases, the courts held that plaintiffs had not met their burdens of pleading plausible claims (at the motion to dismiss stage) or creating a factual dispute about the existence of a constitutional violation (at the summary judgment stage).[109] In another ten cases, the courts did not clearly rule one way or the other on plaintiffs' constitutional claims, but expressed skepticism about the cases' underlying merits.[110] Absent qualified immunity, courts likely would have denied one of these motions and dismissed most or all of the remaining thirty-five cases because plaintiffs failed to satisfy their burdens of pleading and proof.

Also, consider the eleven cases that resulted in defense verdicts after trial. It is impossible to know how the juries seated in these cases would have evaluated the evidence had qualified immunity not resulted in the dismissal of some claims. But plaintiffs in my docket dataset usually lost at trial—regardless of whether qualified immunity was raised in the case—and there is every reason to believe that plaintiffs would continue to lose regularly at trial in a world without qualified immunity.[111] When I surveyed attorneys about the biggest obstacle to bringing police misconduct cases, attorneys' most common answer was juries (with judges in second place).[112] Many attorneys I interviewed agreed that juries and judges are often more sympathetic to government defendants, more likely to believe officers at trial, and hostile to plaintiffs' claims.[113] Several attorneys reported losing

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108. Dunklin v. Mallinger, No. C-11-01275 JCS, 2013 WL 1501446, at *19 (N.D. Cal. Apr. 10, 2013) ("The Court finds that there are significant fact questions that preclude summary judgment on the question of whether Mr. Dunklin's Fourth Amendment right to be free from excessive force was violated.").

109. See infra Appendix (setting out the courts' rationale in the thirty-six cases dismissed on qualified immunity grounds).

110. See id.

111. See Schwartz, How Qualified Immunity Fails, supra note 21, at 46 tbl.12. Across the five districts in my study, seventy-seven trials ended in jury verdicts and sixty-seven (87%) were defense verdicts. See id.

112. See Schwartz, Selection Effects, supra note 22 (manuscript app. at 57 tbl.6).

113. See, e.g., Telephone Interview with E.D. Pa. Attorney A (May 14, 2017) (explaining that federal juries are often conservative and "when we win . . . they give us very little"); Telephone Interview with M.D. Fla. Attorney F (Dec. 13, 2017) (noting "the jurors here are pretty damn conservative in the federal court" and "the judges are unsympathetic"); Telephone Interview with S.D. Tex. Attorney D (May 1, 2017) ("[A] lot of the judges here are pro-police, pro-government and the cases are just more difficult to prosecute here."). Note, however, that attorneys varied to some degree in their views depending on their jurisdiction. See, e.g., Telephone Interview with N.D. Cal. Attorney D (Nov. 10, 2017) ("I view [federal judges] generally favorably."). For discussion of this regional variation, see Schwartz, Civil Rights Ecosystems, supra note 80 (manuscript at 10–12) ("Judges can differ considerably in their approach to substantive and procedural questions relevant to civil rights litigation, and local communities—from which juries are drawn—can vary considerably in their sympathies toward government defendants and civil rights plaintiffs." (footnote omitted)).

cases at trial despite egregious facts, and blamed those losses on juries' predisposition against their clients.[114] Several attorneys predicted that more cases would go to trial in a world without qualified immunity, but that jurors' skepticism about plaintiffs' claims meant that they would not win more often.[115]

Finally, consider the thirteen cases dismissed as a sanction or for failure to prosecute. In one case, the dismissal of the individual damages claim on qualified immunity grounds may have caused the plaintiff to abandon the case. In that case, the district court dismissed plaintiff's Section 1983 claims against defendant police officers on qualified immunity grounds, leaving only his *Monell* claim against the city.[116] Plaintiff's counsel stopped responding to defendant's communications after the court ruled, and the case was dismissed for failure to prosecute. It is possible that plaintiff's counsel abandoned the case because he concluded that he could not succeed on the *Monell* claim, and would have remained in the case had the individual damages claims not been dismissed. But it is more difficult to see how the results of the other twelve cases would have changed absent qualified immunity. Three of the cases were dismissed because counsel failed to comply with court orders. In each case, defendants' qualified immunity

114. See, e.g., Telephone Interview with M.D. Fla. Attorney A (Apr. 28, 2017) (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); Telephone Interview with M.D. Fla. Attorney C (Nov. 15, 2017) (describing an excessive force case in which the plaintiff was awarded $2,500, which amounted to half of his medical bills); Telephone Interview with M.D. Fla. Attorney E (Nov. 30, 2017) (describing a case where the plaintiff was bitten by a dog, and the plaintiff was left "with [a] leg that look[ed] like a chicken bone" and the jury entered a defense verdict, as well as multiple other cases that resulted in defense verdicts); Telephone Interview with M.D. Fla. Attorney F, supra note 113 (describing a week-long trial in a case involving a beaten inmate in which the jury found in favor of the plaintiff and awarded punitive damages but no compensatory damages).

115. See, e.g., Telephone Interview with M.D. Fla. Attorney E, supra note 114 (predicting that, absent qualified immunity, cases would "actually get to go to juries more often and let them decide . . . [but] [i]t's still a hard road to hoe"); Telephone Interview with N.D. Cal. Attorney C (Nov. 7, 2017) (predicting that, without qualified immunity, some additional cases "would settle or would go to trial and be successful, but . . . it's kind of hard to predict what juries are going to do . . . there's just too many people out there who want to support the police, right or wrong"); Telephone Interview with N.D. Cal. Attorney E (Nov. 17, 2017) ("[I]f they eliminated qualified immunity, I would have more cases [going] to trial. And I would be in front of a jury. In terms of my overall success rate, in all honest[y], I don't think it would make . . . that much difference."); Telephone Interview with N.D. Ohio Attorney D (Nov. 20, 2017) (responding "no, not really" when asked whether he would win cases more often in a world without qualified immunity); Telephone Interview with N.D. Ohio Attorney F (Dec. 9, 2017) (responding, when asked about whether he would win more often at trial absent qualified immunity, "I don't know because you still have to deal with the complexities of police–citizen encounters, and there is a built-in inclination to give the police the benefit of the doubt); Telephone Interview with N.D. Ohio Attorney G (Dec. 11, 2017) (predicting more trials, but also stating, "I don't think I'd win any more cases").

116. Porter v. City of Santa Rosa, No. 11-cv-04886-EDL, slip op. at 6–12 (N.D. Cal. July 2, 2012) (granting in part and denying in part defendants' motion for summary judgment).

motions were denied or granted in part on other grounds before the attorney's failure to comply.[117] Nine of the cases dismissed for failure to prosecute were litigated by pro se plaintiffs who failed to respond to motions or comply with court orders.[118] Cases brought by pro se plaintiffs often fail, regardless of whether defendants raise qualified immunity.[119] It is possible that attorneys would agree to represent some of these pro se plaintiffs absent qualified immunity—but only if the plaintiffs had a decent chance of success.[120] And although representation would make success more likely, represented plaintiffs still have to overcome many other challenges at the motion to dismiss and summary judgment stages, and at trial.[121]

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117. See Docket for Whitaker v. Alameda Cty., No. 3:12-cv-05923-JD (N.D. Cal. filed Nov. 20, 2012) (denying defendant's motion to dismiss on qualified immunity but ultimately dismissing the case for failure to prosecute when the plaintiff's attorney missed two pretrial conferences, writing to the court that he had been on medical leave); Docket for Powell v. County of Delaware, No. 2:12-cv-06285-PBT (E.D. Pa. filed Nov. 7, 2012) (granting in part the defendant-detectives' motion for judgment on the pleadings in an unwritten order but ultimately dismissing the rest of the claims because plaintiff never wrote a requested letter); Docket for Lathan v. City of Cleveland, No. 12-cv-0037, 2012 WL 1708762, at *3–6 (N.D. Ohio May 15, 2012) (granting defendants' motion to dismiss in part on grounds other than qualified immunity with leave to file an amended complaint, but the attorney never served an amended complaint on defendants)).

118. See Order Dismissing Action for Failure to Comply with Court Orders, Cannon v. City of Petaluma, 3:11-cv-00651-JST (N.D. Cal. filed July 8, 2013) (dismissing a pro se plaintiff's case for failing to comply with the court's orders); Order Dismissing This Matter for Want of Prosecution, Murphy v. Nw. Sch. Dist., No. 5:12-cv-02429-JRA (N.D. Ohio filed Apr. 26, 2013) (dismissing a pro se plaintiff's case for failure to prosecute); Order Dismissing Case with Prejudice, Durham v. City of Palo Alto, No. 5:12-CV-00666-LHK (N.D. Cal. filed Jan. 23, 2013) (dismissing a pro se plaintiff's case for failure to prosecute after the plaintiff failed to respond to a motion for summary judgment); Docket for Barberi v. Freitas, No. 3:12-cv-06311-WHA (N.D. Cal. filed Dec. 12, 2012) (dismissing a pro se plaintiff's case for failure to prosecute while a motion to dismiss on qualified immunity grounds was pending); Docket for Collura v. City of Philadelphia, No. 2:12-cv-04398-JD (E.D. Pa. filed Aug. 2, 2012) (dismissing the case as a sanction because the pro se plaintiff did not comply with several court orders); Docket for Johnson-Slaughter v. Ahern, No. 3:12-cv-02385-SI (N.D. Cal. filed May 11, 2012) (same); Docket for Grogg v. Gee, No. 8:11-cv-02646-MSS-MAP (M.D. Fla. filed Nov. 25, 2011) (dismissing a pro se plaintiff's case for failure to prosecute after the plaintiff's counsel withdrew from the case while the motion to dismiss raising qualified immunity was pending); Docket for Hickman v. City of Berkeley, No. 3:11-cv-04395-EDL (N.D. Cal. filed Sept. 2, 2011) (dismissing a pro se plaintiff's case for failure to prosecute after plaintiff's counsel withdrew from the case while a summary judgment motion raising qualified immunity was pending, and granting the summary judgment motion on qualified immunity in the alternative); Docket for Silverman v. City & County of San Francisco, No. 4:11-cv-01615-SBA (N.D. Cal. filed Apr. 1, 2011) (dismissing a pro se plaintiff's case for failure to prosecute after plaintiff's counsel withdrew from the case while a summary judgment motion raising qualified immunity was pending).

119. See Schwartz, Selection Effects, supra note 22 (manuscript at 26) (describing failure rates in pro se cases).

120. For further discussion of attorneys' case selection decisions, see infra Part IV.

121. See supra note 94 and accompanying text (describing the frequency of and bases for dismissal at the motion to dismiss and summary judgment stages); supra notes 111–115 and accompanying text (describing the likelihood of success at trial).

Thus far, I have focused only on cases in my docket dataset in which plaintiffs failed. But eliminating qualified immunity could also influence the outcomes of some cases where plaintiffs succeeded. Presumably, most plaintiffs who are today able to negotiate a settlement or win a verdict after trial would be able to succeed in these same ways in a world without qualified immunity. Some of these plaintiffs might recover a larger verdict or settlement absent qualified immunity because the predicted costs of litigating qualified immunity and the threat of dismissal on qualified immunity grounds may cause defendants to offer—and plaintiffs to accept—lower settlement amounts than they would absent the defense. In addition, qualified immunity sometimes results in a partial dismissal of the plaintiff's most valuable claims, and the plaintiff subsequently succeeds on the claims that remain; absent qualified immunity, that plaintiff would likely recover additional money for the claims that were dismissed on qualified immunity grounds.[122]

But eliminating qualified immunity might in some instances cause plaintiffs to decline settlements in favor of trial. For example, approximately 17% of qualified immunity motions and 34% of interlocutory and final appeals in my docket dataset were never decided, presumably because the cases settled while the motions were pending.[123] These settlements may have been motivated by uncertainty about how the qualified immunity motions and appeals might be decided. In a world without qualified immunity, litigants might still settle while motions to dismiss and for summary judgment are pending, for fear that they will be granted on other grounds. Some cases might in fact be dismissed on other grounds. And plaintiffs might decide to take some cases to trial.[124] As I have explained, defendants win the vast majority of cases that go to trial and attorneys view jurors as hostile to these cases.[125] So, if cases that would have otherwise settled would go to trial absent qualified immunity, at least some of those plaintiff "successes"—settlements—might turn into failures after trial.

Although plaintiffs' success rate is unlikely to change markedly absent qualified immunity, there are, indisputably, some cases dismissed on qualified immunity grounds that would have succeeded in a world without the defense. District and circuit courts around the country issue a slow but steady stream of decisions finding that plaintiffs' constitutional rights were violated but granting qualified immunity because there was not a prior case holding factually similar conduct to be unconstitutional.[126] Many of

122. For further discussion of the ways qualified immunity can reduce the value of plaintiffs' claims, see Schwartz, Selection Effects, supra note 22 (manuscript at 51).

123. See Schwartz, How Qualified Immunity Fails, supra note 21, at 51.

124. See supra note 115 (describing attorneys' predictions that more cases would go to trial without qualified immunity).

125. See supra notes 112–115 and accompanying text.

126. See, e.g., Chambers v. Pennycook, 641 F.3d 898, 901–02 (8th Cir. 2011) (finding that the plaintiff's constitutional rights were violated when police officers kicked and choked him while he was restrained and intentionally drove erratically so that the plaintiff

these decisions describe tragic facts and clear misconduct: defendants who have searched homes without probable cause, fabricated evidence, and used excessive force, but are nevertheless shielded from liability.[127] These decisions deny what is often the best available relief[128] to plaintiffs who have been grievously wronged by government actors, suggest to government officials that they can violate the law with impunity,[129] and send the troubling message to victims of misconduct that they are not deserving of constitutional protection.[130] Commentators have reasonably, but incorrectly, taken these decisions as proof that qualified immunity regularly shields defendants from liability and that plaintiffs would succeed far more often in qualified immunity's absence.[131] Yet courts infrequently grant qualified immunity after finding constitutional violations.[132] Far more often, courts granting qualified immunity also find that the plaintiff failed on their constitutional claim, or express great skepticism about the merits of that claim.[133] And civil rights suits usually fail for reasons unrelated to qualified immunity. They are dismissed sua sponte by the court before defendants even have an opportunity to respond, dismissed as a sanction or for failure to prosecute, dismissed at the motion to dismiss stage for

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was "jerked back and forth in his seat," but granting qualified immunity); Coates v. Powell, 639 F.3d 471, 476–77 (8th Cir. 2011) (finding that the plaintiff's constitutional rights were violated when an officer remained in the plaintiff's house after consent was revoked, but granting qualified immunity); Costanich v. Dep't of Soc. & Health Servs., 627 F.3d 1101, 1113–14 (9th Cir. 2010) (finding that the plaintiff "had a Fourteenth Amendment due process right to be free from deliberately fabricated evidence in a civil child abuse proceeding," but granting qualified immunity); Bryan v. MacPherson, 630 F.3d 805, 827, 832–33 (9th Cir. 2010), superseding 608 F.3d 614 (9th Cir. 2010) (finding that an officer violated the Fourth Amendment when he used a Taser against a plaintiff who was unarmed and "far from an 'immediate threat,'" but granting qualified immunity); Cordova v. Aragon, 569 F.3d 1183, 1189, 1195 (10th Cir. 2009) (finding that the decedent's constitutional rights were violated when an officer shot him in the back of his head as he was driving away, but granting qualified immunity). For additional decisions see *Allah* Cross-Ideological Amicus Brief, supra note 16, at 15–17 (describing a "sample of recent cases in which Section 1983 claimants prevailed on the merits, only to have a court deny recovery because the adjudicated constitutional violation was nevertheless insufficiently 'clearly established'" (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); Schwartz, Case Against, supra note 1, at 1840–51 (describing forty-three cases in which courts found constitutional violations but granted qualified immunity).

127. See supra note 126.

128. Although there are other possible forms of oversight—including criminal prosecution and internal discipline—these approaches "often fail or are otherwise unavailable." *Allah* Cross-Ideological Amicus Brief, supra note 16, at 12–13. See generally Joanna C. Schwartz, Who Can Police the Police?, 2016 U. Chi. Legal Forum 437 (describing various forms of government regulation and their strengths and limitations).

129. See supra notes 6–8.

130. For the legal estrangement that can result from being denied constitutional protections, see generally Monica C. Bell, Police Reform and the Dismantling of Legal Estrangement, 126 Yale L.J. 2054 (2017).

131. See supra note 81 and accompanying text.

132. See supra note 53.

133. See supra note 54.

failing to allege plausible claims, dismissed at summary judgment for failing to put forth sufficient evidence to support the plaintiff's claim, or dismissed following defense verdicts at trial.[134]

For reasons I will soon explain, eliminating qualified immunity would likely result in more civil rights cases filed.[135] More attorneys might be inclined to take civil rights cases, and attorneys who already take some civil rights cases might devote a greater percentage of their docket to this area of their practice.[136] Plaintiffs' attorneys who currently bring civil rights cases might also be more inclined, absent qualified immunity, to file cases alleging novel constitutional violations, false arrest cases, and cases with limited damages.[137] It is impossible to know how many more cases would be filed in a world without qualified immunity. But these additional cases would likely have a similar success rate as cases filed today.[138] Plaintiffs in these cases would still have to overcome the same burdens of pleading, discovery, and proof that are today the primary bases for dismissal.[139] And

134. See supra notes 91–99 and accompanying text.

135. See infra Part IV.

136. See infra note 221 and accompanying text.

137. See infra notes 217–220 and accompanying text.

138. George Priest and Benjamin Klein famously hypothesized that plaintiff success rates are impervious to changes in the applicable legal standard. See George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1, 31 (1984) (positing "that litigants will take varying attitudes of jurors or differing legal standards into account in their settlement negotiations so that the proportion of observed plaintiff recoveries will tend to remain constant over time regardless of changes in the underlying standards applied"). Others have examined and disputed the Priest–Klein hypothesis. See, e.g., Daniel Klerman & Yoon-Ho Alex Lee, Inferences from Litigated Cases, 43 J. Legal Stud. 209, 210–11 (2014) (finding that "trial win rates vary with judicial characteristics, legal standards, and other factors that affect case strength"); Peter Siegelman & John J. Donohue III, The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest–Klein Hypothesis, 24 J. Leg. Stud. 427, 431 (finding that settlement and win rates are influenced by the strength of the economy). Although I predict limited change in plaintiffs' success rates absent qualified immunity, I do not believe that plaintiff success rates are impervious to changes in legal standards. Instead, a combination of factors—including state and federal liability rules, procedural rules, jury pools, judges, and the plaintiffs' bar—influence plaintiffs' success rates. See Schwartz, Civil Rights Ecosystems, supra note 80, at 38–41. My prediction that success rates would not change absent qualified immunity is based on my view that qualified immunity currently plays a limited role in most case dispositions, and so eliminating qualified immunity without adjusting other legal rules and characteristics of civil rights litigation is unlikely to dramatically affect the distribution of dispositions.

139. See supra notes 91–99 and accompanying text (describing the bases for dismissal of cases in my dataset); see also *Allah* Cross-Ideological Amicus Brief, supra note 16, at 19–20 ("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 other[] [contexts]."); Karen M. Blum, Section 1983 Litigation: The Maze, the Mud, and the Madness, 23 Wm. & Mary Bill Rts. J. 913, 915, 964 (2015) [hereinafter Blum, Section 1983 Litigation] (explaining that "the need to prove whatever level of culpability is required for the constitutional tort, as well as the need to prove causation, would still present formidable roadblocks to success" if plaintiffs were allowed to sue municipalities directly for constitutional violations by their employees).

there is no reason to believe that the additional cases filed absent qualified immunity would be more likely to overcome those obstacles than the pool of cases filed today.[140] Eliminating qualified immunity would likely increase the absolute number of plaintiff successes, but all available evidence suggests it would not result in a "bonanza for plaintiffs' attorneys."[141]

III. LITIGATION

The Supreme Court has repeatedly described qualified immunity as a means of shielding government defendants from the costs and burdens associated with litigation.[142] Presumably, then, the Court believes that eliminating qualified immunity would increase the litigation burdens on defendants. In contrast, my research suggests that qualified immunity actually increases the time, cost, and complexity of civil rights cases in which the defense is raised. Doing away with qualified immunity will likely cause the total number of cases filed to increase,[143] but eliminating qualified immunity would likely decrease the average cost and time spent litigating and adjudicating civil rights cases.

Litigants and courts spend money and time on qualified immunity in four different ways. First, they spend time and money researching, briefing, writing, arguing, and deciding motions raising qualified immunity. Defendants raised qualified immunity as a defense in 368 (31.1%) of the 1,183 cases in my docket dataset.[144] In sixty of these cases, defendants raised qualified immunity two or more times during the course of litigation.[145] Defendants are entitled to qualified immunity unless a plaintiff can prove the constitutional violation was obvious, or can point to a factually similar case from their circuit or the Supreme Court—or a consensus of factually

140. For further discussion of attorneys' case selection decisions absent qualified immunity, see infra Part IV.

141. King, supra note 19.

142. See, e.g., Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment))); Pearson v. Callahan, 555 U.S. 223, 231 (2009) (describing protecting government officials from burdens associated with discovery and trial as the "'driving force' behind [the] creation of the qualified immunity doctrine." (quoting Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987))); Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (explaining that qualified immunity is necessary to protect against "the diversion of official energy from pressing public issues").

143. See infra Part IV.

144. See Schwartz, How Qualified Immunity Fails, supra note 21, at 29 & tbl.2. The time and costs associated with litigating qualified immunity are not evenly distributed across jurisdictions. While defendants in the Southern District of Texas and the Middle District of Florida brought qualified immunity motions in more than half of the cases in which the defense could be raised, defendants in the Eastern District of Pennsylvania brought qualified immunity motions in less than one-fourth of possible cases. See id.

145. See id. at 33 tbl.5. Defendants in the Southern District of Texas and Middle District of Florida were more likely to raise qualified immunity in multiple motions. See id.

similar cases—that would put the defendant on notice that their conduct was unlawful.[146] So, for a plaintiff to effectively respond to a qualified immunity motion, they must research factually similar cases holding defendants' conduct unconstitutional, and then must brief and argue the motion. To be sure, qualified immunity is generally one of many arguments raised in motions to dismiss, summary judgment motions, and motions for judgment as a matter of law.[147] But qualified immunity, criticized by both commentators and courts for its complexity, is considered a particularly difficult issue to brief and decide.[148] As one attorney I interviewed explained, eliminating qualified immunity would make litigation "less burdensome definitely" because it is "the biggest [defense] that you have to confront."[149]

Second, litigants spend money and time on interlocutory appeals of qualified immunity denials. Unlike other arguments raised in motions to dismiss and summary judgment motions, defendants are entitled to immediate appeals of qualified immunity denials that turn on questions of law.[150] Defendants brought interlocutory appeals of forty-one (21.7%) of the 189 qualified immunity motions in my docket dataset that were denied in whole or part.[151] Attorneys must take time to research, brief, and argue

146. 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*, 483 U.S. at 640)); 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).

147. See Schwartz, How Qualified Immunity Fails, supra note 21, at 35 & figs.1 & 2 (reporting the frequency with which motions to dismiss and summary judgment motions included a qualified immunity argument).

148. See, e.g., Blum, Section 1983 Litigation, supra note 139, at 925 ("One has to work hard to find some doctrinal consistency or predictability in the case law and the circuits are hopelessly conflicted both within and among themselves." (footnote omitted)); Alan K. Chen, The Intractability of Qualified Immunity, 93 Notre Dame L. Rev. 1937, 1937 (2018) ("[T]he doctrine has now puzzled, intrigued, and frustrated legal academics, federal judges, and litigators for half a century."); Jeffries, What's Wrong, supra note 81, at 852 (calling qualified immunity "a mare's nest of complexity and confusion").

149. Telephone Interview with N.D. Cal. Attorney B (Oct. 23, 2017); see also Telephone Interview with E.D. Pa. Attorney A, supra note 113 (explaining that defendants use qualified immunity to "beat down the plaintiff's counsel" and make their lives "somewhat miserable"); Telephone Interview with M.D. Fla. Attorney B (Oct. 30, 2017) (explaining that qualified immunity requires attorneys to "litigate everything to the nth degree"); Telephone Interview with N.D. Ohio Attorney G, supra note 115 (predicting that his fees would "go down" if qualified immunity were eliminated).

150. See Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) ("[A] district court's denial of qualified immunity, to the extent it turns on an issue of law, is an appealable 'final decision' . . . .") (quoting 12 U.S.C. § 1291 (1984)).

151. See Schwartz, How Qualified Immunity Fails, supra note 21, at 40 tbl.9. There is regional variation in the frequency of interlocutory appeals. In the Eastern District of Pennsylvania, there was an interlocutory appeal in just one of the 407 filed cases. In contrast, in the Northern District of Ohio, defendants filed interlocutory appeals in almost 10% of filed cases. See id.

oppositions to interlocutory appeals, and courts of appeals must take time to consider and decide the appeals.

Third, cases can be suspended while qualified immunity motions and appeals are pending. The Supreme Court has described qualified immunity as "an immunity from suit rather than a mere defense to liability,"[152] and has instructed that, when defendants raise qualified immunity, lower courts "should resolve that threshold question before permitting discovery."[153] District courts appear to have heeded the Court's instruction: Although they have broad discretion to grant stays,[154] district courts have characterized this power as particularly important when qualified immunity motions are pending.[155] Defendants received formal discovery stays—lasting 152 days, on average—in almost 6% of the cases in the docket dataset in which qualified immunity was raised at the motion to dismiss stage.[156] Cases are also suspended while interlocutory appeals are pending; among the cases in the docket dataset, interlocutory appeals were pending for 441 days on average before being decided.[157] Several attorneys I interviewed predicted that eliminating qualified immunity would reduce the amount

152. *Mitchell*, 472 U.S. at 526.

153. Crawford-El v. Britton, 523 U.S. 574, 598 (1998).

154. See Clinton v. Jones, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket."); Landis v. N. Am. Co., 299 U.S. 248, 254–55 (1936) ("The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.").

155. See, e.g., Slocum v. Fowler, No. 2:16-cv-02169-JAD-CWH, 2018 WL 4468998, at *2–3 (D. Nev. Sept. 18, 2018) (quoting *Crawford-El*, 523 U.S. at 597–98) (granting stay of discovery while a qualified immunity motion was pending, observing that "[o]nce the issue of qualified immunity is raised, the court must exercise its discretion to protect the substance of the qualified immunity defense, and to prevent subjecting officials to 'unnecessary and burdensome discovery.'"); Alvarez-Cortez v. Vallaria, No. 11-cv-02307-WYD-KMT, 2012 WL 12863, at *3 (D. Colo. Jan. 4, 2012) (granting a stay of discovery while a motion to dismiss raising qualified immunity was pending, noting that, "[b]ecause qualified immunity is meant to free a defendant from the burdens of litigation, allowing discovery to proceed would necessarily burden the Defendants as the defense would be lost"); Ransaw v. United States, No. 1:10 CV 01672, 2011 WL 1752160, at *2 (N.D. Ohio May 5, 2011) ("When a defendant motions for dismissal on grounds of qualified immunity, the Court must not only determine that issue at the earliest possible moment, but also stay discovery while the motion is pending. . . . [I]f the Court were to allow discovery to proceed in the present case, the benefit of the immunity doctrine would be lost . . . ." (citations omitted)).

156. See Schwartz, Selection Effects, supra note 22 (manuscript at 18). A total of eight discovery stays were granted, amounting to 5.9% of the cases in which qualified immunity was raised at the motion to dismiss stage (136), and 5.2% of the total motions to dismiss raising qualified immunity that were filed (154). (In eighteen cases, there were multiple motions to dismiss filed that raised qualified immunity.) See Schwartz, How Qualified Immunity Fails, supra note 21, at 30 tbl.3, 33 tbl.4.

157. See Schwartz, Selection Effects, supra note 22 (manuscript at 22).

of time spent litigating civil rights cases because there would be fewer discovery stays and no interlocutory appeals.[158]

Fourth, apart from the costs and time associated with researching and responding to individual qualified immunity motions, litigants and courts must learn about and stay abreast of the law. Qualified immunity is considered a particularly complex area of civil rights doctrine.[159] The Supreme Court has offered unclear and shifting guidance about which courts' decisions can clearly establish the law, and how factually similar prior precedent must be to clearly establish the law.[160] Litigants and courts report dedicating significant time and resources to understanding the intricacies of the doctrine.[161]

Qualified immunity increases the cost, complexity, and time associated with civil rights litigation in each of these ways. Accordingly, as one attorney I interviewed observed, eliminating qualified immunity "would make the cases a lot simpler."[162] But qualified immunity might still be serving its core function if it effectively shields government defendants from the burdens of discovery and trial. Government defendants would almost certainly prefer that their attorneys spend their time researching and arguing qualified immunity motions rather than be forced themselves to respond to questions under oath at deposition and trial. And some

158. See, e.g., Telephone Interview with M.D. Fla. Attorney E, supra note 114 (predicting that, absent qualified immunity, "we wouldn't spend so much [time] flailing around with these huge motions waiting for the judge to rule"); Telephone Interview with N.D. Cal. Attorney B, supra note 149 (describing a case that took eight years to resolve because of qualified immunity appeals); Telephone Interview with N.D. Ohio Attorney D, supra note 115 (predicting that, without qualified immunity, cases "would be completed sooner[,]" because an interlocutory appeal "adds another year, year and a half to a case in our circuit"); Telephone Interview with N.D. Ohio Attorney G, supra note 115 (explaining that one of his cases "got delayed for a year and a half when it went up [to the] Sixth Circuit and back").

159. See supra note 148 and accompanying text.

160. See Blum, Section 1983 Litigation, supra note 139, at 924–25 (reporting that courts are "hopelessly conflicted both within and among themselves" about qualified immunity standards).

161. See, e.g., Wilson, supra note 80, at 447 ("Wading through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal appellate court judges routinely face."); Telephone Interview with M.D. Fla. Attorney C, supra note 114 ("[I]t takes an enormous amount of dedication to do these cases properly. I think it takes an enormous amount of experience to do them properly. And there's a huge learning curve."); Telephone Interview with N.D. Ohio Attorney C (Nov. 10, 2017) (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"); Telephone Interview with S.D. Tex. Attorney C (Apr. 26, 2017) ("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."); Telephone Interview with S.D. Tex. Attorney F (Nov. 15, 2017) (explaining that "qualified immunity is not easily understandable" and "[y]ou have to read a lot of cases and do a lot of research").

162. Telephone Interview with M.D. Fla. Attorney B, supra note 149.

government attorneys reportedly consider motion practice less burdensome than trial.[163]

But my research suggests that qualified immunity motion practice does not usually obviate the need for discovery and trial. Among the cases in my dataset, defendants most often raised qualified immunity at summary judgment, after litigants had already participated in discovery.[164] And qualified immunity motions were rarely dispositive. Across the five districts in my dataset, just 8.6% of defendants' qualified immunity motions resulted in the dismissal of plaintiffs' cases.[165] Seven of these qualified immunity motions were granted at the motion to dismiss stage, and twenty-nine were granted at summary judgment or on appeal.[166] In the remaining 91.4% of motions, the parties and courts took the time and money to research, brief, argue, and decide the qualified immunity defense without disposing of the cases.[167]

Qualified immunity motions and appeals might not even save litigants time in the rare event that they are dispositive. Thirty-six cases in my dataset were dismissed on qualified immunity grounds.[168] Courts in twenty-five of those cases held that plaintiffs also had failed to meet their burden of pleading or proof, and expressed skepticism about the merits of plaintiffs' claims in another ten.[169] Absent qualified immunity, it appears that most or all of those thirty-five cases would have been dismissed on other grounds. If so, the time taken to research and brief qualified immunity in these thirty-five cases was unnecessary.

In one of the thirty-six cases dismissed on qualified immunity grounds, the court held that a jury could have found the plaintiff's constitutional rights were violated, but granted qualified immunity because those rights were not clearly established.[170] Absent qualified immunity, the case might have gone to trial. Did qualified immunity save the parties time in this case? Not likely. Civil rights trials—which, in my dataset, were almost always completed within a few days—take far less time than qualified immunity motions and appeals take to resolve.[171] For this

163. See Blum, Time to Change, supra note 2, at 1890 n.23 (describing defense attorneys' views that "the costs of trying a case are a lot greater than the costs of taking an [interlocutory] appeal [of qualified immunity]").

164. See Schwartz, How Qualified Immunity Fails, supra note 21, at 33 tbl.4 (reporting that 64.3% of qualified immunity motions were filed at summary judgment, 35% were filed at the motion to dismiss stage, and 0.7% were filed at or after trial).

165. See id. at 60.

166. See id. at 46 tbl.12; supra text accompanying note 92 (correcting the data from the original study).

167. See Schwartz, How Qualified Immunity Fails, supra note 21, at 60–61.

168. See supra note 92.

169. See supra notes 109–110 and accompanying text.

170. See Dunklin v. Mallinger, No. C-11-01275 JCS, 2013 WL 1501446, at *19 (N.D. Cal. Apr. 10, 2013). For a description of the thirty-six rulings, see infra Appendix.

171. See Telephone Interview with N.D. Cal. Attorney B, supra note 149 (describing the time it takes to prepare oppositions to summary judgment motions).

reason, Alan Chen has observed that "the pretrial litigation costs caused by the invoking of the immunity defense may cancel out the trial costs saved by that defense."[172] Northern District of Ohio Judge James Gwin has criticized interlocutory appeals of qualified immunity denials on similar grounds.[173] As he has explained, most denials of qualified immunity are affirmed on appeal—so, the time spent on the appeal increases the time spent on the case without changing the result.[174] Even when a defendant is awarded qualified immunity on interlocutory appeal, the decision might not save time. As Judge Gwin writes:

> [A]n interlocutory appeal adds another round of substantive briefing for both parties, potentially oral argument before an appellate panel, and usually more than twelve months of delay while waiting for an appellate decision. All of this happens in place of a trial that . . . could have finished in less than a week . . . .[175]

Even when qualified immunity motion practice eliminates the need for trial, the defense may not actually reduce the cost, time, and complexity of litigation.

Some have suggested that qualified immunity might streamline litigation in another way—by encouraging plaintiffs' attorneys to settle early, while a qualified immunity motion is pending or threatened.[176] But several plaintiffs' attorneys I interviewed held the opposite view. They believe that qualified immunity delays settlement because defendants do not engage in meaningful settlement negotiations until after summary judgment motions raising qualified immunity have been decided.[177] My docket dataset suggests that both views may sometimes be correct. Among the 368 cases in which

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172. 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, 100 (1997).

173. See Wheatt v. City of East Cleveland, No. 1:17-CV-377, 2017 WL 6031816, at *4 (N.D. Ohio Dec. 6, 2017).

174. See id.

175. Id.

176. See, e.g., Nielson & Walker, Qualified Defense, supra note 17, at 1881 (suggesting that qualified immunity might "encourag[e] plaintiffs to settle before discovery or trial and/or for far less than they would in a world without qualified immunity").

177. See, e.g., Telephone Interview with M.D. Fla. Attorney B, supra note 149 (predicting that "[t]here would be more and earlier settlements" if there was not qualified immunity); Telephone Interview with M.D. Fla. Attorney E, supra note 114 (explaining that defense counsel offers "peanuts" at mediation because they want to see if they can win their qualified immunity motions); Telephone Interview with N.D. Ohio Attorney G, supra note 115 (predicting that, absent qualified immunity, "[t]here'd be a lot more honest discussion about what's really going on much earlier in every case. We wouldn't wait for summary judgment to start talking to each other. It would be a dramatic change"); Telephone Interview with S.D. Tex. Attorney C, supra note 161 (explaining that "[a]fter [defendants] take their shot at qualified immunity then they'll start talking [about settlement]"); see also Michael E. Solimine, Revitalizing Interlocutory Appeals in the Federal Courts, 58 Geo. Wash. L. Rev. 1165, 1191 (1990) (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").

qualified immunity was raised at some point during the course of litigation,[178] 186 were settled or voluntarily dismissed.[179] Seventy-seven (41.4%) of those 186 cases were settled while qualified immunity motions or interlocutory appeals were pending.[180] Perhaps plaintiffs would have been less inclined to settle these cases absent qualified immunity, but we do not know for certain. Defendants made other arguments in most or all of these motions, and motions to dismiss and for summary judgment raising qualified immunity were far more likely to be granted on other grounds.[181] Another eighty (43%) of the 186 settlements were entered into after plaintiffs had defeated defendants' summary judgment motions (raising qualified immunity), after an unsuccessful interlocutory appeal, or during or after trial.[182] Settlements in these eighty cases appear to have been hastened not by plaintiffs' concerns about qualified immunity, but by defendants' inability to convince a judge or jury that the case should be dismissed. If so, defense attorneys in these cases were doing what plaintiffs' counsel described[183]—waiting to pursue settlement until after they lost their qualified immunity motions. Although we cannot know for sure what motivated settlements in these cases, it appears that qualified immunity may hasten settlement in some cases and delay settlement in others.

Doing away with qualified immunity would eliminate the need to spend time and money bringing, defending against, and deciding qualified immunity motions and interlocutory appeals; eliminate lengthy delays while motions and appeals are pending; and make irrelevant a complex, uncertain, and shifting area of the law. Most qualified immunity motions are denied, only adding to the cost of litigation. Even if some cases would go to trial that would have settled or been dismissed because of qualified immunity, eliminating the defense may still be the most efficient course because trials are often quicker and less complex than qualified immunity motion practice and appeals. Although qualified immunity is intended to reduce litigation burdens, doing away with qualified immunity may actually decrease the average time, complexity, and cost of civil rights cases.

IV. FILINGS

The Supreme Court intends for qualified immunity doctrine to shield government officials from the costs and burdens associated with insubstantial

178. See Schwartz, How Qualified Immunity Fails, supra note 21, at 29 tbl.2.

179. Schwartz, Five Districts Dataset, supra note 103.

180. Id.

181. See Schwartz, How Qualified Immunity Fails, supra note 21, at 39 (finding that courts more often than not grant both summary judgment motions and motions to dismiss on grounds other than qualified immunity when such motions raised qualified immunity).

182. Schwartz, Five Districts Dataset, supra note 103. The remaining twenty settlements were entered into after a motion to dismiss but before summary judgment. It is difficult to tell, based on the timing, what prompted these settlements.

183. See supra note 177.

litigation.[184] Although the Court appears to believe that qualified immunity achieves this goal by causing insubstantial cases to be dismissed before discovery and trial,[185] defenders of qualified immunity have suggested that the doctrine may achieve this goal by discouraging plaintiffs from ever filing insubstantial cases.[186] If so, eliminating qualified immunity might result in a massive influx of frivolous suits.[187] But those sharing this concern overlook two critically important features of civil rights litigation: plaintiffs' attorneys' strong incentives to decline weak cases and the many other barriers to relief in these cases.[188] Attorneys would likely file more civil rights cases absent qualified immunity, but there would not be a dramatic increase in "frivolous and distracting litigation."[189]

Plaintiffs' attorneys generally accept civil rights cases on contingency,[190] with an agreement that they can seek reasonable attorneys' fees under Section 1988 if the plaintiff prevails.[191] Congress intended that the

184. See supra note 142.

185. Pearson v. Callahan, 555 U.S. 223, 231 (2009) ("[T]he 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that '"insubstantial claims" against government officials [will] be resolved prior to discovery.'" (second alteration in original) (quoting Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987))).

186. See, e.g., Nielson & Walker, Qualified Defense, supra note 17, at 1881 ("[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 . . . .").

187. See, e.g., Fallon, Bidding Farewell, supra note 19, at 975 (predicting that eliminating qualified immunity could result in "frivolous and distracting litigation").

188. See generally supra Part II (discussing the variety of reasons—other than qualified immunity—that most unsuccessful civil rights cases fail).

189. Fallon, Bidding Farewell, supra note 19, at 975. It is unlikely that eliminating qualified immunity would change pro se plaintiffs' case-filing decisions because pro se plaintiffs are, presumably, unfamiliar with the doctrine. See Schwartz, Selection Effects, supra note 22 (manuscript at 10–11) (noting that pro se plaintiffs are likely to "be unaware of the precise doctrinal challenges associated with these claims and unfamiliar with the contours of qualified immunity"). Accordingly, this discussion focuses on attorneys' case-selection decisions.

190. Although there are some attorneys who represent civil rights plaintiffs pro bono and others who work for nonprofits like the ACLU, they "are the exceptions rather than the rule . . . . [M]ost civil rights litigation is not brought by institutional litigators or by large firms engaging in pro bono activity." 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, 767–69 (1988); see also Samuel R. Bagenstos, Mandatory Pro Bono and Private Attorneys General, 101 Nw. U. L. Rev. 182, 183–84 (2007) (explaining that most civil rights litigation is brought "by individual lawyers who are trying to make a living").

191. See 42 U.S.C. § 1988(b) (2012) (giving district courts the discretion to grant "the prevailing party . . . a reasonable attorney's fee" if the litigation is brought pursuant to enumerated civil rights statutes). See generally 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 Section 1988); Paul D. Reingold, Requiem for Section 1983, 3 Duke J. Const. L. & Pub. Pol'y 1, 11–21 (2008) (describing typical fee arrangements in Section 1983 cases).

availability of attorneys' fees would create financial incentives for attorneys to bring civil rights cases, including cases with limited recoverable damages.[192] But the Supreme Court's narrow construction of what it means to prevail in civil rights cases means that plaintiffs are generally entitled to fees only if they win at trial.[193] If a case is settled, the lawyer's fee will usually be a percentage of the settlement award.[194] If the plaintiff loses, the attorney bears the entire costs of litigation.[195]

This financial arrangement influences which cases plaintiffs' attorneys are willing to accept.[196] Scholars assume that attorneys representing plaintiffs on contingency will only accept a case if the expected recovery is greater than the anticipated litigation costs.[197] Given contingency fee arrangements, and the general unavailability of fee shifting absent a jury verdict, one might assume that plaintiffs' attorneys would only accept cases they are likely to win (so that the attorney is not shouldered with the costs of litigation), and that are likely to result in large damages awards (so that the attorney can be assured adequate compensation if the case resolves in plaintiff's favor before trial).[198]

When I interviewed thirty-five plaintiffs' attorneys around the country about their case selection decisions, I found more variation in attorneys' case-selection calculations.[199] Some attorneys take smaller damages cases if they expect to bring them to trial and win—after which they can seek fees over and above the plaintiff's award.[200] Other attorneys are willing to bring

192. See S. Rep. No. 1011, at 2 (1976), as reprinted in 1976 U.S.C.C.A.N. 5908, 5910 (explaining that the availability of attorneys' fees for civil rights cases were necessary because "civil rights laws depend heavily upon private enforcement").

193. See Reingold, supra note 191, at 13–18; see also Alan K. Chen & Scott L. Cummings, Public Interest Lawyering: A Contemporary Perspective 192 (2013) (describing research exploring the impact of the Court's attorney fee decisions on civil rights filings).

194. See Reingold, supra note 191, at 13–18.

195. See id.

196. See id.

197. See, e.g., Herbert M. Kritzer, Risks, Reputations and Rewards: Contingency Fee Legal Practice in the United States 67–88 (2004) ("[L]awyers should evaluate potential cases in terms of the risks involved and the potential returns associated with those risks. An attorney will reject cases which do not satisfy the attorney's [] return criteria."); William H.J. Hubbard, A Fresh Look at Plausibility Pleading, 83 U. Chi. L. Rev. 693, 706–07 (2016) ("A plaintiffs' attorney working on contingency must offset the entire cost of litigating every case with a fraction of the judgments in the successful cases."); Schwab & Eisenberg, supra note 190, at 742 ("The plaintiff will file suit if the expected recovery from the suit outweighs the expected costs.") .

198. See, e.g., Kritzer, supra note 197, 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").

199. See generally Schwartz, Selection Effects, supra note 22 (finding that qualified immunity may increase costs and risks of litigation, but attorneys do not reliably decline cases because of the risks of qualified immunity, and the cases they do decline are not necessarily insubstantial).

200. See, e.g., Telephone Interview with N.D. Cal. Attorney E, supra note 115 ("Somebody who's been beaten up, bruises, no broken bones . . . . Those cases aren't worth

cases they expect to lose if there are other associated benefits—establishing a constitutional right, or uncovering evidence that can be useful to the plaintiff or to future cases.[201] These attorneys tend to view risk and reward holistically—expecting that some cases they take will be money losers, some will be cost-neutral, and some will result in fee awards greater than the amount of money put into the cases.[202] And some offset the risks of their civil rights practice with other types of cases—criminal defense, personal injury, employment discrimination, and medical malpractice—where they believe recoveries are more predictable.[203] Although attorneys' case-selection decisions do not conform precisely to theoretical models, the fundamental intuition stands: If plaintiffs' attorneys want to stay in business, they must earn more than they spend.[204]

As a result, plaintiffs' attorneys are extremely selective in the cases they accept.[205] The thirty-five attorneys I interviewed reported declining the vast majority of civil rights cases they consider.[206] Twenty-two attorneys

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the time on the damages side. But you can play them up on the attorney's fees side. So, I don't think about the damages when I take the case. I'm thinking more about the indignity.").

201. See, e.g., Telephone Interview with E.D. Pa. Attorney A, supra note 113 ("[W]e look for cases that have the potential for actually resulting in changes in police procedures, practices, directives . . . . So we're looking for, you know, the potential for institutional reform."); Telephone Interview with N.D. Ohio Attorney D, supra note 115 ("[T]he main factor [in case selection] is my point of view on the world[,] which is equality and there is such a thing as justice . . . . I just like to level the playing field."); Telephone Interview with N.D. Ohio Attorney E (Dec. 6, 2017) ("Well, fundamentally, it's very simple, whether someone suffered an injustice and I think maybe more so than other firms in other practice areas, we don't necessarily only consider whether there's going to be big damages."); Telephone Interview with N.D. Ohio Attorney F, supra note 115 (reporting that his firm has sometimes taken "a political case that we felt very committed to for the principle as opposed to whether it was financially valuable to us").

202. See, e.g., Telephone Interview with M.D. Fla. Attorney F, supra note 113 (reporting that he files low-damages cases when the evidence is strong, but will file high-damages cases that are harder to prove).

203. See Schwartz, Selection Effects, supra note 22 (manuscript at 41–44) (describing the practice areas of interviewed attorneys and the amount of time spent on civil rights work).

204. To the extent that pro bono attorneys and nonprofits accept these cases, they may not have the same financial incentives as contingency-fee attorneys but are, nevertheless, likely to select only the strongest cases. See Hubbard, supra note 197, at 713 (suggesting that because plaintiffs' attorneys are generally "oversubscribed," they tend "to screen cases on plausible merit before filing" regardless of whether their "motivation is maximizing profit or maximizing relief to deserving plaintiffs (or both)").

205. For discussion of the contingency-fee lawyer's role as gatekeeper, see Herbert M. Kritzer, Contingency Fee Lawyers as Gatekeepers in the Civil Justice System, 81 Judicature 22, 22 (1997).

206. See, e.g., Telephone Interview with E.D. Pa. Attorney A, supra note 113 (estimating they decline 90–95% of cases); Telephone Interview with E.D. Pa. Attorney F (Apr. 25, 2017) (estimating they decline 96% of cases); Telephone Interview with M.D. Fla. Attorney B, supra note 149 (estimating they decline 99% of cases); Telephone Interview with M.D. Fla. Attorney C, supra note 114 (suggesting they decline many more cases than they take on); Telephone Interview with N.D. Cal. Attorney B, supra note 149 (estimating that they decline 83% of cases); Telephone Interview with N.D. Cal. Attorney F (Dec. 6, 2017) (estimating

reported that vulnerability to motion practice and dismissal on qualified immunity are considerations they take into account.[207] But all of the attorneys reported considering a wide range of factors related to a case's costs, risks, and potential rewards, including: whether the judge and jury would be sympathetic to the plaintiff; the strength of the evidence supporting the plaintiff's claim(s); the legal merits of the claim(s); the cost of litigating the case; and the amount of recoverable damages.[208] Because attorneys believe juries are skeptical of plaintiffs' claims in police misconduct cases,[209] many report selecting only cases with egregious government misconduct, a plaintiff whose story will be compelling, and/or video or eyewitness evidence that a jury will believe.[210] Because attorneys are often paid a portion of their client's settlement award (if they are paid at all), lawyers often are willing to accept only cases with significant potential awards, and are less inclined to accept cases with large anticipated costs.[211] Eliminating qualified immunity would do away with one challenge that increases the cost, risks, and complexity of these cases. But many other

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that they decline 85–87% of cases); Telephone Interview with N.D. Ohio Attorney A (May 1, 2017) (estimating that they decline 94–99% of cases); Telephone Interview with N.D. Ohio Attorney G, supra note 115 (estimating that they decline 90% of cases); Telephone Interview with S.D. Tex. Attorney A (Apr. 25, 2017) (estimating that they decline 80–85% of cases); Telephone Interview with S.D. Tex. Attorney D, supra note 113 (estimating that they decline 99% of cases). See also Schwartz, Selection Effects, supra note 22 (manuscript at 67 tbl.7) (listing the estimated percentage of cases declined by all thirty-five interviewed attorneys).

207. For further discussion of these findings, see Schwartz, Selection Effects, supra note 22 (manuscript at 38–39).

208. For further discussion of these considerations, see id. (manuscript at 27–32).

209. See supra notes 112–115 and accompanying text.

210. See, e.g., Telephone Interview with E.D. Pa. Attorney G (May 15, 2017) ("[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."); Telephone Interview with M.D. Fla. Attorney A, supra note 114 ("[T]he conduct has to be somewhat egregious [and] the client didn't provoke the conduct or cause what happened to him."); Telephone Interview with N.D. Cal. Attorney C, supra note 115 ("[P]art of [case selection] is the overall circumstances[,] . . . do I think the client is likeable, or do I think the jury would like the client. That's not necessarily a deal breaker but it's nice to . . . represent[] somebody who is going to come across sympathetic and articulate . . . ."); see also Schwartz, Selection Effects, supra note 22 (manuscript at 27–32) (describing attorneys' case selection considerations).

211. See, e.g., Telephone Interview with M.D. Fla. Attorney B, supra note 149 ("You know distance might make a difference [in case selection], so it's kind of a mathematical calculation of miles divided by damages or . . . whatever the formula is . . . . I've done some pretty serious police cases in Key West which is . . . 12 to 14 hours from here."); Telephone Interview with N.D. Ohio Attorney G, supra note 115 (reporting declining some cases because "[s]ometimes it's just the damages are really, really low"); Telephone Interview with S.D. Tex. Attorney C, supra note 161 (explaining that the main factor in case selection "is the extent of the injuries[.] [A] lot of people get handcuffed or falsely arrested . . . . It's kind of like getting hit by a car but you don't sustain any personal injury . . . . I'll let those go . . . ."); see also Schwartz, Selection Effects, supra note 22 (manuscript at 27–32) (describing attorneys' case selection considerations).

barriers to relief would remain, and lawyers would continue to be very selective in the cases that they accept.[212]

With that said, eliminating qualified immunity would likely result in more lawsuits being filed. One attorney I interviewed reported that the challenges associated with qualified immunity had caused him to stop filing any civil rights cases.[213] Other attorneys reported that they knew of lawyers who took one or two Section 1983 cases and then declined to take more because various challenges—including qualified immunity—made these cases economically unfeasible to bring.[214] Some attorneys additionally reported that they had reduced the number of civil rights cases they bring because of these same challenges.[215] Accordingly, some of the attorneys I interviewed predicted that more lawyers might be willing to file civil rights cases were qualified immunity eliminated.[216] Eliminating qualified immunity

212. Federal Rule of Civil Procedure 11—which authorizes federal courts to sanction attorneys who file cases without factual or legal support—provides an additional incentive to file only strong cases, and it would remain in effect absent qualified immunity, although no attorneys mentioned it during their interviews. See Fed R. Civ. P. 11(c).

213. See Telephone Interview with S.D. Tex. Attorney G (Dec. 18, 2017).

214. See, e.g., Telephone Interview with E.D. Pa. Attorney D (Apr. 24, 2017) (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); Telephone Interview with M.D. Fla. Attorney D (Nov. 20, 2017) ("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."); Telephone Interview with M.D. Fla. Attorney E, supra note 114 (explaining that there are very few lawyers who can make a living just doing civil rights claims); Telephone Interview with N.D. Cal. Attorney C, supra note 115 (stating that they've "seen a lot of lawyers who were successful personal injury attorneys" who are then unprepared to litigate police misconduct cases because they are in federal court and juries are less able to relate to the plaintiffs); Telephone Interview with S.D. Tex. Attorney A, supra note 206 ("[T]here are people that I hear of occasionally filing [a civil rights case], but they're the same people that eventually decide they never want to file one again, and usually call me . . . saying, 'oh my god this case is screwed up, can you help me?'"). For further discussion of attorneys' decisions to stop bringing civil rights cases, see Schwartz, How Qualified Immunity Fails, supra note 21, at 50–51 (explaining how qualified immunity can increase the cost and complexity of civil rights litigation, and reporting attorneys' observations that qualified immunity and other barriers to suit may discourage some lawyers from bringing civil rights cases).

215. See, e.g., Telephone Interview with E.D. Pa. Attorney E (Apr. 26, 2017) (explaining that they have brought police misconduct cases for twenty-four years but that, in recent years, they "transitioned into . . . easier work that pays a lot more money, which is personal injury and medical malpractice"); Telephone Interview with M.D. Fla. Attorney E, supra note 114 ("I'd say that I probably went from 50%, maybe 60% [civil rights cases] to 20 to 25% over the years . . . . [A]s I commonly say[,] if you like to have your teeth in your hand after a fight, then do civil rights litigation."). For further discussion of attorneys' decisions to reduce the number of civil rights cases they bring, see Schwartz, How Qualified Immunity Fails, supra note 21, at 50–51.

216. See, e.g., Telephone Interview with M.D. Fla. Attorney G (Dec. 19, 2017) ("I think you would encourage other lawyers to take these cases [were qualified immunity eliminated]. They don't take them because they don't want an interlocutory appeal."); see also Schwartz, How Qualified Immunity Fails, supra note 21, at 50–51 (describing attorneys' views that qualified immunity and other challenges associated with civil rights litigation cause lawyers to take fewer cases or stop bringing civil rights cases).

would also likely encourage attorneys to file certain types of claims more frequently. One-third of the attorneys I interviewed reported that qualified immunity discourages them from taking cases alleging novel constitutional violations, cases concerning certain types of claims—like false arrest claims—where the qualified immunity standard is particularly difficult to overcome, and cases where low potential damages do not offset the potential costs of litigating qualified immunity motions and appeals.[217]

In a world without qualified immunity, plaintiffs' attorneys would no longer be dissuaded from bringing false arrest cases by a legal standard that immunizes officers from liability so long as they have "arguable probable cause" to arrest.[218] Attorneys would not be dissuaded from bringing novel constitutional claims simply because a court had not previously held the conduct at issue unconstitutional.[219] When attorneys estimate the cost of litigating a case, they would not have to factor in the cost and time necessary to litigate qualified immunity denials on interlocutory appeal.[220] Eliminating qualified immunity might also encourage more attorneys to include Section 1983 cases in their portfolio of cases because Section 1983 doctrine would be less complicated to understand and these cases would be less costly, risky, and time-consuming to bring.[221]

But even if eliminating qualified immunity changed attorneys' calculation of risk and reward in certain types of cases, and increased attorneys' willingness to consider taking such cases, attorneys' case-selection decisions would still be made against the backdrop of their contingency-fee arrangements and the many other challenges associated with bringing these cases. An attorney considering whether to accept a false arrest case

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217. See Schwartz, How Qualified Immunity Fails, supra note 21, at 50–51.

218. See, e.g., Lawrence v. Gwinnett County, 557 F. App'x 864, 870 (11th Cir. 2014) (describing arguable probable cause); see also Telephone Interview with E.D. Pa. Attorney G, supra note 210 (describing false-arrest cases he has reviewed where he believes there is a Fourth Amendment violation, but the judge is likely to find "arguable probable cause."); Telephone Interview with S.D. Tex. Attorney F, supra note 161 (explaining the challenges of disproving "arguable probable cause" in false arrest cases).

219. See, e.g., Telephone Interview with N.D. Cal. Attorney D, supra note 113 ("[I]t seems like if there is not a case directly on point indicating that the law was clearly established . . . then you risk being dumped on summary judgment because of qualified immunity."); Telephone Interview with S.D. Tex. Attorney B (May 15, 2017) ("[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."); see also Schwartz, Selection Effects, supra note 22 (manuscript at 46–47) ("[A]ttorneys reported they were more inclined to decline cases when they could not find factually similar precedent because of concerns about qualified immunity . . . .").

220. See, e.g., Telephone Interview with N.D. Cal. Attorney B, supra note 149 (explaining that they consider the costs and delays associated with qualified immunity motions and interlocutory appeals when deciding whether to accept a case); see also Schwartz, How Qualified Immunity Fails, supra note 21, at 50–51.

221. See, e.g., Telephone Interview with M.D. Fla. Attorney G, supra note 216 (predicting that more attorneys might file civil rights cases if qualified immunity did not exist); see also Schwartz, How Qualified Immunity Fails, supra note 21, at 50–51.

would no longer be discouraged by the qualified immunity standard applied in these cases, but might nevertheless decline the case if the potential recoverable damages are low or the plaintiff has a lengthy arrest record. An attorney considering whether to accept a case with a novel constitutional claim would no longer be discouraged by the fact that they cannot point to another factually similar case on point, but might decline the case if the facts are not egregious or there is no video or witness to support the plaintiff's story. An attorney considering whether to accept a case with low recoverable damages would not have to litigate qualified immunity in the district court or on appeal, but would still recognize that, unless the case goes to trial and they can recover fees pursuant to Section 1988, their payment will be limited to a portion of the plaintiff's modest settlement.[222] And, even in the absence of qualified immunity, attorneys might continue to conclude it would be wiser to spend the majority of their time on personal injury or medical malpractice cases than on civil rights claims given jurors' perceived predisposition in favor of government officials.[223]

Eliminating qualified immunity would likely increase the number of civil rights cases filed to some degree. But there is no reason to fear that eliminating qualified immunity would result in a massive influx of "frivolous and distracting litigation."[224] Absent qualified immunity, attorneys would still have strong incentives to file successful civil rights cases, and many barriers to relief would still remain in these cases that would inform attorneys' case selection decisions. For these reasons, one lawyer predicted that there would be "a fairly small number" of cases he would decline today but accept in a world without qualified immunity.[225] Attorneys would still consider civil rights litigation to be less reliably remunerative than personal injury, medical malpractice, or work for paying clients. And those that do decide to bring civil rights cases would continue to reject the vast majority of cases that came their way.

V. DETERRENCE

The Supreme Court and some commentators believe that being sued and the threat and imposition of damages liability overdeter officers, discourage people from entering government service, and imperil government budgets.[226] Qualified immunity is considered a critically important protection

222. See supra note 191 and accompanying text.

223. See supra note 113 and accompanying text.

224. Fallon, Bidding Farewell, supra note 19, at 975, 982 (explaining the persistent concern of frivolous litigation).

225. Telephone Interview with E.D. Pa. Attorney G, supra note 210.

226. See, e.g., Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982). The Court noted that:

> [C]laims 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. These social costs include the expenses of litigation, the diversion of official

against these harms. If it were, doing away with the doctrine would jeopardize government operations in each of these ways. But those holding this view overstate the deterrent effects of lawsuits and overestimate the ability of qualified immunity to shield against these presumed ill effects of civil rights litigation.

The Supreme Court has written that the threat of liability puts government officers in an impossible position—an officer must "choose between being charged with dereliction of duty if he does not arrest when he has probable cause" and "being mulcted in damages if he does."[227] Fred Smith recently echoed this concern, arguing that, absent qualified immunity, "We would sometimes be asking government officials to gamble: Follow state and local guidance, or follow your perception of what the law may one day be. If you guess wrong, then you may find yourself liable."[228] Michael Wells has offered a similar prediction: "If officers were liable for every constitutional violation, they might hesitate before taking a step that produces a public benefit because an error would lead to personal liability."[229]

But available evidence suggests that the threat of civil damages liability does not regularly force government officials into making this type of difficult decision. Several studies of law enforcement officers have shown that "the possibility of being sued does not play a role in the day to day thinking of the average police officer."[230] The majority of surveyed officers in two different studies reported that legal liability was not among their top ten thoughts when doing their work.[231] Contrary to the Supreme Court's suggestion that police fret overmuch about the possibility of being sued while making split-second decisions, available evidence suggests that

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> energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is 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."

Id. (alteration in original) (citation omitted) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)); see also infra notes 227–229, 237–238 and accompanying text (describing these concerns).

227. Scheuer v. Rhodes, 416 U.S. 232, 245 (1974) (internal quotation marks omitted) (quoting Pierson v. Ray, 386 U.S. 547, 555 (1967)); see also Owen v. City of Independence, 445 U.S. 622, 655 (1980) (fearing that lawsuits will "paralyz[e] . . . [an] official's decisiveness and distort[] his judgment").

228. Fred O. Smith, Jr., Formalism, Ferguson, and the Future of Qualified Immunity, 93 Notre Dame L. Rev. 2093, 2108 (2018).

229. Wells, supra note 19, at 391.

230. Arthur H. Garrison, Law Enforcement Civil Liability Under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers, 18 Police Stud.: Int'l Rev. Police Dev., nos. 3 & 4, 1995, at 19, 28; see also Schwartz, Case Against, supra note 1, at 1811–13 (describing other similar studies).

231. See Garrison, supra note 230, at 26; Daniel E. Hall, Lois A. Ventura, Yung H. Lee & Eric Lambert, Suing Cops and Corrections Officers: Officer Attitudes and Experiences About Civil Liability, 26 Policing: Int'l J. Police Strategies & Mgmt. 529, 542 (2003).

the threat of legal liability rarely enters most officers' minds when they are doing their job.

One might view these studies as evidence that qualified immunity is working—protecting officers from the threat of legal liability so that they can work without distraction—and that eliminating qualified immunity would force officials into making these types of difficult decisions more often. But there are three likely explanations for officers' indifference to the threat of legal liability unrelated to qualified immunity that would presumably continue to exist even if the defense was eliminated. First, law enforcement officials infrequently pay for their defense counsel and virtually never contribute to settlements and judgments entered against them[232]—and there is no reason to believe that other types of government officials have different arrangements with their government employers.[233] Second, available evidence suggests that most law enforcement agencies do not gather and analyze information from lawsuits brought against their officers—and there is no reason to believe that other government agencies pay closer attention to the information in lawsuits brought against their employees.[234] Third, available evidence suggests that government officials have a number of other concerns on their minds beyond the threat of litigation. Recent reports attribute the challenges of recruiting and retaining law enforcement officers to "high-profile shootings, negative publicity about the police, strained relationships with communities of color, tight budgets, low unemployment rates, and the reduction of retirement benefits."[235] Officers unquestionably

232. See Schwartz, Police Indemnification, supra note 13, at 912–17 (finding that officers rarely contribute to settlements and judgments against them, and that their contributions amounted to 0.02% of the total dollars paid to plaintiffs in the eighty-one jurisdictions studied).

233. See Wells, supra note 19, at 406 (observing that my studies of indemnification and litigation, Schwartz, How Qualified Immunity Fails, supra note 21 and Schwartz, Police Indemnification, supra note 13, focus on law enforcement, but "suspect[ing]" that those "findings are valid across the whole field of constitutional tort litigation"). For research reaching similar conclusions regarding *Bivens* litigation against federal employees of the Federal Bureau of Prisons, see James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, The Myth of Personal Liability: Who Pays When *Bivens* Claims Succeed, 72 Stan. L. Rev. (forthcoming 2020) (manuscript at 57–58), https://ssrn.com/abstract=3343800 (on file with the *Columbia Law Review*).

234. See Joanna C. Schwartz, Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking, 57 UCLA L. Rev. 1023, 1045–52 (2010) [hereinafter Schwartz, Myths and Mechanics] (discussing police departments that ignore information from lawsuits); see also Pfander et al., supra note 233 (manuscript at 32–33) (describing a similar failure to collect lawsuit information by the Federal Bureau of Prisons).

235. Schwartz, Case Against, supra note 1, at 1813 (citing and describing these reports); see also Rich Morin, Kim Parker, Renee Stepler & Andrew Mercer, Pew Research Ctr., Behind the Badge 64–65 (2017), http://assets.pewresearch.org/wp-content/uploads/sites/3/2017/01/06171402/Police-Report_FINAL_web.pdf [https://perma.cc/27FH-N7S7] (reporting that nine in ten officers report increased concerns about their safety following high-profile police shootings and protests of those shootings).

dislike being sued.[236] But these three factors—widespread indemnification, government inattention to information in lawsuits, and myriad other concerns about accepting government employment—likely explain officers' current disregard for the threat of being sued while on the job. And these three factors would presumably continue to exist in a world without qualified immunity.

Commentators have also expressed concern that eliminating qualified immunity would overdeter local government officials who make policy decisions. As Nielson and Walker argue, the money currently spent on lawsuits already presents "a heavy financial burden on financially strapped municipalities."[237] Were qualified immunity eliminated, settlements and judgments might increase, municipal budgets might be further compromised, and government officials might encourage inaction to reduce payouts.[238] This bleak picture assumes that lawsuits currently impose significant economic burdens on local governments, that eliminating qualified immunity would dramatically increase these burdens, and that government officials would respond by discouraging valuable behavior that might lead to further suits.

Setting aside for a moment what effect eliminating qualified immunity would have on payouts, this argument relies on an inaccurate view of lawsuit budgeting. Lawsuits do not threaten most governments' budgets. Although there are isolated stories of small towns and villages that have gone bankrupt or had to disband their police departments after large awards,[239] liability costs are a small part of most government budgets. One

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236. For some reasons that officers might dislike being sued, see Smith, supra note 228, at 2109 (observing that, when an officer is sued or has a judgment entered against him, there might be implications for the officer's credit history or background checks); see also Margo Schlanger, Inmate Litigation, 116 Harv. L. Rev. 1555, 1675 n.389 (2003) (offering similar observations regarding suits against corrections officers). But, as Schlanger notes, because officers rarely bear personal financial responsibility, "litigation is mostly a minor inconvenience." Schlanger, supra, at 1675–76.

237. Nielson & Walker, Qualified Defense, supra note 17, at 1877; see also Fallon, Bidding Farewell, supra note 19, at 975 (predicting that eliminating qualified immunity would impose "unanticipated drains on the public fisc [that] could upset budgetary planning and withdraw resources from other needful programs").

238. See Jeffries, Liability Rule, supra note 38, at 245–46 ("[W]hile erroneous government action and erroneous government inaction may be equally costly to society as a whole, the former is more likely to trigger on-budget liability and thus to affect and distort government behavior.").

239. See, e.g., John Rappaport, How Private Insurers Regulate Public Police, 130 Harv. L. Rev. 1539, 1588 & n.282 (2017) (describing examples of municipalities that closed their police forces after losing liability insurance); Schwartz, How Governments Pay, supra note 23, at 1190–91 (describing towns and small cities that lost liability coverage following lawsuit payouts and disbanded their police departments). In these cases, the damages award is often the straw that breaks the camel's back; the town or village is already underfunded, then foregoes liability insurance, and then is successfully sued and does not have funds to satisfy the judgment. See, e.g., Andrew Cockburn, Blood Money: Taxpayers Pick Up the Tab for Police Brutality, Harper's Mag., Nov. 2018, at 61, 61–62, https://harpers.org/archive/2018/11/blood-money-police-brutality-taxpayers/ [https://perma.cc/FV6S-4WY4] (describing this type

study found that liability costs amount to approximately one percent of the budgets for counties, cities, villages, and towns in New York State.[240] The executive director of a national association of more than 200 risk pools across the country has estimated that small jurisdictions pay no more than one or two percent of their budgets to liability insurers.[241] And in my study of one hundred law enforcement agencies across the country, I found that law enforcement liability—the most common and costly type of government litigation—amounts to significantly less than one percent of most governments' budgets.[242] Moreover, lawsuit payouts usually have little or no direct financial impact on the budget of the agency that employs the defendant officials.[243] It is impossible to know how much more plaintiffs would recover in a world without qualified immunity, but the increase would have to be dramatic to create significant drains on most governments' budgets.

Fears of municipal overdeterrence also assume a closer connection than actually exists between lawsuit filings and payouts on the one hand, and personnel and policy decisions on the other. Highly publicized cases and other incidents of misconduct can have political consequences for elected officials and can cause them to make personnel and policy changes.[244] But

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of downward cycle in South Tucson). There are growing calls to consolidate small law enforcement agencies because larger agencies are more efficient and better able to train and supervise their officers. See, e.g., Office of Cmty. Oriented Policing Servs., Final Report of the President's Task Force on 21st Century Policing 28 (2015), https://www.cops.usdoj.gov/pdf/taskforce/Interim_TF_Report.pdf (on file with the *Columbia Law Review*) (recommending that the DOJ "provide technical assistance and incentive funding to jurisdictions with small police agencies that take steps towards shared services, regional training, and consolidation"); Police Exec. Research Forum, Overcoming the Challenges and Creating a Regional Approach to Policing in St. Louis City and County 2 (2015), https://www.policeforum.org/assets/stlouis.pdf [https://perma.cc/LA2P-D2F6] (finding that St. Louis County's "patchwork of police departments, many of which have jurisdiction over very small areas . . . [leads] to confusion and distrust among residents," and is "inefficient, undermines police operations, and makes it difficult to form effective law enforcement partnerships to combat crime locally and regionally"). These anecdotes offer another reason to support growing calls to consolidate small law enforcement agencies. But all available evidence suggests that lawsuit payouts are not too large for most jurisdictions to handle. See infra notes 240–244 and accompanying text.

240. Sydney Cresswell & Michael Landon-Murray, Taking Municipalities to Court: An Examination of Liability and Lawsuits in New York State Local Governments, at vii (2013).

241. See Schwartz, How Governments Pay, supra note 23, at 1164–65 n.74 (reporting that the executive director of a national association of over 200 risk pools that insure small municipalities explained that "[c]ontributions to risk pools . . . are minimal in a local government's overall budget" and are, at the maximum, "just a percent or two of a city's budget" (quoting Email from Ann Gergen, Exec. Dir., AGRiP, to author (June 23, 2015))).

242. See id. at 1165 (reporting that lawsuit payouts in police misconduct cases are less than one percent of municipal budgets in my study).

243. See id. at 1172–74, 1193–94 (finding that at least 60% of large law enforcement agencies studied suffered no financial consequences of payouts in lawsuits against them and their officers).

244. See, e.g., Myriam E. Gilles, In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies, 35 Ga. L. Rev. 845, 858–67 (2001) (describing the

my research has shown that law enforcement agencies infrequently gather or analyze information about run-of-the-mill lawsuits brought against them, and there is no reason to believe that other types of government agencies are more attentive to lawsuit filings and information.[245] As a result, many government officials do not have good information about the types of behaviors that lead to lawsuits and liability against their agencies, and so do not have an informed understanding about what personnel and policy changes might decrease liability. In fact, many law enforcement agencies do not know the most basic information about lawsuits filed against their officers—how many suits were filed in any given year, how much was paid in settlements and judgments in these cases, or whether punitive damages were awarded.[246] Furthermore, several of the largest cities and counties in the country reported that they kept no records in any government agency or office reflecting how much they paid in lawsuits brought against their employees.[247] Government officials may implement personnel and policy decisions based upon political pressures and a general sense of what might reduce liability. But the connection between lawsuits, payouts, and government decisionmaking is far more tenuous than has been assumed, and unless eliminating qualified immunity causes local governments to pay better attention to lawsuits brought against them, these information gaps will continue to exist in a world without qualified immunity.

Available evidence suggests that government employees rarely suffer financial or job-related costs of being sued, that local governments' and agencies' budgets are rarely imperiled by lawsuits, and that governments do not collect enough information about lawsuits brought against them and their officers to make informed decisions about what personnel and policy actions could reduce liability. All of these characteristics of local government employment, budgeting, and information systems disrupt the ways in which lawsuits are presumed to deter. And all of these barriers to deterrence would presumably continue to exist were qualified immunity eliminated. Against this backdrop, what impact could eliminating qualified immunity have on officer and official decisionmaking? Although there is no reason to believe eliminating qualified immunity would change government indemnification, budgeting, or risk-management practices, eliminating

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"informational" and "fault-fixing" functions of constitutional damages actions); Schlanger, supra note 236, at 1681 (describing how negative publicity regarding lawsuits "can trigger embarrassing political inquiry and even firings, resignations, or election losses"); Schwartz, How Governments Pay, supra note 23, at 1151 (explaining that "lawsuits can create nonfinancial pressures by generating publicity about allegations of misconduct and by revealing previously unknown information about the details of that misconduct").

245. See generally Schwartz, Myths and Mechanics, supra note 234, at 1066–67 (reporting that the overwhelming majority of police departments and sheriff's departments studied failed to collect or review litigation information).

246. See Schwartz, Police Indemnification, supra note 13, at 956.

247. See id.

qualified immunity might lead to changes in constitutional litigation that could influence government behavior in several important ways.

Because qualified immunity increases the cost, complexity, and risk associated with civil rights litigation, eliminating qualified immunity might encourage plaintiffs' attorneys to file more cases,[248] and might encourage plaintiffs to take their cases to trial more often.[249] As I have explained, plaintiffs' success rate is unlikely to increase—jurors' sympathies for government defendants mean that plaintiffs would continue to regularly lose at trial.[250] But there would be more cases filed, more trials, and more plaintiff victories in absolute terms. It is unclear what effect additional suits and trials might have on the officers directly involved in the cases. The Supreme Court has assumed that participating in discovery and trial is taxing and time-consuming for government officials.[251] If so, more suits and more trials might cause officers to change their behavior to avoid being sued again.[252] On the other hand, a study of officers in Cincinnati found that those who had previously been sued were more aggressive than those who had not.[253] Moreover, officers would presumably continue to be indemnified for their conduct, and officers' decisions on the job would continue to be influenced by a number of different concerns and incentives apart from litigation.[254]

More lawsuits and trials could also influence officer behavior in a less direct way—through the disclosure of information about government behavior.[255] Complaints, discovery, motion practice, and trial can bring to the surface valuable information about government behavior previously unknown to the public—and sometimes unknown to the government entities whose employees are implicated in the suit.[256] This additional information can inform government officials about areas of concern and

248. See supra notes 213–221 and accompanying text.

249. See supra notes 123–124 and accompanying text.

250. See supra notes 112–115 and accompanying text.

251. See supra note 142 and accompanying text.

252. For further exploration of the deterrent effect of certain practical consequences of being sued, such as having to sit for a deposition, see Daniel J. Meltzer, Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General, 88 Colum. L. Rev. 247, 283–86 (1988) (discussing the possible deterrent effects of tort liability imposed on law enforcement); Reinert, Measuring *Bivens* Success, supra note 90, at 847–49 & n.179.

253. See Kenneth J. Novak, Brad W. Smith & James Frank, Strange Bedfellows: Civil Liability and Aggressive Policing, 26 Policing: Int'l J. Police Strategies & Mgmt. 352, 360 (2003) (surveying and observing Cincinnati police officers, and finding that "[o]fficers who have previously been sued for on-the-job behavior were observed to use an impact weapon in a higher proportion of encounters with citizens than their counterparts").

254. See supra notes 230–235 and accompanying text.

255. See generally Joanna C. Schwartz, Introspection Through Litigation, 90 Notre Dame L. Rev. 1055 (2015) (examining how law enforcement can use information from lawsuits to "identify and correct weaknesses in personnel, training, management, and policies").

256. See id. at 1066–72 (providing examples of how lawsuits provided organizations with important information about internal practices and potential misconduct).

can heighten political pressures on them to make personnel, policy, or training adjustments. These personnel, policy, and training adjustments can, in turn, improve officer behavior.[257] Influencing official and officer behavior in this manner is far less certain than theoretical models would presume.[258] It depends upon suits and trials that reveal damaging information, officials motivated to take action, and well-designed policies and trainings that influence officers in intended ways. But, given what we know, it is most plausible to imagine that additional lawsuits and trials would influence government officials' and officers' decisions in this manner.

Eliminating qualified immunity could also make the scope of constitutional law clearer. As I have described, qualified immunity creates legal uncertainty because courts can grant qualified immunity without explaining whether the constitutional right in question was violated.[259] To return to an earlier example, the existence and scope of a First Amendment right to record the police has been "needlessly floundering in the lower courts" for years, and six circuits still have not ruled on whether such a right exists.[260] Absent qualified immunity, courts would more regularly announce the law. Patrol officers are unlikely to study these circuit and Supreme Court decisions themselves, much less compare the situation they are confronting on the job to the facts or holding of a prior case.[261]

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257. See, e.g., Emily Owens, David Weisburd, Karen L. Amendola & Geoffrey P. Alpert, Can You Build a Better Cop? Experimental Evidence on Supervision, Training, and Policing in the Community, 17 Criminology & Pub. Pol'y 41, 43 (2018) (finding that when officers participated in a training program focused on procedural justice, they "were as active in the community as untreated officers along multiple dimensions, but they were less likely to resolve incidents with an arrest and less likely to be involved in use-of-force incidents"); DeRay McKesson, Samuel Sinyangwe, Johnetta Elzie & Brittany Packnett, Police Use of Force Project, http://useofforceproject.org/#project [https://perma.cc/S7D7-8FAB] (last visited Oct. 29, 2019) (finding that "police departments with policies that place clear restrictions on when and how officers use force had significantly fewer killings than those that did not have these restrictions in place").

258. For foundational theories of the relationship between liability rules and behavior, see generally Mark F. Grady, A New Positive Economic Theory of Negligence, 92 Yale L.J. 799 (1983); Richard Posner, A Theory of Negligence, 1 J. Legal Stud. 29 (1972); Steven Shavell, Strict Liability Versus Negligence, 9 J. Legal Stud. 1 (1980).

259. See supra Part I.

260. See Blum, Time to Change, supra note 2, at 1897 ("[B]oth the Third Circuit and the Fifth Circuit, after years of disposing of the issue on the second prong, have recently joined the First, Seventh, Ninth, and Eleventh Circuits in recognizing a First Amendment right to film police when they are engaged in performing their duties in public." (footnotes omitted)).

261. See, e.g., Manzanares v. Roosevelt Cty. Adult Det. Ctr., 331 F. Supp. 3d 1260, 1294 n.10 (D.N.M. 2018) (criticizing the Supreme Court "assum[ption] 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"). The court added that "[i]t strains credulity to believe that a reasonable officer, as he is approaching a suspect to arrest, is thinking to himself: 'Are the facts here anything like the facts in *York v. City of Las Cruces*?'" Id. (citing York v. City of Las Cruces, 523 F.3d 1205 (10th Cir. 2008)).

And government agencies are unlikely to adjust their policies and trainings every time a court finds a constitutional violation. But, in the past, when the Supreme Court or circuit courts have announced new legal requirements—or clarified what the law does not require—police departments have incorporated the substance of those rulings into their policies and trainings.[262] Presumably, absent qualified immunity, courts' decisions would clarify the scope of constitutional protections; these decisions would give governments better guidance about what the law prohibits, allows, and requires; governments could translate that guidance to their officers in the form of policies and trainings; and those policies and trainings could influence officer behavior.

In addition, eliminating qualified immunity would do away with the slow but steady stream of district and circuit decisions finding that plaintiffs' constitutional rights have been violated, but nevertheless insulating defendants from liability because a prior decision did not clearly establish the law. Although cases are infrequently resolved in this manner,[263] these types of decisions may send the message to government officials that they can violate the law with impunity, as Justice Sotomayor has written she fears.[264] By eliminating qualified immunity, courts would no longer send this message in this way.

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262. See, e.g., David Alan Sklansky, Is the Exclusionary Rule Obsolete?, 5 Ohio St. J. Crim. L. 567, 580–81 (2008) (observing that California law enforcement agencies started training their officers to ignore the California Constitution's ban on warrantless searches of trash after the United States Supreme Court rejected this prohibition as a matter of federal constitutional law); Charles D. Weisselberg, In the Stationhouse After *Dickerson*, 99 Mich. L. Rev. 1121, 1123–25 (2001) (examining how California law enforcement agencies trained officers to comply with a Supreme Court decision reaffirming *Miranda*); Patrick Healy, LAPD Commission Adds to Guidelines for Review of Police Use of Force, NBC L.A. (Feb. 19, 2014), https://www.nbclosangeles.com/news/local/LAPD-Commission-Adds-to-Guidelines-for-Review-of-Police-Use-of-Force-246094151.html [https://perma.cc/LFC2-ZSAZ] (reporting that the Los Angeles Police Commission changed how it evaluates use of deadly force by officers following a California Supreme Court decision that deemed "tactical conduct and decisions preceding the use of deadly force" as relevant considerations in assessing whether the force used was proper (citation omitted)). For other examples, see Schwartz, Case Against, supra note 1, at 1819 n.138.

263. See supra notes 52–56 and accompanying text.

264. See supra note 11 and accompanying text. Although law enforcement has not agreed with Justice Sotomayor that the Court's qualified immunity decisions promote a "shoot first, think later" approach to policing, one police publication did applaud the Court's qualified immunity decisions for "demonstrat[ing] the Court's continued determination to give police officers the benefit of doubt when reviewing their split-second life changing decisions from the entirely safe contours of judicial chambers" and "demonstrat[ing] the extraordinary value of the qualified immunity defense to police officers who use deadly force in the performance of their duty, even in cases where the need for such force was not absolutely clear cut and obvious." Mike Callahan, Protecting Cops from Frivolous Lawsuits: Qualified Immunity, Explained, PoliceOne (Apr. 29, 2016), https://www.policeone.com/legal/articles/176707006-Protecting-cops-from-frivolous-lawsuits-Qualified-immunity-explained/ [https://perma.cc/N4BX-CHDQ].

All available evidence suggests that civil rights cases do not deter constitutional violations in the manner courts and commentators expect. Government employees are rarely financially liable for settlements and judgments in suits brought against them, and the threat of civil liability does not enter most law enforcement officers' minds when they are doing their jobs. The link between lawsuits and municipal behavior is similarly tenuous—settlements and judgments make up less than one percent of most jurisdictions' budgets.[265] Although high-profile lawsuits can have political consequences, governments generally do not gather or analyze information from run-of-the-mill lawsuits brought against them such that they can design personnel and policy changes that would reduce the likelihood of future suits. Eliminating qualified immunity is unlikely to change the fundamental characteristics of government indemnification and budgeting that shield officers and policymakers from the financial consequences of lawsuits. Eliminating qualified immunity is also unlikely to change officers' and policymakers' inattention to the vast majority of lawsuits brought against them. But eliminating qualified immunity may nevertheless influence government behavior by increasing pressure on officials to change their policies and trainings, providing clearer guidance about the legal standards these policies and trainings should contain, and dampening the message that government officials can violate constitutional rights without consequence. It is difficult to measure the impact these adjustments would have, but there is reason to believe they could, at least to some degree, reduce the frequency of constitutional violations and improve government behavior.

CONCLUSION

Critics and supporters of qualified immunity appear to agree that constitutional litigation is dominated by the doctrine. For critics, qualified immunity is a scourge that closes courthouse doors to people whose constitutional rights have been violated.[266] For supporters, qualified immunity is the only shield against an avalanche of frivolous suits[267]—thus, its "importan[ce] to society as a whole."[268] Not surprisingly, commentators

265. See supra notes 239–243 and accompanying text.

266. See, e.g., 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."); Reinhardt, supra note 81, at 1245 (arguing that through qualified immunity "the Court 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"). See generally Blum et al., Qualified Immunity Developments, supra note 2 (describing recent cases expanding the power of qualified immunity).

267. See, e.g., King, supra note 19.

268. White v. Pauly, 137 S. Ct. 548, 551 (2017) (internal quotation marks omitted) (quoting City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015)).

hold opposing views about how the elimination of qualified immunity might influence constitutional litigation and government officials' conduct. To some, doing away with qualified immunity would result in more suits and larger judgments that would "incentivize officials acting under the color of law to better respect and protect individuals' rights, which is more than the Court's § 1983 doctrine currently encourages."[269] To others, eliminating qualified immunity would result in a massive influx of meritless suits and damages awards, causing officers to become overly cautious on the street, discouraging people from accepting government employment, and leading government officials to promote inaction as a means of reducing legal liabilities.[270] This Article presents a more nuanced portrait of qualified immunity's role in constitutional litigation, and suggests very different predictions about how civil rights litigation would function in a world without qualified immunity.

This Article offers three reasons to conclude that the direst predictions—of an avalanche of frivolous suits and payouts, overdeterred officers and officials, and imperiled government budgets—are overblown.

First, qualified immunity is one of many barriers to success in civil rights actions against government officials.[271] Cases brought without counsel are likely to be dismissed sua sponte by the court before the defendant has an opportunity to respond. At the motion to dismiss and summary judgment stages, cases are dismissed for a variety of reasons, including failing to satisfy pleading requirements and failing to establish evidence of a constitutional violation. If a case gets to trial, the jury may be sympathetic to the government defendants and skeptical of the plaintiff's claim. Today, the vast majority of cases fail for reasons other than qualified immunity. In a world without qualified immunity, cases would continue to fail for these other reasons.

Second, these same barriers to relief would protect against a flood of meritless suits.[272] Plaintiffs' attorneys, who usually take civil rights cases on contingency, bear all the financial risk of loss and therefore have strong incentives to take cases they believe they can win. Today, qualified immunity is one of many risks on attorneys' minds. In a world without qualified immunity, attorneys would continue to consider the other risks and challenges associated with bringing civil rights cases, and would continue to have strong financial incentives only to accept what they consider to be the strongest cases.

Third, eliminating qualified immunity would not dramatically change the pressures on officers and government officials.[273] Lawsuit payouts

269. Levin & Wells, supra note 19, at 41.

270. See supra notes 19, 226 and accompanying text (describing these concerns).

271. See supra Part II.

272. See supra Part IV.

273. See supra Part V.

currently have a limited impact on officers' and governments' decision-making for reasons that have nothing to do with qualified immunity: Officers are almost always indemnified; lawsuit payments are rarely a significant portion of local budgets; and both officers and government officials weigh multiple other considerations when making policy decisions and taking action on the street. In a world without qualified immunity, government indemnification, budgeting, and risk-management practices, and the many other drivers of government behavior would continue to minimize lawsuits' deterrent effects.

Although many aspects of constitutional litigation would remain the same absent qualified immunity, this Article also predicts at least five important changes in a post–qualified immunity world.

First, the cost, risk, and complexity of constitutional litigation would decrease.[274] Lawyers would no longer have to brief qualified immunity motions, wait months or years while motions and interlocutory appeals are pending, or prepare for the possibility that their cases will be dismissed on qualified immunity grounds after lengthy discovery. Attorneys would not have to learn and stay abreast of an exceedingly convoluted and shifting doctrine, or be prepared to argue their case on interlocutory appeal.

Second, the decreased costs and risks of civil rights litigation might encourage more lawyers to include civil rights cases in their docket, and might encourage lawyers who already litigate civil rights cases to increase the number of cases they bring.[275] Lawyers may be more willing to file cases involving novel constitutional claims, cases with lower damages, and cases alleging false arrest and other constitutional violations that lawyers consider particularly vulnerable to motion practice or dismissal on qualified immunity grounds. Lawyers would still have strong incentives to select only cases they believe they can win, but more plaintiffs would likely be able to secure representation.

Third, more cases might go to trial.[276] These trials would not likely result in a dramatic increase in plaintiff victories, given juries' apparent predisposition against plaintiffs in civil rights cases. But more trials would offer more transparency, more opportunity for plaintiffs to have their day in court, and more focus on what should be the critical question in these cases—whether government defendants violated plaintiffs' constitutional rights.

Fourth, courts would offer more clarity about the scope of constitutional rights.[277] Courts could no longer grant qualified immunity because a prior case had not held sufficiently similar conduct unconstitutional. Instead, courts would more regularly rule on constitutional questions underlying these cases. Constitutional rights are unlikely to change dramatically

274. See supra Part III.

275. See supra Part IV.

276. See supra Part II.

277. See supra Part I.

in their scope, but clarity about constitutional rights would benefit the public and assist local governments as they guide and train their officers.[278]

Fifth, courts would no longer issue decisions shielding defendants from liability even when they have violated plaintiffs' constitutional rights.[279] Although courts issue these types of decisions in relatively few civil rights cases, they deny justice to deserving plaintiffs and send a message to government officials that they can violate plaintiffs' rights without consequence.[280] Eliminating qualified immunity would end these types of decisions and curtail this type of message from the courts.

How should defenders and critics of qualified immunity view these predictions? If we take the Supreme Court at its word—that its qualified immunity jurisprudence is motivated by an interest in shielding government officials from the burdens of suit in insubstantial cases, and avoiding overdeterrence of officers and officials—the Court need not fear doing away with qualified immunity. And if the Court does do away with qualified immunity, neither it nor Congress need craft another protection to put in its place. Given the multiple doctrinal, institutional, and bureaucratic shields that protect government defendants from suit, discovery, trial, damages awards, and overdeterrence, eliminating qualified immunity will not fundamentally disrupt the functioning of government or society as a whole. Each of these shields will continue to exist absent qualified immunity and will continue doing qualified immunity's intended work.

For these same reasons, doing away with qualified immunity will not be the silver bullet that critics of qualified immunity hope. In qualified immunity's absence, there would remain multiple other substantive and procedural barriers to relief, judges and juries predisposed against civil rights plaintiffs, and local government practices—including widespread officer indemnification, budgetary arrangements that shield agencies from the financial consequences of suits, and inattention to lawsuit data—that dampen the deterrent effect of civil rights suits. Eliminating qualified immunity will not address these barriers to relief and reform. Yet eliminating qualified immunity will also prompt several significant shifts in civil rights litigation: It will clarify the law, reduce the cost and complexity of civil rights litigation, increase the number of attorneys willing to consider taking civil rights cases, and put an end to decisions protecting officers who have clearly exceeded their constitutional authority. Eliminating qualified immunity should, therefore, be understood as a preliminary—but important—step toward greater accountability and deterrence.

278. See supra notes 35–36 and accompanying text.

279. See supra Part IV.

280. See supra notes 11, 122–126 and accompanying text.

APPENDIX

The following thirty-six cases in my dataset were dismissed on qualified immunity grounds. This Appendix sets out the operative language in these thirty-six opinions regarding the courts' views of the underlying merits of plaintiffs' constitutional claims.

Case	**Ruling on first step of qualified immunity analysis?**	**Reasoning**
Rollerson v. City of Freeport, No. 4:12-cv-01790, 2013 WL 2189892 (S.D. Tex. May 16, 2013)	Yes. Plaintiff did not plead a constitutional violation. Id. at *12–13.	Motion to dismiss granted after plaintiff, represented by counsel, did not file a response to the motion. Id. at *1, *15. The court found that "[p]laintiff's complaint fails to allege facts that would support a substantive due process claim under the Fourteenth Amendment" or negate defendant's qualified immunity defense, and rejected plaintiff's excessive force handcuffing claim because he had not pled "facts and law to support his excessive force claim and to negate Bryant's qualified immunity defense." Id. at *12–13.
Johnson v. Galveston Police Dep't, No. 3:11-cv-00473 (S.D. Tex. filed Oct. 17, 2011)	Yes. Plaintiff did not plead a constitutional violation. Memorandum and Order at 6, *Galveston*, No. 3:11-cv-00473 (S.D. Tex. Jan. 31, 2012).	Motion to dismiss granted (pro se plaintiff). Id. at 7. "Because probable cause existed for both arrests, and because the plaintiff has admitted the circumstances were such that an officer, exercising his own judgment, could make an arrest, the doctrine of qualified immunity applies and shields the City of Galveston and the police officers from civil liability." Id.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Allen v. City of Houston, No. 4:11-cv-04095 (S.D. Tex. Nov. 16, 2012)	Yes. Plaintiff did not plead a constitutional violation. Order at 11, *Allen*, No. 4:11-cv-04095 (S.D. Tex. Nov. 16, 2012).	Motion to dismiss granted for all defendants (pro se plaintiff). Id. at 9–12. "Allen has failed to articulate a violation of his right to due process." Id. at 13. His racial profiling claim failed because "Allen's Second Amended Complaint does not identify any facts supporting a claim of discrimination or unequal treatment . . . . In sum, Allen has failed to plead facts which, if true, provide a fair inference that Captain Ellen and Sergeant Musick violated a clearly established constitutional right." Id. "Because Allen's Second Amended Complaint fails to plead facts which, if true, show that Officer Kennedy violated his constitutional rights, her qualified immunity defense stands." Id. at 22.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Miller v. City of Houston, No. 4:11-cv-00429, 2013 WL 6222539 (S.D. Tex. Nov. 29, 2013)	Yes. No evidence of constitutional violation. Id. at *7–8.	Summary judgment motion granted to supervisor because evidence showed that she was not personally involved and that she was not present at the scene. Id. at *7. And there was no "competent" evidence that "(1) she inadequately supervised and/or trained [the involved officer] . . . ; (2) a causal relationship existed between her failure to train and/or supervise and the plaintiff's alleged constitutional deprivations; and (3) her failure to train or supervise amounted to gross negligence or deliberate indifference." Id. The officer involved in the use of force is granted qualified immunity because "[a] reasonable person could conclude that the plaintiff posed a danger to Deputy James[] and to herself. Therefore, [the officer] was correct to use such force as was necessary to repel the plaintiff's aggression." Id. at *8. The court found that the claim of sexual assault failed as a matter of law because plaintiff did not dispute the deputy's description of the facts. Id.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Cooper v. City of La Porte Police Dep't, No. 4:12-cv-02651 (S.D. Tex. June 2, 2014)	Yes. No evidence of constitutional violation. Memorandum and Recommendation at 21, 23, *Cooper*, No. 4:12-cv-02651 (S.D. Tex. June 2, 2014).	The district court adopted the Memorandum and Recommendation that defendant's summary judgment motion be granted. Id. at 23–24. "Taking into account the totality of the circumstances at the time Plaintiff was arrested, the court finds that Davidson's conduct was not objectively unreasonable. Based on two eyewitness accounts and Davison's [sic] own observation that Plaintiff's children were playing near the street, a reasonable officer could have believed with 'fair probability' that Plaintiff's children were 'in imminent danger of death, bodily injury, or physical or mental impairment.' A reasonable officer could have further believed that Plaintiff acted with the requisite mental state by allowing her children to be placed in such danger. That Davidson sought the input of [an] Assistant District Attorney who advised that probable cause existed further supports the conclusion that sufficient facts existed to support an arrest. Accordingly, Davidson is entitled to qualified immunity from Plaintiff's false arrest claim under Section 1983." Id. at 20–21 (citations omitted).

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Goodarzi v. Hartzog, No. H-12-2870, 2014 WL 722109 (S.D. Tex. Feb. 21, 2014)	Yes. No evidence of constitutional violation. Id. at *13.	"The Court concludes that Plaintiff has failed to satisfy her burden to show that Gonzalez is not entitled to qualified immunity. In turn, Gonzalez has demonstrated that he is entitled to qualified immunity . . . . [Gonzalez] has established from the facts within his knowledge on which he reasonably relied and what occurred within his presence that he had probable cause to believe Goodarzi was committing an offense and to arrest Goodarzi, who intentionally impeded him from detaining her and effecting her arrest and by refusing his commands to stop and to provide identification by violent physical [resistance]; he also demonstrated his right to act as he did under the law." Id.
Stewart v. City of Corpus Christi, No. 2:12-cv-00207, 2013 WL 2422370 (S.D. Tex. June 3, 2013)	Yes. No evidence of constitutional violation. Id. at *3–4.	Summary judgment motion granted. Id. at *11. "Plaintiffs have failed to create a genuine issue of material fact that the force used under the circumstances or any seizure of Stewart was objectively unreasonable. Neither have they shown that the law was so 'clear,' under reasonably analogous circumstances confronted by the Officers, that 'no reasonable officer' would have used that quantum of force." Id. at *3.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Carlon v. Miller, No. 4:12-cv-00704 (S.D. Tex. Dec. 5, 2013)	Yes. No evidence of constitutional violation. Order at 10–14, *Carlon*, No. 4:12-cv-00704 (S.D. Tex. Dec. 5, 2013).	Summary judgment motion granted. Id. at 16. "[T]he Court concludes that Miller did not seize Esteban [when his gun accidentally went off] and no excessive force violation can be maintained on that basis. Nor does the summary judgment evidence show that Miller acted objectively unreasonably by deciding to arrest Esteban, drawing his firearm, or not reholstering it before attempting to apprehend Esteban. . . . Because the evidence does not show that it was objectively unreasonable for Miller to approach Esteban's truck with his firearm drawn and to not reholster the firearm before attempting to apprehend Esteban, Plaintiffs cannot maintain a Fourth Amendment claim on any of these bases. . . . Plaintiffs have not identified any evidence that Miller's act in discharging his firearm was anything other than an accident. Absent any evidence of intentional action, Plaintiffs cannot maintain a due process claim . . . [because] Plaintiffs have not responded to Defendants' motion for summary judgment with respect to the equal protection claim, which the Court construes as a representation of no opposition." Id. at 10–14.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Grant v. City of Houston, No. 4:11-cv-03278, 2014 WL 4966224 (S.D. Tex. Sept. 30, 2014), aff'd, 625 F. App'x 670 (5th Cir. 2015)	Yes. No evidence of constitutional violation. Id. at *13, *18.	Summary judgment motion granted because defendants' "conduct . . . did not violate any clearly established constitutional or statutory rights of which a reasonable person would have known. There is no evidence that Simpson shot the dog without good cause and in bad faith. The shooting was justified because he was caught off guard and cornered by a snarling dog. The fact that the officers entered the house in reasonable reliance on a search warrant issued by a neutral magistrate indicates they acted in an objectively reasonable manner of in [sic] 'objective good faith.'" Id. at *13 (citation omitted). "Moreover, the warrant was based on credible information and observation. . . . In sum, the Court concurs with Defendants that Grant has failed to prove that . . . the police officers are not shielded from suit by qualified immunity." Id. at *13–18.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Wallace v. Foster, No. H-11-3388, 2013 WL 1155247 (S.D. Tex. Mar. 19, 2013)	Unclear.	Summary judgment motion granted. Id. at *1. "Plaintiff has failed to cite to case law that would support her contention that Officer Foster's refusal to call a Vietnamese-speaking officer to the scene when he was able, in his opinion, to adequately communicate with Plaintiff in English violated any clearly established right protected by federal law. Likewise, Plaintiff has failed to cite, and the court has not located, case law supporting her claims that the officer's alleged rude remarks, alleged refusal to locate her car keys, alleged failure to investigate the accident or alleged threat to place her in handcuffs for failing to follow his verbal instructions violated her clearly established constitutional rights. . . . Only the claim that Officer Foster deprived her of her driver's license without due process of law potentially raises a claim of constitutional dimension. However, crediting Plaintiff's version of the events as true, that claim has limited factual support . . . . [If] Plaintiff has stated a claim for the wrongful seizure of her driver's license, as opposed to the wrongful deprivation

Case	Ruling on first step of qualified immunity analysis?	Reasoning
		of her license, the court considers Officer Foster's claim of qualified immunity for that action. In order for Plaintiff's claim for wrongful seizure to survive, the facts must show that a reasonable official would understand that what he was doing violated a clearly established right." Id. at *6. "Plaintiff has not overcome Officer Foster's claim of qualified immunity concerning his initial seizure of her driver's license because these facts do not support a conclusion that Officer Foster would have known that his actions were unconstitutional." Id.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Salazar-Limon v. City of Houston, 97 F. Supp. 3d 898 (S.D. Tex. 2015), aff'd, 826 F.3d 272 (5th Cir. 2016)	Yes. No evidence of constitutional violation. Id. at 909.	Summary judgment granted. Id. at 911. "Thompson's use of deadly force was justified, however, by the officer's reasonable belief that Salazar was reaching for a weapon and turning to shoot him. The undisputed summary judgment evidence shows that: Thompson had not checked Salazar for weapons; Salazar appeared intoxicated; Salazar did not obey repeated orders to stop and an order to show his hands; and that, as he walked away from Officer Thompson toward his own truck, he reached toward his waistband . . . ." Id. at 906. "A reasonable officer in the circumstances Thompson faced could have believed [Salazar posed an immediate threat], based on the facts that Salazar struggled with Thompson to resist detention and handcuffing, walked away from Thompson toward his truck, [and] refused to obey repeated commands . . . ." Id. at 907. "Because Thompson reasonably believed that Salazar posed an immediate threat, his use of deadly force was not excessive. Thompson's use of deadly force did not violate Salazar's clearly established constitutional rights." Id. at 909.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Pratt v. Harris County, No. H-12-1770, 2015 WL 224945 (S.D. Tex. Jan. 15, 2015), aff'd, 822 F.3d 174 (5th Cir. 2016)	Yes. No evidence of constitutional violation. Id. at *13.	Summary judgment granted. Id. at *12. "Plaintiff, Deputy Wilks is entitled to qualified immunity for his actions in restraining Pratt, because hog-tying Pratt under these circumstances did not constitute unreasonably excessive force. . . . Assuming all disputed facts in favor of Plaintiff, Deputy Medina is entitled to qualified immunity for his use of a taser against Pratt, because tasing Pratt five times under these circumstances did not constitute unreasonably excessive force." Id. at *11–12. The court concluded that officers who used lesser force and the bystanders were also entitled to qualified immunity because the officers directly involved did not violate clearly established law. Id. at *12–13.
Hargis v. City of Orlando, No. 6:12-cv-723-Orl-37KRS, 2013 WL 4080121 (M.D. Fla. Aug. 13, 2013)	Unclear.	Summary judgment granted. Id. at *1. The court found that the facts were similar to United States v. Briggman, 931 F.2d 705 (11th Cir. 1991), an Eleventh Circuit case finding no constitutional violation, and concluded that qualified immunity should be granted because "[h]ere, the standard is *arguable* reasonable suspicion, a lower threshold than the one met on similar facts in *Briggman*." Id. at *4.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Pantelakos v. Spadafora, No. 6:11-cv-00947-Orl-36DAB, 2012 BL 332536 (M.D. Fla. Dec. 19, 2012)	Yes. Plaintiff did not plead a constitutional violation. Order at 12, *Pantelakos*, No. 6:11-cv-947-Orl-36-CEH-DAB (M.D. Fla. Oct. 5, 2012).	Motion to dismiss granted (pro se plaintiff). Id. at 25. The court described the pro se complaint as "barely comprehensible" and concluded that "Plaintiff has not sufficiently alleged the Individual Defendants' violation of any clearly established constitutional right nor, in most cases, stated a plausible claim upon which relief can be granted." Id. at 6, 12. For three claims, the court found no constitutional violation. Id. at 12–14. For the fourth, a claim of false arrest, the court observed that the plaintiff "asserts this claim without factual support" but accepts the defendants' explanation that the plaintiff is claiming it was improper to arrest him in his home despite the fact that they had a search warrant. Id. at 14–15. The court cited Supreme Court authority suggesting they could and concluded "because it was not clearly established that the Individual Defendants' conduct was unconstitutional, they are entitled to qualified immunity on Plaintiff's claim for false arrest." Id. at 15.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Borsella v. Parker, No. 6:11-cv-1249-Orl-28GJK, 2013 WL 375480 (M.D. Fla. Jan. 31, 2013)	Yes. No evidence of constitutional violation. Id. at *4–5.	Summary judgment granted. Id. at *5. The plaintiff was arrested, handcuffed, and kept in a hot police vehicle. Id. at *2. On claims concerning the plaintiff's detention in police vehicle, the officer's threatening demeanor, and the use of force in searching plaintiff, the court found no constitutional violation. Id. at *4–5. Regarding the handcuffing, the court observed: "Although Jones arrested Borsella for relatively minor motor-vehicle violations and Borsella did not resist arrest or pose an immediate threat to Jones's safety, arrests typically involve handcuffing the suspect, and 'painful handcuffing, without more, is not excessive force in cases where the resulting injuries are minimal.' . . . Jones is therefore entitled to qualified immunity with respect to the force he used in handcuffing Borsella." Id. at *4 (citation omitted).

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Desravines v. Fla. Dep't of Fin. Servs., No. 6:11-cv-00235-ACC-DAB, 2011 WL 2292180 (M.D. Fla. Feb. 14, 2012)	Yes. Plaintiff did not plead a constitutional violation. Id. at *12–13.	Motion to dismiss granted (pro se plaintiffs). Id. at *15. The court concluded that the pro se plaintiffs "fail to allege facts sufficient to state a plausible claim for constitutional violations as a result of false affidavits for arrest warrants" although they allege, "though in a conclusive manner, that probable cause for the affidavits was lacking." Id. at *12–13. So, "[i]n an abundance of caution, the Court proceeds to the second prong of the two-step inquiry" and concludes that there was "arguable probable cause when the Defendants executed the affidavits in question." Id. at 13.
Hill v. Lee Cty. Sheriff's Office, No. 2:11-cv-00242, 2012 WL 4356818 (M.D. Fla. Sept. 24, 2012)	Unclear.	Motion to dismiss and summary judgment granted. Id. at *1. The Court concluded there was arguable probable cause to arrest and rejected plaintiff's argument that the police should have reviewed surveillance videos before making the arrest because probable cause does not require officers "to sift through conflicting evidence or resolve issues of credibility, so long as the totality of the circumstances present a sufficient basis for believing than an offense has been committed." Id. at *14.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Granger v. Williams, No. 6:12-cv-00223, 2013 WL 4494312 (M.D. Fla. Aug. 19, 2013)	Unclear.	Summary judgment granted. Id. at *4. The court concluded that "[o]fficers had arguable probable cause to arrest Plaintiffs for being involved in an altercation" but also noted that "[i]n this case there is sufficient evidence, viewed in the appropriate light, to support Plaintiffs' arrest." Id. at *3–4.
Quiles v. City of Tampa Police Dep't, 596 F. App'x 816 (11th Cir. 2015)	Yes. No evidence of constitutional violation. Id. at 819.	Eleventh Circuit decision, reversing denial of summary judgment. Id. at 816. "The evidence, viewed in the light most favorable to Plaintiff, shows that Officer Savitt violated no constitutional right when he shot Quiles: [T]he officer's act was objectively reasonable. . . . Furthermore, we feel certain that it was not clearly established—as a matter of law—at the time of the shooting that Officer Savitt acted unreasonably in the Fourth Amendment sense." Id. at 819.
Flowers v. City of Melbourne, 6:12-cv-202-Orl-18KRS, 2013 WL 12098771 (M.D. Fla. Aug. 21, 2013)	Yes. No evidence of constitutional violation. Id. at *5.	Summary judgment granted. Id. at *6. Court concluded: "[U]nder the Fourth Amendment's reasonableness standard, none of the Officer Defendants violated Albert Flowers' constitutional rights." Id. at *5.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Bodden v. Cole, No. 3:11-cv-0 0127-J-20MCR, 2012 U.S. Dist. LEXIS 194585 (M.D. Fla. May 31, 2012)	Yes. No evidence of constitutional violation. See id. at *21–23.	Summary judgment granted. Id. at *24. "This Court concludes, based on the perspective of a reasonable officer at the scene, Cole's use of deadly force was reasonable. . . . Considering this situation as a whole, this Court concludes that Cole's use of deadly force was reasonable, and this determination entitles Cole to qualified immunity." Id. at *15–16.
Smith v. Dixon, No. 8:11-cv-02388-T-27TGW, 2013 WL 1651813 (M.D. Fla. Apr. 16, 2013)	No. See id. at *6.	Summary judgment granted. Id. at *7. "Construing the facts and inferences in the light most favorable to Plaintiff, it is evident that the officers had at least arguable probable cause to arrest Mr. Smith for obstruction." Id. at *6.
Southerland v. Carey, No. 3:11-cv–01193-J-37MCR, 2013 WL 1912716 (M.D. Fla. May 9, 2013)	Yes. No evidence of constitutional violation. See id. at *5.	Summary judgment granted. Id. at *7. "[T]he Plaintiffs have failed to establish that Sergeant Carey's belief that Southerland posed a risk of serious physical injury to the officers, ride-along civilian Halstead, or the public was objectively unreasonable." Id. at *4.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Vinson v. Jewett, No. 3:11-cv-00817 (M.D. Fla. Mar. 6, 2013)	Yes. No evidence of constitutional violation. See Order at 25–26, *Vinson*, No. 3:11-cv-00817 (M.D. Fla. Mar. 6, 2013).	Summary judgment granted. Id. at 30. "The Court determined that Defendant is protected by qualified immunity because he had arguable probable cause to submit the Complaint Affidavit in support of Plaintiff's arrest. Alternatively, the Court determines that actual probable cause existed at the time Plaintiff was charged and arrested." Id. at 29–30.
Bussey-Morice v. Gomez, 587 F. App'x 621 (11th Cir. 2014) (per curiam)	No. Id. at 627.	Eleventh Circuit, reversing lower court denial of summary judgment. Id. at 631. "On this record, despite the tragic nature of Bussey's death, we simply cannot conclude that clearly established law precluded Gomez and Hewatt from using their Tasers in the manner used here. Rather we find the circumstances of this case to be more akin to the facts of *Hoyt v. Cooks*, a case in which we determined that police officers were entitled to qualified immunity on excessive-force claims in a situation where they repeatedly used their Tasers in an attempt to subdue a mentally unstable arrestee." Id. at 630 (citation omitted).

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Olin v. Scales, No. 6:12-cv-1455-Orl-28TBS, 2014 WL 1621952 (M.D. Fla. Apr. 22, 2014)	No. Id. at *7.	Summary judgment granted. Id. at *1. "Deputy Scales had at least arguable probable cause to believe that Mr. Olin had committed the offense of resisting an officer without violence. Because he had arguable probable cause, there was no clearly established constitutional violation, and Deputy Scales is entitled to qualified immunity." Id. at *7.
Hunsader v. Melita, No. 8:12-cv-2080-T-27MAP, 2013 WL 6866468 (M.D. Fla. Dec. 31, 2013)	Unclear.	Summary judgment granted. Id. at *5. "[T]he Cruses' history with Plaintiff and their suspicions of him were just not enough to create 'serious doubt' as to their identification of Plaintiff such that a reasonable officer would have taken additional steps to confirm the [identity] of the individual depicted in the video. Defendant's reliance on the sworn affidavits of the Cruses identifying Plaintiff and the fact that they were one hundred percent certain was reasonable under the circumstances. In sum, reasonable officers in the same circumstances and possessing the same knowledge as Defendant could have believed that Plaintiff was the individual who damaged the Cruses' floodlights, and thus, that arguable probable cause existed to arrest Plaintiff. Therefore, Defendant is entitled to qualified immunity." Id. at *4–5.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Apsey v. Chester Township, 608 F. App'x 335 (6th Cir. 2015)	Yes. No evidence of constitutional violation. Id. at 339.	Sixth Circuit, reversing lower court denial of summary judgment. Id. at 336. "We REVERSE the district court because the undisputed facts show probable cause existed to arrest and prosecute Apsey . . . ." Id. Regarding Officer Pocek, his "'contribution to the arrest' appears to be helping with the initial stop of Apsey's pickup, standing by the pickup while Brickman questioned Apsey, and then contacting the daycare. That conduct alone did not violate the Constitution." Id. at 339 (citation omitted) (quoting Brief of Plaintiff-Appellee at 32, *Apsey*, 608 F. App'x 335 (No. 14-3875), 2014 WL 7339431 at 32). Regarding Officer Brickman, he "could have reasonably concluded that Apsey was driving under a suspended license. And even if Apsey was permitted to drive under certain restrictions, Brickman could have reasonably concluded that Apsey was violating those restrictions by driving not to a job site but to the daycare. . . . Because Brickman had probable cause to arrest Apsey for driving under suspension and for obstruction of official business, we reverse the denial of qualified immunity to Brickman on the false arrest claim." Id.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Kinlin v. Kline, No. 1:12-cv-581, 2013 WL 3364405 (N.D. Ohio July 3, 2013)	Yes. No evidence of constitutional violation. Id. at *7.	Summary judgment granted. Id. at *7. The stop was lawful "[b]ecause the undisputed evidence establishes that Kline pulled Kinlin over for an unsafe lane change, and because he had probable cause to do so . . . . Kinlin's arrest claim fails because he cannot show that Trooper Kline lacked probable cause to arrest him . . . . Assuming, arguendo, that Kinlin could show that his arrest did in fact violate the Fourth Amendment, the Court would still find that Trooper Kline is protected by qualified immunity." Id. at *3, *5, *7.
Shepherd v. Sheldon, No. 1:11-cv-127, 2012 WL 1231856 (N.D. Ohio Apr. 12, 2012)	Yes. No evidence of constitutional violation. Id. at *10.	Summary judgment granted. Id. "Even if Bosco's false statements in his search warrant affidavit that Shepherd was 'involuntarily' transported and committed to the VA facility in Brecksville are disregarded or set aside, there was still probable cause to believe that Shepherd committed the felony of possessing a weapon under a disability under Ohio Revised Code § 2923.13. Shepherd sought mental health treatment similar to treatment found to constitute 'commitment' to a mental institution in *Pivar*. Accordingly, Bosco is entitled to qualified immunity on the basis that his false statements were not material to a finding of probable cause." Id.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Mason v. Holmes, No. 4:12-CV-2717, 2014 WL 696418 (N.D. Ohio Feb. 24, 2014)	Yes. No evidence of constitutional violation. Id. at *11.	Summary judgment granted. Id. at *12. "The Court GRANTS Defendants' motion for summary judgment as to Plaintiff's claims of false imprisonment, false arrest and/or lack of probable cause for arresting her. The Sixth Circuit Court of Appeals has interpreted Ohio law as barring plaintiffs from litigating false imprisonment claims where they pleaded no contest to charges of disorderly conduct in state court." Id. at *7 (citation omitted). Regarding the excessive force (taser) claim, the court found that an audio recording contradicted the plaintiff's allegations of the event. "The Court finds that Officer Holmes' tasering of Plaintiff was objectively reasonable. The audio recording clearly revealed that Plaintiff repeatedly failed to comply with his orders to put her hands behind her back after he told her that she was under arrest. . . . The fact that Plaintiff was yelling and screaming and failing to comply with the officers' multiple requests to put her hands behind her back to be handcuffed posed a threat to the officers and to others in the house. For these reasons,

Case	Ruling on first step of qualified immunity analysis?	Reasoning
		the Court finds that Officer Holmes' tasering of Plaintiff was reasonable. Moreover, Plaintiff has produced insufficient evidence to show that Officer Holmes is not entitled to qualified immunity under the circumstances that existed at the time that she was tasered. No reasonable juror could conclude based upon the totality of the circumstances that Officer Holmes' actions were objectively unreasonable due to the uncertainties surrounding him at the time." Id. at *9.
Killian v. City of Monterey, No. 5:12-cv-05418-PSG, 2014 WL 1493941 (N.D. Cal. Apr. 16, 2014).	Yes. No evidence of constitutional violation. Id. at *3.	Summary judgment granted. Id. at *3. "In light of the uncontroverted factual record[,] summary judgment . . . is warranted on Killian's remaining equal protection claim. Because Killian has not identified similarly-situated individuals who were treated differently, a reasonable jury could only find that the defendant officers did not violate Killian's constitutional right to the equal protection of the laws. Because Killian cites no case law that the defendant officers violated any clearly established constitutional right by acting on the probable cause that was present when they arrested Killian, the officers are entitled to qualified immunity on Killian's equal protection claim." Id.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Dunklin v. Mallinger, No. 3:11-cv-01275-JCS, 2013 WL 1501446 (N.D. Cal. Apr. 10, 2013)	Yes. Jury could find constitutional violation based on the record. Id. at *20.	Summary judgment granted. Id at *31. "The Court finds that there are significant fact questions that preclude summary judgment on the question of whether Mr. Dunklin's Fourth Amendment right to be free from excessive force was violated. Assuming that excessive force was used, however, the Court concludes, based on the circumstances of this case as reflected in the undisputed facts, that Defendants' use of force did not violate a right that was 'clearly established.'" Id. at *19
McClain v. City & County of San Francisco, No. C 12-3225 MEJ, 2014 WL 465595 (N.D. Cal. Feb. 3, 2014)	No evidence of constitutional violation. Id. at *10, *11, *13.	Summary judgment granted. Id. at *15. The court concluded that defendants had statutory authority to inspect the plaintiff's boat and seize it for lack of a visible Hull Identification Number (HIN) under state law. Id. at *13. "As discussed above, when inspecting the boat for the HIN and being unable to locate one, and when towing the vessel, the officers were acting pursuant to California Vehicle Code sections 9845 and 9872.1. The officers thus could have reasonably believed that their actions were legal. The Court therefore finds that the officers are entitled to qualified immunity." Id.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Keahey v. Bethel Township, No. 2:11-cv-07210, 2012 WL 6525543 (E.D. Pa. Dec. 13, 2012)	No. Id. at *6, *8.	Summary judgment granted. Id. at *10. The court concluded defendants were entitled to qualified immunity. "In the whole [arrest] process, the officers used no physical force against Keahey. The officers never displayed a weapon. Even taking the facts in a light most favorable to Keahey, a reasonable jury could not find that a constitutional right was clearly violated. . . . Plaintiff alleges that Officers Register and Buck illegally seized his property by removing him from his home and instructing him that he could not return and by refusing to allow him the use of the F150 or Mustang. Again, even if the facts are taken in a light most favorable to Keahey, there is nothing to suggest that the officers['] actions were so blatantly unconstitutional such that no reasonable officer would have taken them." Id. at *6–7.

Case	Ruling on first step of qualified immunity analysis?	Reasoning
Mathai v. City of Philadelphia, No. 2:11-cv-03056 (E.D. Pa. filed May 9, 2011)	Yes. No evidence of constitutional violation. See Order at 5, *Mathai*, No. 2:11-cv-03056 (E.D. Pa. Feb. 29, 2012).	Motion to dismiss granted. Id. at 10. "I conclude that Plaintiff has not made out a claim that his rights were violated or the officers acted unreasonably. . . . The warrant obtained by Officer Doughten was supported by probable cause. . . . Even if the warrant were not supported by probable cause, the Defendant Officers did not violate rights so clearly established 'that a reasonable officer would understand that what he is doing violates that right.'" Id. at 4–6 (quoting Ray v. Township of Warren, 626 F.3d 170, 174 (3d Cir. 2010)).

DEFENDING QUALIFIED IMMUNITY

Lawrence Rosenthal*

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I. INTRODUCTION

Civil actions seeking damages against public officials are often the only effective vehicle for challenging the constitutionality of governmental conduct. As the Supreme Court has recognized, in cases not amenable to

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injunctive relief,[1] "it is damages or nothing."[2] Damages actions against government entities themselves are often unavailing—the federal government enjoys sovereign immunity;[3] the Eleventh Amendment bars damages actions against state governments and their instrumentalities;[4] and although local governments are amenable to suit under Title 42 § 1983 of the United States Code, which allows for actions against those who, acting under color of law, deprive another of "any rights, privileges, or immunities secured by the Constitution and laws,"[5] local governmental entities can be held liable only for constitutional torts that are the result of their customs, policies, or practices.[6] Thus, it is no exaggeration that the availability of a damages remedy against an individual public official will often be the only way to vindicate constitutional rights.

Yet, confronting actions against public officials seeking damages for constitutional violations is the defense of qualified immunity, which bars damages awards against officials—whether state and local officials under § 1983 or federal officials in lawsuits brought directly under the Constitution as authorized by *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* and its progeny[7]—unless the defendant "violate[s] clearly

1. Federal courts do not have authority to issue injunctive relief based on a plaintiff's alleged injury absent an appropriate showing that the plaintiff is likely to experience similar injuries in the future. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 105–06 (1983) (holding that plaintiff could not seek injunction against use of police chokeholds based on a prior incident absent showing that plaintiff "would have another encounter with the police" and "either, (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such manner"); O'Shea v. Littleton, 414 U.S. 488, 488, 495–99 (1974) (holding that the district court lacked jurisdiction to award injunctive relief on allegations of unconstitutional patterns and practices involving the setting of bond, discrimination in sentencing, and imposing fees for jury trials, absent a showing of a "real and immediate" threat that the plaintiffs faced injury from these practices).

2. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment); *accord, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) ("In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." (citing Butz v. Economou, 438 U.S. 478, 506 (1978))).

3. *E.g.*, FDIC v. Meyer, 510 U.S. 471, 477 (1994) (citing Loeffler v. Frank, 486 U.S. 549, 554 (1988)).

4. *E.g.*, Alden v. Maine, 527 U.S. 706, 712–13, 728–29, 742 (1999).

5. 42 U.S.C. § 1983.

6. *E.g.*, Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 690–91 (1978) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 167–68 (1970)).

7. The Court first recognized a right to recover damages directly under the Constitution in *Bivens*. *See* 403 U.S. at 397 ("Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, we hold that petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment."

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established statutory or constitutional rights of which a reasonable person would have known."[8] Moreover, "[t]o be clearly established, a right must be sufficiently clear that every reasonable official would [have understood] that what he is doing violates that right. In other words, existing precedent must have placed the statutory or constitutional question beyond debate."[9] The defense is justified, the Court has written, because of "the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."[10]

Qualified immunity has come under sustained academic attack.[11] One line of argument questions its lawfulness, noting that nothing in § 1983's text or the prevailing principles of the common law liability of public officials

(citation omitted)). For the Court's account of the course of its *Bivens* jurisprudence, see Ziglar v. Abbasi, 137 S. Ct. 1843, 1856–58 (2017).

8. Pearson v. Callahan, 555 U.S. 223, 231 (2009) (internal quotation marks omitted) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Although actions against officials acting under color of state law are brought under § 1983 and *Bivens* actions are brought directly under the Constitution, the Court has "deem[ed] it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." Butz v. Economou, 438 U.S. 478, 504 (1978); *accord* Wilson v. Layne, 526 U.S. 603, 609 (1999); Malley v. Briggs, 475 U.S. 335, 340 n.2 (1986).

9. Reichle v. Howards, 566 U.S. 658, 664 (2012) (first brackets added) (citations omitted) (internal quotation marks omitted) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)).

10. *Ziglar*, 137 S. Ct. at 1866 (internal quotation marks omitted) (quoting Anderson v. Creighton, 483 U.S. 635, 638 (1987)); *accord* Filarsky v. Delia, 566 U.S. 377, 389–90 (2012); Richardson v. McKnight, 521 U.S. 399, 409–11 (1997). The Court has added that qualified immunity is intended to spare defendants the burden of defending litigation as well as the burden of paying damages awards. *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) ("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." (citation omitted) (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring))); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) ("[Qualified immunity's protections] are not limited to liability for money damages; they also include 'the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service . . . [E]ven such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" (final alteration in original) (citation omitted) (quoting *Harlow*, 457 U.S. at 816–17)).

11. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797–1798, 1800 (2018).

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extant at the time of its enactment supports the defense.[12] Another line of argument attacks § 1983's consequences, albeit from different directions. Some argue that the defense is so powerful that it renders damages actions ineffective as a check on governmental misconduct.[13] Joanna Schwartz, in contrast, has argued that qualified immunity is actually ineffective because, in her view, it too rarely protects public officials from the threat of litigation and liability to achieve its intended objective.[14] Conversely, while scholarly criticism of qualified immunity is frequent, scholarly defenses of the doctrine are rare and usually equivocal.[15] The critique of qualified immunity has been echoed by members of the Supreme Court, where there are indications of

12. *See, e.g.*, Baude, *supra* note 11, at 88 ("In suggesting that the doctrine of qualified immunity is unlawful, I do not mean to raise foundational questions about the American legal order or the basic notion of government under law. Rather, I mean the more modest point that the doctrine lacks legal justification, and the Court's justifications are unpersuasive." (footnote omitted)); Schwartz, *supra* note 11, at 1801 ("Despite the Court's repeated invocation of the common law, several scholars have shown that history does not support the Court's claims about qualified immunity's common-law foundations.").

13. For good examples of arguments along these lines, see Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633 (2013); 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 Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1244–50 (2015).

14. *See, e.g.*, Schwartz, *supra* note 11, at 1803–04 ("I have found, contrary to the Court's assertions, that qualified immunity is unnecessary to shield law enforcement officers from the financial burdens of being sued because they are virtually never required to contribute to settlements and judgments entered against them. I have additionally found that qualified immunity is unnecessary and ill-suited to shield government officials from burdens of discovery and trial, as it is very rarely the reason that suits against law enforcement officers are dismissed. Finally, available evidence suggests that the threat of being sued does not play a meaningful role in job application decisions or officers' decisions on the street."); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 71 (2017) ("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.").

15. *See, e.g.*, Richard H. Fallon Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 989–94 (2019) (defending qualified immunity for individual defendants but also advocating for enhanced entity liability and a less "draconian" formulation of the immunity defense); Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. (forthcoming 2020) (manuscript at 31) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544897 [https://perma.cc/Q6U3-7JHP] ("To begin, we agree that just because qualified immunity has federalism implications does not necessarily mean it is worth retaining or that the Court's cases recognizing it were rightly decided. Congress may have determined that it makes sense to force states and local governments to be [sic] bear the full costs of the mistakes made by their officers, even if the officers made reasonable mistakes, or at least acted in a way that was not clearly lawful . . . .").

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disquiet in the citadel.[16] Attacks on qualified immunity have entered the political realm as well, with the emergence of legislative proposals for its abolition.[17]

This Article is the first to offer a direct response to the emerging case against qualified immunity. After this introduction, Part II below defends the lawfulness of qualified immunity. While acknowledging that the conventional defenses of qualified immunity wither under scrutiny, Part II offers a novel justification: Congress's delegation of authority to the federal courts to develop common law rules for the administration of liability under the Civil Rights Act of 1866.

Part III begins by acknowledging that the conventional justification for qualified immunity—that it protects public employees against the chilling effects of personal liability for damages—is largely unpersuasive in light of the reality that public employees rarely face a credible threat of personal liability. Instead, they are almost always indemnified by their employers. Part III then offers an alternative justification for qualified immunity by examining its incentive effects in light of the ubiquity of indemnification. By shifting the financial burden of constitutional tort litigation from public employees to their employers, indemnification encourages public employers wishing to minimize costs to induce their employees to comply with settled legal rules. Qualified immunity permits damages liability for violation of such settled rules, while discouraging plaintiffs' lawyers from bringing a wide variety of novel damages claims of questionable merit, and it also minimizes the costs that would be incurred by innocent third parties if public officials faced unlimited liability. This last point is of special import. After all, the funds that public employers must devote to the defense of civil rights litigation and their payment of judgments and settlements comes either from raising taxes or, more likely, from cuts to public services that are likely to fall disproportionately on relatively powerless populations, such as the poor and disadvantaged. This is reason enough for those who are concerned about the government's ability to finance important public services to see virtue in defenses that limit the government's exposure to damages liability.

16. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."). For a helpful discussion of the various criticisms of aspects of qualified immunity doctrine that have been articulated by members of the Court, see Schwartz, *supra* note 11, at 1798–800.

17. *See, e.g.*, H.R. 7120, 116th Cong. § 102 (2020) (amending § 1983 to abolish defenses based on a law enforcement officer's good faith and reasonable belief in the lawfulness of the officer's conduct or the lack of clearly established law).

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II. THE LAWFULNESS OF QUALIFIED IMMUNITY

At first blush, the case against the lawfulness of qualified immunity seems compelling. Originally enacted as part of the Civil Rights Act of 1871,[18] § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[19]

It is unclear whether this statutory language leaves any room for an immunity defense. William Baude, for example, in the course of questioning the lawfulness of qualified immunity, observed that the statute nowhere "makes any reference to immunity."[20] He concluded that "the doctrine lacks legal justification, and the Court's justifications are unpersuasive."[21]

Professor Baude's critique destabilizes the basis for qualified immunity in *Bivens* actions no less than actions brought under § 1983. The Supreme Court has embraced the defense of qualified immunity in *Bivens* litigation on the view that federal officials should receive the same protection from liability for damages afforded to state and local officials sued under § 1983.[22] If qualified immunity is rejected in § 1983 litigation, accordingly, it presumably

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18. As originally enacted, the statute provided:

> [A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . .

An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, Sess. I, 17 Stat. 13 (1871).

19. 42 U.S.C. § 1983.

20. Baude, *supra* note 11, at 50.

21. *Id.* at 88. For a similar argument, see Pierson v. Ray, 386 U.S. 547, 559–63 (1967) (Douglas, J., dissenting).

22. *See, e.g.*, Wilson v. Layne, 526 U.S. 603, 609 (1999) ("Although this case involves suits under both § 1983 and Bivens, the qualified immunity analysis is identical under either cause of action."); Butz v. Economou, 438 U.S. 478, 504 (1978) ("[W]e deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.").

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should be reassessed under *Bivens* as well. Indeed, some scholars have already made just this move.[23]

A. Problematic Defenses of Qualified Immunity

Professor Baude has a point; the legal justifications traditionally offered for qualified immunity wither under scrutiny.

1. History

The Supreme Court has frequently utilized the common law context in which § 1983 was enacted as a justification for qualified immunity.[24] Section 1983 was enacted, the Court has reasoned, against the backdrop of traditional immunity rules that Congress likely assumed would be applied to the statutory liability it was creating.[25]

At the outset, it is doubtful that the text of § 1983 accommodates the defense of qualified immunity as a kind of historical gloss. In unambiguous terms, the statute provides that "[e]very person" acting under color of state law who "subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable* to the party injured . . ."[26] The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."[27] The plain terms of § 1983 do not seem to leave any room to read in a historical gloss of common law defenses to liability inconsistent with the statute's text.

To this, one might respond that the Supreme Court's twenty-first century methodology for interpreting statutes should not be applied to a nineteenth-

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23. *See, e.g.*, Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1417–20, 1448–60 (2019) (discussing the critiques of Professor Baude and others concerning the statutory basis for qualified immunity under § 1983 and concluding that there is no adequate non-statutory justification for qualified immunity as a defense to § 1983 or *Bivens* actions).

24. *See, e.g.*, Filarsky v. Delia, 566 U.S. 377, 389 (2012) (quoting Wyatt v. Cole, 504 U.S. 158, 167 (1992)).

25. *See, e.g.*, *id.* at 383–84 ("At common law, government actors were afforded certain protections from liability . . . . Our decisions have recognized similar immunities under § 1983, reasoning that common law protections '"well grounded in history and reason" had not been abrogated "by covert inclusion in the general language" of § 1983.'" (quoting Imbler v. Pachtman, 424 U.S. 409, 418 (1976))).

26. 42 U.S.C. § 1983 (emphasis added).

27. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461–62 (2002) (internal quotation marks omitted) (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992)).

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century statute such as § 1983. There is, however, scant evidence that the interpretive methodology familiar to those who enacted § 1983 was dissimilar to contemporary thinking.[28] Moreover, there is little indication that the legislators who crafted § 1983 were concerned with preserving historically-recognized immunities. Scholars who have studied the matter have consistently concluded that the statute's legislative history, consistent with its text, reflects a predominant congressional concern with crafting a remedy more efficacious than the common law, which had not proven effective to protect constitutional rights.[29] The Supreme Court has, moreover, acknowledged: "Section 1983 'ha[s] no precise counterpart in state law . . . [I]t is the purest coincidence when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect.'"[30] Thus, it is far from clear that common law defenses unsupported by § 1983's text are properly read into a statute not crafted to track the common law.

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28. *See, e.g.*, Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 766 (1987) ("The legislative history of important Reconstruction Era statutes shows a number of legislators who were quite aware of interpretational methodology . . . . Some tied interpretation of provisions solely to their plain meaning. Others began with plain meaning, but accepted evidence of legislative intent as a method for resolving ambiguities in language. Others suggested that regardless of plain meaning or legislative statements, the legislation should be interpreted broadly because of its overall remedial purposes. Although there were not a great number of speakers who directly addressed proper interpretational methodology, there is absolutely no suggestion by anyone that congressional silence should be read to override either plain meaning or actual legislative statements." (footnotes omitted)).

29. *See, e.g.*, David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 523–24 (1992) ("The 42nd Congress was well aware that it was creating a new cause of action that protected constitutional rights by restricting the previously existing powers and privileges of state and local officials . . . . Immunities designed to minimize the extent to which common-law principles unintentionally impinged on official prerogatives would be peculiarly ill-suited to a statute which was primarily intended to prevent the abuse of those prerogatives."); Matasar, *supra* note 28, at 774–75 ("Although section 1983 was not the subject of much discussion or objection, its drafters and supporters clearly stated its broad remedial purpose. Moreover, at least some of the supporters of section 1983 believed that the only effective means to enforce federal rights would be by suits against state officers. A Congress concerned with effective legislation that intended to limit that legislation's scope would be unlikely to do so silently." (footnotes omitted)); Michael Wells, *Constitutional Remedies, Section 1983, and the Common Law*, 68 MISS. L.J. 157, 177–78 (1998) ("The legislative history of the Civil Rights Act of 1871 contains many indications that Congress intended to enact a sweeping remedy in order to deal with the serious problem that prompted the statute. That problem was Ku Klux Klan violence against the newly-freed blacks and their white supporters in the South . . . [F]ar from adopting the common law, Congress may have meant to ignore it in the event it got in the way of the statute's remedial aim. Common law limitations on recovery, such as the immunity doctrines, may actually be at odds with Congress' intent." (footnotes omitted)).

30. Rehberg v. Paulk, 566 U.S. 356, 366 (2012) (alteration in original) (quoting Wilson v. Garcia, 471 U.S. 261, 272 (1985)).

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Even if a deeply entrenched common law immunity rule could be read into § 1983, the historical record stops well short of reflecting anything like the defense of qualified immunity that the Supreme Court has recognized. Consider, for example, *Pierson v. Ray*, in which the Court first endeavored to place a historical gloss on § 1983, writing that the statute "should be read against the background of tort liability . . . Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause."[31] The Court, however, subsequently broadened this defense into a general doctrine of immunity for actions based on a good faith and reasonable belief that they comport with the law without claiming that the common law had ever recognized this type of defense outside of the context of false arrest.[32] Thus, as a number of scholars have concluded, history does not support the view that § 1983 was enacted against the backdrop of a general defense of qualified immunity.[33]

In any event, the Court abandoned the view that qualified immunity rests on historical standards in *Harlow v. Fitzgerald*.[34] In that case, the Court concluded that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-

31. Pierson v. Ray, 386 U.S. 547, 556–57 (1967) (citation omitted) (internal quotation marks omitted) (quoting Monroe v. Pape, 365 U.S. 167, 187 (1961)).

32. *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 322 (1975) ("[A] school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student."); Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974) ("[A] qualified immunity is available to officers of the executive branch of government . . . . It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.").

33. *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) (arguing that *Pierson* misapprehended immunity law existing when § 1983 was enacted); Baude, *supra* note 11, at 55–61 (discussing conflicting historical evidence casting doubt on the existence of a widely accepted immunity rule at the time of § 1983's enactment); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RSRV. L. REV. 396, 432–70 (1986) (arguing that *Pierson* and subsequent immunity doctrine depart from nineteenth-century approaches to immunity). *But cf.* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. (forthcoming 2021) (manuscript at 6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3680714 [https://perma.cc/27JA-226A] ("[T]he Supreme Court's current officer immunity doctrines depart from the common law around 1871 in three main ways: (1) high-ranking executive officers had absolute immunity at common law, while today they have only qualified immunity (and vice versa for government prosecutors and legislative aides); (2) qualified immunity at common law could be overridden by showing an officer's subjective improper motive, while today the clearly-established-law test applies; and (3) qualified immunity at common law required the plaintiff to prove bad faith with clear evidence, while there is confusion today over whether the plaintiff or defendant has the burden of proof in qualified immunity cases.").

34. 457 U.S. 800 (1982).

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reaching discovery."[35] Instead, "government officials performing discretionary functions generally are shielded 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."[36] Therefore, as the Court subsequently acknowledged, *Harlow* "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."[37]

Accordingly, as currently formulated, qualified immunity is not anchored in any background legal principle extant at the time § 1983 was enacted. Indeed, in recent years, a number of the Court's members have complained that qualified immunity jurisprudence has departed from historical standards.[38] Given the disjunction between historical standards and contemporary doctrine, it is surely untenable to defend current qualified immunity doctrine on the ground that § 1983 implicitly imported the prevailing immunity defense when it was enacted.[39]

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35. *Id.* at 817–18.

36. *Id.* at 818 (internal quotation marks omitted).

37. Anderson v. Creighton, 483 U.S. 635, 645 (1987).

38. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in judgment) ("In further elaborating the doctrine of qualified immunity for executive officials, . . . we have diverged from the historical inquiry mandated by the statute."); Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) ("[O]ur treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume."); Wyatt v. Cole, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) ("In the context of qualified immunity for public officials, . . . we have diverged to a substantial degree from the historical standards.").

39. On at least one occasion, the Court has offered a different legal justification for qualified immunity rooted in conceptions of fair notice. *See* Hope v. Pelzer, 536 U.S. 730, 739 (2002) ("Officers sued in a civil action for damages under 42 U.S.C. § 1983 have the same right to fair notice as do defendants charged with the criminal offense defined in 18 U.S.C. § 242."). There is, however, an important textual difference between § 1983 and the criminal provision referenced by the Court. Section 242 imposes criminal liability on "[w]hoever, under color of any law, statute, ordinance, regulation, or custom, *willfully* subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States," 18 U.S.C. § 242 (emphasis added), whereas § 1983 has no willfulness requirement. This textual difference undermines the view that the same standard for notice is imposed by both statutes, as Professor Baude has observed. *See* Baude, *supra* note 11, at 73–74. Indeed, while the criminal statute's willfulness requirement suggests that defendants cannot be held liable unless they knew that their conduct infringed constitutional rights, there is no such requirement in § 1983. Nor is there any rule requiring immunity from liability when the defendant merely fails to anticipate a new rule of constitutional law; for example, despite concerns about fair notice, the Court has insisted that new rules of constitutional law should be retroactively applied to all pending and future cases even in cases arising from events predating

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2. *Stare Decisis*

In light of the weakness of a historically-based defense of qualified immunity, the few scholars willing to defend the doctrine have offered some alternative justifications. For example, Aaron Nielson and Christopher Walker have argued that "when it comes to nonconstitutional holdings, 'stare decisis carries enhanced force," and for that reason, "if the United States as a society does not want qualified immunity, Congress should enact new legislation."[40] On this view, qualified immunity doctrine may be a mistake, but it is one that only Congress can correct.

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the announcement of the new rule. *See, e.g.*, Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."). Moreover, in terms of constitutional concerns about fair notice, the Supreme Court has long taken the view that "the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactments" and "[t]he Court has . . . expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 498–99 (1982). Even in the criminal context, concern for fair notice has not generated a general defense of qualified immunity, but instead a due process defense available when a "court's decision was 'unexpected and indefensible' such that it offended the due process principle of fair warning . . . ." Rogers v. Tennessee, 532 U.S. 451, 466 (2001) (quoting Bouie v. City of Columbia, 378 U.S. 347, 354 (1964)). Qualified immunity doctrine, of course, provides far greater protection—granting immunity as long as there is no violation of clearly established law. Finally, when it comes to concerns about fair notice, § 1983 jurisprudence is inconsistent; the Court has refused to recognize a defense of qualified immunity for municipal defendants facing even unforeseeable liabilities. *See, e.g.*, Owen v. City of Indep., 445 U.S. 622, 655 (1980) ("[E]ven where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated.").

40. Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1856 (2018). Nielson and Walker have endeavored to bolster their argument for the precedential force of current qualified immunity doctrine by contending that "a judicial decision invaliding qualified immunity would be extraordinarily disruptive to reliance interests" because "against a backdrop of decades of consistent cases from the U.S. Supreme Court [recognizing qualified immunity], state governments have created their own schemes for compensating officers, and . . . a key part of virtually all those schemes is indemnification." Nielson & Walker, *supra* note 15, at 66–67 (footnote omitted). Yet, in their own survey of state indemnification laws, they identify none that distinguish between liability for damages under § 1983 and liabilities imposed under other federal or state laws under which the defense of qualified immunity is not recognized. *Id.* at 40, 45–46, 50 (surveying state indemnification laws and identifying none that indemnify only for damages awarded under § 1983 and not for other types of legal costs for which qualified immunity is unavailable). They also acknowledge that "[s]ome States have . . . essentially eliminate[d] qualified immunity for

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It is rather odd to defend qualified immunity doctrine based on the force of stare decisis when *Harlow* itself repudiated prior precedent and reformulated qualified immunity without precedential support.[41] To be sure, *Harlow* was itself a *Bivens* case not subject to § 1983,[42] but the Court applied its new rule to § 1983 litigation as well, even though Congress had not revised the statute.[43] Similarly, the Court promulgated and later retracted a rule requiring lower courts to decide in both § 1983 and *Bivens* litigation whether the plaintiff has established a violation of the Constitution before reaching a proffered qualified immunity defense.[44] And the Court's willingness to revise § 1983 precedent is not confined to qualified immunity. For example, the Court also repudiated its prior interpretation that the statute did not permit municipal liability despite the force of stare decisis.[45] Thus, there is more than a little force to Scott Michelman's conclusion: "The Court's history of taking

certain claims by creating overlapping state causes of action that are not subject to such a defense." *Id.* at 68; *see also* Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L.J. (forthcoming 2020) (manuscript at 23), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3565362 [https://perma.cc/Q6WL-DQ26] ("[S]tates' indemnification statutes concern liability for both Section 1983 claims and state tort claims—including assault, battery, negligence, and the like—where qualified immunity cannot shield government officials from liability. If states enacted their indemnification statutes in reliance on qualified immunity doctrine, they presumably would have focused indemnification to Section 1983 claims, where qualified immunity could provide the protection Nielson and Walker describe."). Accordingly, since indemnification is available on equal terms for § 1983 and other types of claims—even state law claims on which there is no qualified immunity—the claim that state and local indemnification practices are premised upon the federal law of qualified immunity seems dubious. Indeed, as we will see, there are powerful reasons for employers to offer employees indemnification regardless of the availability of qualified immunity. *See infra* text accompanying notes 114–115. In any event, Professors Nielson and Walker do not explain why revising state indemnification laws in the wake of the abolition of qualified immunity would pose special difficulties so serious as to warrant granting qualified immunity extraordinary precedential weight.

41. *See supra* text accompanying notes 34–37.

42. Harlow v. Fitzgerald, 457 U.S. 800, 802–06 (1982).

43. *Id.* at 818 n.30 ("This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under 42 U.S.C. § 1983. We have found previously, however, that it would be 'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.'" (quoting Butz v. Economou, 438 U.S. 478, 504 (1978))). Although this statement was technically dicta in *Harlow*, the Court soon squarely held the *Harlow* reformulation of qualified immunity was applicable to § 1983 litigation. *See* Davis v. Scherer, 468 U.S. 183, 190–91 (1984) (citing *Harlow*, 457 U.S. at 818).

44. *See* Pearson v. Callahan, 555 U.S. 223, 231–43 (2009) (first citing *Harlow*, 457 U.S. at 818; then citing Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987); then citing Saucier v. Katz, 533 U.S. 194, 201 (2001); then citing Cnty. of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998); and then citing Payne v. Tennessee, 501 U.S. 808, 829–30 (1991)) (explaining the evolution of § 1983 jurisprudence on this point).

45. *See* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 695–701 (1978) (explaining the evolution of § 1983 jurisprudence on this point).

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ownership of this doctrine, together with the constitutional implications of the doctrine itself, should overcome the force of the special 'statutory stare decisis' rule."[46]

3. *Common Law Statute*

Perhaps the best defense of qualified immunity in the scholarly literature is that § 1983 should be regarded as a kind of "common law statute" that effectively delegates authority to the judiciary to promulgate doctrine, much like the Sherman Act gave birth to a complex law of antitrust hardly evident from the terms of that statute.[47]

By its own account, the Supreme Court "has treated the Sherman Act as a common-law statute . . . Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraint[s] of trade' evolve to meet the dynamics of present economic conditions."[48] Notably, the Sherman Act is crafted at a high level of generality, prohibiting "every contract, combination . . . or conspiracy in restraint of trade."[49] Since almost any economic arrangement involving competitors could be regarded as a "restraint of trade," the statute effectively

46. Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999, 2007 (2018). Relatedly, Justice Scalia once defended qualified immunity on the ground that the Court erred in holding that § 1983 reached those who abused their authority under state law in *Monroe v. Pape*, 365 U.S. 167, 191–92 (1961), *overruled in part by Monell*, 436 U.S. at 659, 663 n.7, thereby "chang[ing] a statute that had generated only twenty-one cases in the first fifty years of its existence into one that pours into the federal courts tens of thousands of suits each year," and consequently, in Justice Scalia's view, the Court was "engaged, therefore, in the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute we have invented—rather than applying the common law embodied in the statute that Congress wrote." Crawford-El v. Britton, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting). As Professor Baude observed, however, this defense of qualified immunity is dubious, both because there are strong arguments in favor of *Monroe* and because qualified immunity doctrine is not tailored to remedy *Monroe*'s supposedly erroneous holding that § 1983 supplies a remedy in cases even in which state law provides plaintiffs with adequate remedies. *See* Baude, *supra* note 11, at 62–67.

47. *See, e.g.*, Fallon, *supra* note 15, at 991–94 (characterizing § 1983 as a common law statute); Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, 9 CALIF. L. REV. ONLINE 40, 51–53 (2018) (same); Michelman, *supra* note 46, at 2002–06; *see also* Baude, *supra* note 11, at 78 ("Maybe Section 1983 could be reconceived as a common-law statute analogous to the Sherman Antitrust Act.").

48. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) (alteration in original). To a similar effect, see, for example, Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) ("Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.").

49. 15 U.S.C. § 1.

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forced courts to develop judicially-administrable rules without much in the way of statutory guidance, as scholars have long observed.[50]

Section 1983, in contrast, offers far less textual room for treatment as a common law statute. In unambiguous terms, § 1983 provides that "[e]very person" acting under color of state law who "subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable* to the party injured . . . ."[51] Once a court finds that the defendant deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States, it is hard to see any textual room for creating a common law defense to liability, such as the qualified immunity defense.

B. The Statutory Basis for a Common Law of Qualified Immunity

A more promising basis for qualified immunity doctrine is hiding in plain sight. In the Civil Rights Act of 1866, Congress not only prohibited racial discrimination with respect to enumerated rights,[52] but also, in § 3, conferred authority on the courts to utilize common law or state law rules when federal statutes "are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . ."[53] As subsequently amended, this

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50. *See, e.g.*, HERBERT HOVENKAMP, PRINCIPLES OF ANTITRUST 34 (2017) ("[T]he Sherman Act condemns 'every contract, combination . . . or conspiracy in restraint of trade,' without giving a clue about what those phrases mean."); William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 663 (1982) ("Congress adopted what is in essence enabling legislation that has permitted a common-law refinement of antitrust law through an evolution guided by only the most general statutory directions.").

51. 42 U.S.C. § 1983 (emphasis added).

52. In pertinent part, the Civil Rights Act of 1866 provided:

> [Sec. 1] . . . [A]ll persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

53. Section 3 provided, in pertinent part:

> The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the

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provision, now codified in Title 42 of the United States Code at § 1988(a), authorizes the courts to supplement various civil rights statutes, including § 1983:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights [which includes § 1983], and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; *but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the disposition of the cause*, and, if it is of a criminal nature, in the infliction of punishment on the guilty party.[54]

Section 1988(a), accordingly, is a gap-filling provision that permits federal courts to supplement § 1983's terms with state or common law doctrine.[55]

To be sure, the correct application of this provision is hardly self-evident.[56] Indeed, it has generated disagreement on the infrequent occasions in which scholarly literature has addressed it. Jennifer Coleman, stressing § 1988(a)'s textual command to apply state law, concluded that it requires that the law of the state in which the case is brought govern all questions not addressed by § 1983 itself—including questions of immunity—unless applicable state law is inconsistent with § 1983 jurisprudence.[57] In contrast,

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> State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.

Id. at § 3, 14 Stat. at 27.

54. 42 U.S.C. § 1988(a) (emphasis added).

55. *See, e.g.*, Moor v. Alameda Cnty., 411 U.S. 693, 705 (1973) (§ 1988(a) "explain[s] the source of law to be applied in actions brought to enforce the substantive provisions of the Act," including § 1983).

56. For a helpful overview of the difficulties in interpreting this statute, see Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 58–65 (1989).

57. *See* Jennifer A. Coleman, *42 U.S.C. Section 1988: A Congressionally-Mandated Approach to the Construction of Section 1983*, 19 IND. L. REV. 665, 722–32 (1986) (arguing that immunity is not addressed in § 1983 and therefore is governed by § 1988(a)).

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Theodore Eisenberg concluded that § 1988 applies state law only to civil or criminal litigation asserting a state claim when removed from state to federal court under the terms of the 1866 Act; it does not apply to a claim based on federal rights under § 1983.[58] Seth Kreimer argued that § 1988(a)'s reference to "the common law" requires application of federal common law rules to matters not addressed by § 1983, although § 1988(a) does requires application of state statutes and constitutional provisions.[59]

Of these views, the least plausible is that of Professor Eisenberg. Even if, as Professor Eisenberg argued, the Civil Rights Act of 1866, when originally enacted, applied only to lawsuits based on state law that had been removed from state to federal court under the terms of that Act, the Civil Rights Act of 1871 subsequently made the provisions of the Civil Rights Act of 1866—including § 3—applicable to all actions brought under what is now § 1983.[60] Thus, the Civil Rights Act of 1871 rendered wholly untenable any effort to confine what would become § 1988(a) to actions that are based in state law and subsequently removed from state courts.[61] For this reason, it is no surprise that the Supreme Court has repeatedly held that § 1988(a) applies to actions for deprivations of federal rights under § 1983.[62]

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58. *See* Theodore Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499, 525–41 (1980) (arguing that there is little indication that Congress intended to apply state law to lawsuits asserting federal rights when it enacted the Civil Rights Act of 1871).

59. *See* Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601, 611–32 (1985) (arguing that when § 1983 was enacted, references to the common law were generally understood to refer to a general federal common law).

60. *See* An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, Sess. I, 17 Stat. 13 (1871) ("[A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action of law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of [the Civil Rights Act of 1866] . . . .").

61. *See* Kreimer, *supra* note 59, at 621 n.94 ("Professor Eisenberg has argued at length that § 1988 was designed to apply only to cases initially brought under state law, usually those removed from state to federal court. As an interpretation of the 1866 predecessor, this position is plausible, although it rests on the assumption that the second sentence of § 3 of the 1866 Civil Rights Act refers to only half of the first sentence. As an interpretation of [§ 1988(a) as subsequently amended], however, it is at war with the text, for [§ 1988] applies by its terms to a variety of federal causes of action." (citations omitted)).

62. *See, e.g.*, Wilson v. Garcia, 471 U.S. 261, 268–75 (1985) (relying on § 1988(a) to hold that state statutes of limitations for actions concerning a personal injury should apply to

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Once it is agreed that, consistent with its plain language, § 1988(a) applies to civil actions brought under § 1983, it becomes impossible to claim that § 1983's text resolves all questions regarding the liability of those who, acting under color of state law, deprive others of constitutional rights. If it did, there would be no need for Congress, in 1871, to have made what is now § 1988(a) applicable to § 1983 litigation when that statute is "not adapted to the object, or . . . deficient in the provisions necessary to furnish suitable remedies . . . ."[63]

One might nonetheless attack the lawfulness of qualified immunity by taking the view that § 1988(a)'s reference to cases in which § 1983 is "not adapted to the object" or "deficient in the provisions necessary to furnish suitable remedies"[64] is simply meant to aid plaintiffs by authorizing courts to utilize remedies not expressly mentioned in § 1983's text. This view, however, ignores the possibility that there may be cases in which no remedy—or no damages remedy—is "suitable" within the meaning of § 1988(a).

This is indeed the path the Supreme Court has taken. The Court has held, for example, that § 1983 is "not adapted to the object" or "deficient in the provisions necessary to furnish suitable remedies" when it is entirely silent on a type of defense usually recognized in civil litigation. The Court has therefore held that, under § 1988(a), state law should determine whether a § 1983 claim survives the death of the plaintiff because § 1983 is silent on questions of survival.[65] The Court has also held that, by virtue of § 1988(a), federal courts should utilize state statutes of limitation in § 1983 litigation since it contains no such provision.[66] Thus, § 1988(a) can be used not only to avail plaintiffs of remedies not referenced in § 1983 but also to recognize defenses that bar any remedy.

One might also argue that § 1988(a) is triggered only with respect to complete defenses to liability on which § 1983 is entirely silent, such as survival or limitations defenses, but has no application to defenses, such as qualified immunity, which involve only the suitability of a particular remedy, such as an award of damages. Section 1988(a), however, states that it is applicable when § 1983 is regarded as "deficient in the provisions necessary to furnish suitable remedies . . . ."[67] This means that § 1988(a) should be

§ 1983 claims); Robertson v. Wegmann, 436 U.S. 584, 588–94 (1978) (relying on § 1988(a) to hold that state law governs survival of claims brought under § 1983).

63. 42 U.S.C. § 1988(a).

64. *Id.*

65. *See Robertson*, 436 U.S. at 593–94 (applying Louisiana's statute governing survival of actions to § 1983 claims by virtue of § 1988(a) and holding that plaintiff's action did not survive the injured party's death).

66. *See* Burnett v. Grattan, 468 U.S. 42, 48–50 (1984) (holding that § 1988(a) requires the use of state limitations periods in § 1983 litigation).

67. § 1988(a).

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applied when considering both whether a complete defense bars any remedy and whether damages, in particular, are a "suitable" remedy.[68]

On the question of whether damages are a "suitable" remedy for a particular § 1983 violation, the statute itself is silent. It provides only that those who, under color of state law, deprive an individual of a constitutional right "shall be liable to the party injured . . . ."[69] Moreover, § 1983 addresses liability, as opposed to damages or other remedies, and it does not provide that damages must be awarded in all § 1983 cases. Indeed, in one of its early encounters with § 1988(a), the Court explained that when issues arise about whether damages are available under the civil rights statutes covered by § 1988(a), that provision governs, under which "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes."[70]

Qualified immunity, moreover, is not a defense to or immunity from liability but is instead an immunity from a particular remedy—damages.[71] Qualified immunity, for example, does not bar actions for injunctive relief.[72] It may even permit actions for nominal damages; the Supreme Court has never decided the question, and there is a serious argument that actions for nominal damages do not present the chilling effects of exposure to substantial damages

68. *Cf.* Moor v. Cnty. of Alameda, 411 U.S. 693, 702–03 (1973) ("[Section] 1988 proceeds to authorize federal courts, where federal law is unsuited or insufficient 'to furnish suitable remedies,' to look to principles of the common law, as altered by state law, so long as such principles are not inconsistent with the Constitution and laws of the United States.").

69. § 1983.

70. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 231, 235, 240 (1969) (discussing the availability of damages under 42 U.S.C. § 1982 for racial discrimination in public accommodations).

71. *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 314 n.6 (1975) ("[I]mmunity from damages does not ordinarily bar equitable relief as well.").

72. *See, e.g.*, Pearson v. Callahan, 555 U.S. 223, 242 (2009) ("Most of the constitutional issues that are presented in § 1983 damages actions and *Bivens* cases also arise in cases in which that defense is not available, such as . . . § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages."); Cnty. of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998) ("[I]n a suit to enjoin future conduct . . . qualified immunity [would not] be available to block a determination of law."); Behrens v. Pelletier, 516 U.S. 299, 312 (1996) ("The *Harlow* right to immunity is a right to immunity *from certain claims*, not from litigation in general . . . . If the district court rules erroneously, the qualified-immunity right not to be subjected to pretrial proceedings will be eliminated, so long as . . . the complaint seeks injunctive relief (for which no 'clearly established' right need be alleged)."); *Wood*, 420 U.S. at 314 n.6 ("[I]mmunity from damages does not ordinarily bar equitable relief as well."). The Court has also held that judicial immunity does not bar claims for injunctive relief under § 1983. *See* Pulliam v. Allen, 466 U.S. 522, 541–42 (1984). Congress subsequently modified this rule by adding an exceptions clause to § 1983 in a manner that effectively acknowledged the absence of judicial immunity from actions seeking injunctive relief: "[I]n an action against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309, 110 Stat. 3847, 3853 (1996).

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liability that the Court has relied upon when fashioning qualified immunity doctrine.[73] Thus, § 1983's textual reference to liability does not address the question whether damages represent a "suitable" remedy for a § 1983 violation.[74] In the face of that silence, § 1988(a) authorizes courts to fashion a common law of remedies when considering whether damages are appropriately awarded under § 1983.

Moreover, if one concluded that § 1983 should be read to mean that damages are a suitable remedy in all cases—leaving no gap for § 1988(a) to fill—more than just qualified immunity doctrine would be in jeopardy. For example, the Supreme Court has recognized absolute immunity from damages liability under § 1983 for legislators,[75] judges and other adjudicative officials acting in a judicial capacity,[76] witnesses,[77] and prosecutors in their litigative capacity.[78] If § 1983 were understood to require damages awards whenever a defendant is held liable, all of these immunities would be indefensible.[79] Nor is there much of a justification for reading, at a minimum, prosecutorial or witness immunity into § 1983 as a kind of historical gloss on the statute. Importing common law defenses into § 1983 as a historical gloss on the statute is a fraught exercise, as we have seen,[80] but even if one could do so, the Supreme Court has acknowledged that absolute immunity was not recognized

73. *See* James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1622–28 (2011); Michael L. Wells, *Constitutional Remedies: Reconciling Official Immunity with the Vindication of Rights*, 88 ST. JOHN'S L. REV. 713, 739–43 (2014).

74. *Cf.* Achtenberg, *supra* note 29, at 516 ("Immunity doctrines define the permissible remedies rather than the permissible defendants.").

75. *See, e.g.*, Lake Cnty. Ests. v. Tahoe Reg'l Plan. Agency, 440 U.S. 391, 394, 403–06 (1979) (recognizing absolute immunity for members of interstate agency when acting in capacity comparable to members of a legislature); Tenney v. Brandhove, 341 U.S. 367, 377–79 (1951) (holding that legislators acting within scope of their duties are immune from civil liability when sued for allegedly improper investigation).

76. *See, e.g.*, Butz v. Economou, 438 U.S. 478, 512–14 (1978) (recognizing immunity for administrative agency adjudicators); Stump v. Sparkman, 435 U.S. 349, 359–360 (1978) (recognizing immunity of judge sued for issuing a sterilization order).

77. *See, e.g.*, Rehberg v. Paulk, 566 U.S. 356, 369 (2012) (recognizing immunity of witnesses before a grand jury); Briscoe v. LaHue, 460 U.S. 325, 335 (1983) (recognizing immunity of witnesses at trial).

78. *See, e.g.*, Van de Kamp v. Goldstein, 555 U.S. 335, 346–49 (2009) (recognizing immunity when supervisory prosecutors sued for inadequate training and supervision of litigation); Imbler v. Pachtman, 424 U.S. 409, 431 (1976) (recognizing immunity for prosecutor's actions in bringing and presenting case).

79. These immunities, moreover, are, like qualified immunity, only immunities from damages liability and not complete defenses to liability. *See, e.g.*, Pulliam v. Allen, 466 U.S. 522, 541–42 (1984) (concluding that judicial immunity does not bar actions for injunctive relief).

80. *See supra* Section II.A.1

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when § 1983 was enacted for either prosecutors,[81] or witnesses.[82] It is therefore quite difficult to read these immunities into the statute on the basis of their supposed historical footing.

Thus, although the Court has rarely discussed § 1988(a) in its immunity jurisprudence, the best way to reconcile that jurisprudence with the terms of § 1983 is to conclude that the question of whether damages are a "suitable" remedy for a violation of § 1983 is not addressed by that statute. Instead, it is appropriately addressed under § 1988(a), which authorizes the courts to develop immunity doctrines when assessing whether damages are an appropriate remedy for a § 1983 violation.

Even if § 1988(a) authorizes courts to develop a law of immunity to assess whether damages are a "suitable" remedy, the statutory inquiry is not at an end. As the Supreme Court has observed, the text of § 1988(a) suggests a three-step process:

> First, courts are to look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." If no suitable federal rule exists, courts undertake the second step by considering application of state "common law, as modified and changed by the constitution and statutes" of the forum State. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not "inconsistent with the Constitution and laws of the United States."[83]

Accordingly, if § 1983's failure to address whether and when damages constitute "suitable remedies" renders the statute "deficient" within the meaning of § 1988(a), § 1988(a)'s second step directs courts to apply "the

81. *See, e.g.*, *Rehberg*, 566 U.S. at 364 ("When § 1983's predecessor was enacted in 1871, it was common for criminal cases to be prosecuted by private parties. And private prosecutors, like private plaintiffs in civil suits, did not enjoy absolute immunity from suit. Instead, 'the generally accepted rule' was that a private complainant who procured an arrest or prosecution could be held liable in an action for malicious prosecution if the complainant acted with malice and without probable cause." (citations omitted)). On the prevalence of private prosecution in the nineteenth century, see Abraham S. Goldstein, *Prosecution: History of the Public Prosecutor*, *in* 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1286 (Sanford M. Kadish et al. eds., 1983).

82. *See, e.g.*, *Rehberg*, 566 U.S. at 366–67 ("At common law, trial witnesses enjoyed a limited form of absolute immunity for statements made in the course of a judicial proceeding: They had complete immunity against slander and libel claims, even if it was alleged that the statements in question were maliciously false." (citing Kalina v. Fletcher 522 U.S. 118, 133 (1997) (Scalia, J. concurring)). For a helpful discussion of the history of witness immunity, see Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463 (1909).

83. Burnett v. Grattan, 468 U.S. 42, 47–48 (1984) (citations omitted).

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common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held," followed by its third step, inquiring whether "the same is not inconsistent with the Constitution and laws of the United States . . . ."[84] It is to these inquiries that we now turn.

C. The Justification for a Federal Common Law of Qualified Immunity

When it comes to the second step of the § 1988(a) inquiry, Professors Coleman and Kreimer have argued that § 1988(a) generally requires that federal courts apply state immunity statutes to § 1983 litigation unless state law is inconsistent with applicable federal law and policy.[85] There are plenty of state immunity statutes to go around—forty-nine states and the District of Columbia recognize a wide variety of common law and statutory immunities from damages liability, such as immunity for discretionary functions; for injuries caused by reliance on statutes or other enactments; for injuries caused by the collection of a tax; for intentional torts; for the issuance, denial, or revocation of a license; for the failure to inspect or to make an adequate inspection of property; for the adoption or failure to adopt legislation or other legislative functions; or for acts or omissions in the execution or enforcement of the law, and most states also cap the damages recoverable from a governmental defendant or a public employee.[86]

Application of state law immunities, however, encounters a serious question under the third step—whether the use of state immunity statutes would be consistent with federal law. At the outset, there is a serious question about whether federal law requires a greater degree of uniformity in § 1983 jurisprudence than could be achieved by importing the bewildering variety of state immunity statutes. When deciding whether to borrow state law under § 1988(a), the Supreme Court has cautioned that "courts must look not only at particular federal statutes and constitutional provisions[] but also at 'the policies expressed in [them].'"[87] Moreover, the Court has recognized a federal

84. 42 U.S.C. § 1988(a).

85. *See* Coleman, *supra* note 57, at 731 (arguing that state law applies unless "the use of state law would substantially undermine the fundamental purposes of section 1983"); Kreimer, *supra* note 59, at 632 ("[W]hatever alterations state statutes make in the underlying federal rule must still be measured against the policies of federal legislation . . . . Application of state law must be contingent on the full availability of the federal remedy.").

86. *See* Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 804–13 (2007).

87. Robertson v. Wegmann, 436 U.S. 584, 590 (1978) (second alteration in original) (quoting Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 240 (1969)).

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policy to maintain a reasonably uniform body of § 1983 jurisprudence.[88] Since § 1988(a)'s third step requires a reasonable degree of uniformity in § 1983 jurisprudence, there is great doubt about whether federal law permits the use of a bewildering variety of state immunity rules.[89]

Beyond the federal interest in uniformity, however, the Supreme Court has consistently cautioned—in terms that echo § 1988(a)'s third step—that the use of state immunity law is inconsistent with federal law and policy in that it makes the availability of damages turn on state, rather than federal, policy judgments.

For example, in *Martinez v. California*,[90] a § 1983 action arising from a murder committed by a state parolee, the Court wrote that a state statute immunizing public officials from liability for injuries caused by paroling a prisoner "does not control this claim . . . ."[91] The Court reasoned: "A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced."[92]

Subsequently, in *Felder v. Casey*,[93] the Supreme Court cautioned:

> Any assessment of the applicability of a state law to federal civil rights litigation[] . . . must be made in light of the purpose and nature of the federal right. This is so whether the question of state-law applicability arises in § 1983 litigation brought in state courts, which possess concurrent jurisdiction over such actions, or in federal-court litigation, where, because the federal civil rights laws fail to provide certain rules of decision thought essential to the orderly adjudication of rights, courts are occasionally called upon to borrow state law. Accordingly, we have held that a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted, even where the federal civil rights litigation takes place

88. *See, e.g.*, Wilson v. Garcia, 471 U.S. 261, 270 (1985) ("[T]he federal interest in uniformity and the interest in having 'firmly defined, easily applied rules,' support the conclusion that Congress intended the characterization of § 1983 to be measured by federal rather than state standards." (citation omitted)).

89. *Cf. id.* at 275–76 (deciding that when borrowing state statutes of limitations, federal law requires that all § 1983 claims be characterized as actions to recover for a personal injury to produce a uniform federal rule).

90. 444 U.S. 277 (1980).

91. *Id.* at 284.

92. *Id.* at 284 n.8. Later the same Term, in the course of holding that municipalities do not enjoy qualified immunity from damages liability under § 1983, the Court wrote: "Municipal defenses—including an assertion of sovereign immunity—to a federal right of action are, of course, governed by federal law." Owen v. City of Independence, 445 U.S. 622, 647 n.30 (1980).

93. 487 U.S. 131 (1988).

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> in state court, because the application of the state immunity law would thwart the congressional remedy, which of course already provides certain immunities for state officials.[94]

The Court then held that Wisconsin's requirement that a plaintiff file an administrative claim prior to filing suit could not be applied to § 1983 litigation because "it conditions the right of recovery that Congress has authorized, and does so for a reason manifestly inconsistent with the purposes of the federal statute: to minimize governmental liability."[95]

Two years later, in *Howlett v. Rose*,[96] the Court held that state courts could not apply state sovereign immunity law barring suits against municipalities to a § 1983 action: "To the extent that the Florida law of sovereign immunity reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law."[97]

Finally, in *Haywood v. Drown*,[98] the Court held that a New York statute requiring that lawsuits against prison guards be filed in the state's court of claims—which may not award punitive damages, injunctive relief, or attorney's fees—could not be applied to § 1983 litigation because it is "a law designed to shield a particular class of defendants (correction officers) from a particular type of liability (damages) brought by a particular class of plaintiffs (prisoners)," adding that the state statute "is effectively an immunity statute cloaked in jurisdictional garb."[99]

These cases are not deeply theorized, and only *Felder* expressly mentions § 1988(a).[100] Nevertheless, § 1988, and in particular, the third step of the inquiry mandated by § 1988(a), offers what is likely the best explanation for the Court's jurisprudence.[101] After all, these cases reflect a federal common law judgment about the propriety of damages remedies and, in particular, holdings that the availability of damages remedies should be controlled by federal and not state law.

Moreover, under the third step of the § 1988(a) inquiry—which requires that state law not be applied to § 1983 litigation when it unduly circumscribes

94. *Id.* at 139 (citations omitted).
95. *Id.* at 134, 141.
96. 496 U.S. 356 (1990).
97. *Id.* at 365–66, 377–78.
98. 556 U.S. 729 (2009).
99. *Id.* at 742.
100. *See Felder*, 487 U.S. at 139 (citing and discussing § 1988).
101. *See* William H. Theis, Case Commentary, *Shaw v. Garrison - Some Observations on 42 U.S.C. § 1983 and Federal Common Law*, 36 LA. L. REV. 681, 685–86 (1976) (noting that qualified immunity doctrine seems to reflect federal common law under § 1988(a) although courts rarely rely on that provision); Burnett v. Grattan, 468 U.S. 42, 48 (1984) (detailing the third step).

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federal rights—it becomes difficult to leave the matter to state law. State immunity statutes are enacted by state legislators who are politically accountable to the state taxpayers and voters. They are hardly impartial balancers of federal and state interests. It would surely be odd to leave the job of striking the balance between the interests of state and local taxpayers and the interests of those who have been harmed by a violation of federal law to state legislators.

The Supreme Court's qualified immunity jurisprudence, accordingly, fits far more comfortably within § 1988(a)'s delegation to the courts of authority to create a federal common law than within any of the conventional justifications that have been offered for qualified immunity. To be sure, the current formulation of qualified immunity dates to *Harlow*, which does not discuss § 1988(a), but that should be unsurprising. *Harlow* was brought under *Bivens*, to which § 1988(a) is not applicable. As an example of federal common law, however, *Harlow*'s formulation of qualified immunity fits comfortably within § 1988(a), which, as we have seen, permits federal courts to utilize common law rules of decision. As Professor Kreimer observed: "Note that section 1988[(a)] does not say 'the common law of the state' in question but 'the common law.'"[102] Thus, under § 1988(a), the Court properly imported the common law judgment it made in *Harlow* into § 1983 immunity jurisprudence.[103]

Accordingly, § 1988(a) authorizes the courts to utilize a federal common law of immunity. Section 1988(a) permits courts to supplement § 1983 with "the common law,"[104] and at the time § 1988(a) was enacted, references to the "common law" were generally understood to refer to the type of federal common law that the federal courts employed when hearing cases between citizens of different states under their diversity jurisdiction over lawsuits between citizens of different states.[105] Thus, the Congress that enacted the original formulation of § 1988(a) in 1866,[106] as well as the Congress that made

102. Kreimer, *supra* note 59, at 619.

103. *See supra* text accompanying notes 42–43.

104. 42 U.S.C. § 1988(a).

105. *See, e.g.*, Kreimer, *supra* note 59, at 618–19 (discussing the use of federal common law in diversity cases under the regime of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), prior to its repudiation in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and arguing that § 1988(a) is best read to incorporate this regime); Theis, *supra* note 101, at 684 ("[T]he statute [§ 1988(a)] seems to state the *Swift v. Tyson* rule: if no federal law (statute) governed, general common law applied unless a state constitutional or statutory provision conflicted with or modified the general common law. The requirement that state provisions not be inconsistent with the Constitution and laws of the United States states the obvious; namely, the supremacy clause of the Constitution would continue to play its role in the law selection process." (footnotes omitted)).

106. *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

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it applicable to § 1983 actions in 1871,[107] would have been well familiar with federal common law.

In short, § 1988(a) offers both a lawful basis and what is likely the best explanation for the course of the Supreme Court's immunity jurisprudence under § 1983. One can disagree with the common law judgment reflected in that jurisprudence, but once it is agreed that § 1983 is silent on questions of whether damages constitute a "suitable" remedy, § 1988(a) governs that question and authorizes the courts to make common law judgments about the availability of damages, including the decision that damages awards should sometimes be barred by a defense of qualified immunity.

III. THE FUNCTIONAL CASE FOR QUALIFIED IMMUNITY

Even if § 1988(a) supplies a lawful basis for a federal common law of immunity under § 1983, it does necessarily follow that existing immunity doctrine represents a sound common law judgment. This Part addresses that issue.

A. Is There Adequate Justification for Qualified Immunity?

As we have seen, the Supreme Court has justified qualified immunity on the theory that public officials will be inhibited in the performance of their duties if they face damages liability whenever they violate the plaintiff's rights.[108] At first blush, there seems to be a substantial basis to fear over-deterrence if public officials faced unlimited liability.

Police officers' compensation is generally not based on their arrests or the local crime rate; accordingly, officers internalize few, if any, of the benefits

107. *See* An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, 17 Stat. 13 (1871).

108. *See supra* text accompanying note 10. John Jeffries has offered a different justification, arguing that qualified immunity limits the costs associated with the recognition of new constitutional rights by shielding officials from liability when new rights are recognized for their prior conduct. *See* John C. Jeffries Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 247 (2013) ("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."). This view, however, fails to account for the fact that municipalities and other units of local government are not entitled to qualified immunity, as Professor Jeffries acknowledges. *See id.* at 232–33. Professor Jeffries does not claim that this omission has inhibited constitutional innovation when it comes to claims against units of local government, which would be precisely the type of evidence required to support his hypothesis. *See id.*

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of effective policing, which are instead externalized to the public at large.[109] The same is likely true for most public officials. Thus, if officials are forced to internalize the costs of their activities through damages liability, when they do not internalize the benefits, the likely result would be to encourage officials to avoid conduct that exposes them to liability, even if such conduct might also produce benefits to the public at large.[110] On this view, *Harlow* and its progeny sensibly offer immunity for officers who reasonably believe that their conduct is consistent with extant law;[111] otherwise, there would be a risk of over-deterrence. There are, however, powerful responses to this line of reasoning.

1. The Effects of Indemnification

The available empirical evidence suggests that the fears that damages liability will over-deter public employees are greatly exaggerated in light of the ubiquity of indemnification. Joanna Schwartz, for example, found: "In

109. *See, e.g.*, Donald A. Dripps, *The "New" Exclusionary Rule Debate: From "Still Preoccupied with 1985" to "Virtual Deterrence,"* 37 FORDHAM URB. L.J. 743, 763–64 (2010) ("Individual officers do not internalize either the benefits or the costs of Fourth Amendment activity. When the police apprehend an offender, they may improve their performance evaluations and gain prestige within the force. They do not, however, pocket what the community is willing to pay to prosecute and punish the offender."); Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 640 (1982) ("Police and other law-enforcement personnel are compensated on a salaried rather than piece-rate basis, so that even if they perform their duties with extraordinary zeal and effectiveness they do not receive financial rewards commensurate with their performance.").

110. *See, e.g.*, John C. Jeffries Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 267 (2000) ("While negative outcomes can readily be translated into adverse legal claims, the benefits of good performance are hard to capture. These skewed incentives may bias discretionary choices . . . . The result is a bias toward inaction, defensiveness, and bureaucratic self-protection."); *cf.* Myron W. Orfield Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1017, 1053 (1987) (detailing a survey of Chicago narcotics officers in which 95% believed that in response to a regime of damages liability replacing the exclusionary rule for search-and-seizure in violation of the Fourth Amendment, "police would be afraid to conduct the searches they should make"). For reviews of empirical evidence suggesting that police officers are sometimes subject to over-deterrence, see, for example, Paul G. Cassell & Richard Fowles, *What Caused the 2016 Chicago Homicide Spike? An Empirical Examination of the "ACLU Effect" and the Role of Stop and Frisks in Preventing Gun Violence*, 2018 U. ILL. L. REV. 1581, 1585, 1649 (explaining that burdens imposed by consent decree reduced rates of stop-and-frisk in Chicago and produced increased homicide); Lawrence Rosenthal, *Good and Bad Ways to Address Police Violence*, 48 URB. LAW. 675, 717 (2016) (discussing evidence of reduced policing and increased crime following events that led police to believe they are likely to be more closely scrutinized); Stephen Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. 721, 754, 765–66 (2017) (discussing evidence that federal consent decrees inhibit policing and produce increased crime).

111. *See supra* text accompanying notes 31–37.

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stark contrast to assumptions underlying civil rights doctrine, law enforcement officers employed by the eighty-one jurisdictions in my study almost never contributed to settlements and judgments in police misconduct lawsuits during the study period."[112] This finding is consistent with the view of most scholars who have written on the prevalence of public-sector indemnification.[113]

Basic economic theory explains the ubiquity of indemnification. Indemnification is the most efficient vehicle available for employers to minimize the risk that their employees' exposure to liability will reduce productivity and inhibit the willingness of highly-qualified individuals to take these positions.[114] Qualified immunity, moreover, is not sufficient to solve the problem because it does not insulate public employees from all costs of litigation; for example, qualified immunity does not protect public employees from the costs of retaining counsel and defending litigation brought against them, even when litigation is likely to encounter a successful qualified immunity defense. If public employees were not indemnified for their legal costs, that alone could produce a substantial chilling effect on their willingness to undertake activities that might expose them to liability.[115]

Given the prevalence of indemnification, public employees generally do not experience financial consequences as a result of litigation arising from their activities. Nonetheless, the Supreme Court has refused to consider the effects of indemnification in its qualified immunity jurisprudence, taking the view that "[w]hatever contractual obligations [the public employer] may (or

112. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 912 (2014). She added: "Although civil rights doctrine and most scholarship considering the question assume that individual officers are personally responsible for punitive damages, no officer in my study actually satisfied a punitive damages award entered against him." *Id.* at 917.

113. *See, e.g.*, Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 590 (2000); Rosenthal, *supra* note 86, at 812, 819–20; Nielson & Walker, *supra* note 15, at 36–37; Martin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1217–20 (2001).

114. For a helpful explication of the economics of employee indemnification, see Larry B. Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 272–76, 279.

115. To be sure, despite the availability of indemnification, public officials might be deterred by the threat of liability if they somehow overestimated the risk that they would be denied indemnification, although this possibility seems more theoretical than real. As Professor Schwartz observed, "[s]tudies 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.'" Schwartz, *supra* note 112, at 942. This should be unsurprising; for the same reason that employers have an incentive to offer indemnity, they are equally incentivized to assure their employees they will be indemnified to ensure that they perform their duties vigorously.

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may not) have to represent and indemnify the officers are not our concern."[116] Since, however, the Court has justified qualified immunity in terms of the potential deterrent effect of the threat of personal liability on the willingness of public employees to perform their duties with vigor,[117] surely evidence suggesting that this threat is illusory bears on the soundness of the doctrine itself.

To address the manner in which indemnification undermines the ability of § 1983 liability to deter public employees from violating the Constitution, indemnification of law enforcement officials could be curbed or abolished, as some have proposed.[118] There is a potent rejoinder to such proposals, however; indemnification might undermine the deterrent objectives of § 1983, but it may also critically advance other statutory objectives, such as the compensation of plaintiffs.[119] After all, if only the assets of individual public employees were available to satisfy § 1983 judgments, potential plaintiffs and their counsel may have inadequate incentives to bring damages actions for fear that a substantial judgment could not be satisfied from the limited assets of the typical public official.[120]

Indemnification does not eliminate the deterrent effects of damages awards; instead, it shifts the costs of litigation to public employers. Accordingly, as many scholars have argued, indemnification gives public employers an incentive to train, monitor, and supervise their employees in a manner that reduces the likelihood they will act unlawfully and thereby

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116. *See, e.g.*, City & Cnty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015). *But cf.* Anderson v. Creighton, 483 U.S. 635, 641–42, 641 n.3 (1987) ("[E]ven assuming that conscientious officials care only about their personal liability and not the liability of the government they serve, the Creightons do not and could not reasonably contend that the programs to which they refer make reimbursement sufficiently certain and generally available to justify reconsideration of the balance struck in *Harlow* and subsequent cases.").

117. *See supra* text accompanying note 10.

118. For proposals along these lines, see, for example, Emery & Maazel, *supra* note 113, at 596–600; Schwartz, *supra* note 112, at 953–54.

119. *See* Schwartz, *supra* note 112, at 891.

120. *Id.* at 952 ("Widespread indemnification facilitates § 1983's goal of compensating plaintiffs after a settlement or judgment in their favor. If officers were not indemnified, they would be personally responsible for satisfying six- and seven-figure settlements and judgments from their relatively modest annual salaries. Because many law enforcement officers could not pay the settlements and judgments entered against them, many plaintiffs would go uncompensated even after a fact finder concluded that their rights were violated. Indemnification ensures that judgments and settlements will be satisfied from governments' deep pockets."). *See generally* Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539, 1565 (2020) ("The City of East Cleveland . . . does not have the resources to pay settlements and judgments entered against it and its officers. East Cleveland is self-insured, so lawsuit payments come from its general funds. And the city is reportedly on the verge of bankruptcy. As a result, attorneys who regularly bring civil rights cases against Cleveland are unwilling to sue the East Cleveland Police Department and its officers." (footnotes omitted)).

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impose costs on the employer.[121] Placing the responsibility to secure compliance with constitutional law on the public employer, moreover, has the virtue of practicability. After all, police officers could scarcely be expected to scour case law and reach their own conclusions about what is "clearly established law." Surely the sensible regime is to have public employers develop policies that are binding on all employees and that comply with constitutional norms—policies on which their employees can then rely. The Supreme Court itself has occasionally acknowledged that qualified immunity is appropriate when public employees reasonably rely on the policies of their employers.[122]

Whether the threat of damages liability incentivizes the government to comply with the law, however, is contested. Daryl Levinson, for example, observed that the "government responds to political, not market incentives . . . [and] cares not about dollars, only about votes"[123] and thus "cannot be expected to respond to forced financial outflows in any socially desirable, or even predictable, way."[124] The likelihood that the government will undertake to reduce potential liability is particularly low, he added, when it comes to activities that are likely to pay political dividends in the eyes of voters.[125]

Professor Levinson's argument seems overstated. If state and local policy makers were indifferent to damages liability, they would presumably not bother to seek state laws that confer immunity from damages liability, but

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121. *See, e.g.*, PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 100–21 (1983) (contending public employers should be liable for constitutional violations committed by their employees within the scope of employment to deter constitutional violations); Harold S. Lewis & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 821, 829–38 (1992) (same).

122. *See, e.g.*, Wilson v. Layne, 526 U.S. 603, 617 (1999) ("[I]mportant to our conclusion [to grant qualified immunity] was the reliance by the United States marshals in this case on a Marshals Service ride-along policy that explicitly contemplated that media who engaged in ride-alongs might enter private homes with their cameras as part of fugitive apprehension arrests. The Montgomery County Sheriff's Department also at this time had a ride-along program that did not expressly prohibit media entry into private homes. Such a policy, of course, could not make reasonable a belief that was contrary to a decided body of case law. But here the state of the law as to third parties accompanying police on home entries was at best undeveloped, and it was not unreasonable for law enforcement officers to look and rely on their formal ride-along policies." (footnote omitted) (citation omitted)).

123. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 420 (2000).

124. *Id.* at 348.

125. *See id.* at 370 ("So long as the social benefits of constitutional violations exceed the compensable costs to the victim and are enjoyed by a majority of the population, compensation will never deter a majoritarian government from violating constitutional rights, because the majority of citizens will gain more from the benefits of government activity than they lose from the taxes necessary to finance compensation payments to victims.").

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such state-law immunities are ubiquitous, as we have seen.[126] The reason why state and local policy makers seem to like immunity—and are able to convince state legislators to enact immunity statutes—is not difficult to explain. Damages liability imposes political costs on the government by diverting scarce public resources from what policy makers are likely to regard as their politically optimal uses to the payment of litigation-related costs.[127] These costs are not insubstantial; in her study, Professor Schwartz found "forty-four jurisdictions paid an estimated $735,270,772 in settlements and judgments involving civil rights claims on behalf of their law enforcement officers between 2006 and 2011."[128]

Some units of government obtain insurance to cover the costs of settlements and judgments through risk pools or commercially-provided insurance, though the largest units of government often self-insure.[129] Insurance, however, does not insulate governments from litigation costs; in the most comprehensive study of the subject to date, Professor John Rappaport found that insurers create financial incentives for the governments they insure to minimize liability through "underwriting and rating—the processes by which insurers evaluate a risk to decide what coverage, if any, to offer or renew[] and for what price."[130] Indeed, insurers have a potent incentive to charge their insureds—including units of government—rates that reflect their exposure to liability, if only to protect the insurers' bottom lines.[131] Thus, insurance does not eliminate the financial effects of litigation costs on state and local governments.[132]

Litigation also imposes political costs on the government when it brings governmental misconduct to the public's attention and affixes fault for that

126. *See supra* note 86 and accompanying text.

127. For a more elaborate argument along these lines, see Rosenthal, *supra* note 86, at 831–41.

128. Schwartz, *supra* note 112, at 913.

129. *See, e.g.*, John Rappaport, *How Private Insurers Regulate Police*, 130 HARV. L. REV. 1539, 1559 (2017) ("[S]mall municipalities—under, say, 100,000 residents—tend to join pools. Midsized entities are divided, with the majority—some estimate 70%—in pools and the rest insured by commercial carriers. The pooling figure is higher for cities than for counties. And the largest municipalities—the big cities and counties, certainly those with over 500,000 or 750,000 residents, and some well below that point—*self-insure*." (footnotes omitted)).

130. *See id.* at 1587. Moreover, Professor Rappaport found that through denials of coverage, differentiated premiums, deductibles and self-insured retentions, and limits on coverage, insurers impose costs on governments that are not taking what the insurers regard as "adequate efforts" to limit liabilities. *Id.* at 1588–91. He also found that reinsurers use similar financial incentives to encourage primary insurers to take measures that limit liability risks. *Id.* at 1591–93.

131. *See id.* at 1543–55.

132. *See* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1172–73, 1190, 1195 (2016) (discussing indirect financial effects of litigation on state and local governments).

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misconduct.[133] Indeed, the potential political costs of controversial litigation, or the political benefits of putting a controversial episode of alleged official misconduct to rest, may mean that settling some § 1983 litigation provides political benefits that offset the political costs of paying judgments or settlements.[134] Still, while state and local governments may be willing to pay handsome settlements to make politically problematic cases go away, it would be extraordinary if state and local governments were indifferent to the overall costs of litigation, even if, on occasion, settling certain types of litigation would prove politically preferable to defending it. I spent more than a decade in a rather senior position in municipal government, and my superiors made it quite plain that they were deeply concerned with litigation costs.

Some have nevertheless questioned whether governments are sufficiently sensitive to costs arising from § 1983 litigation. Damages awards arising from police misconduct, for example, are generally not paid out of police budgets but rather out of the larger pool of funds available to meet the general expenses of the indemnifying unit of government.[135] Moreover, while Professor Schwartz found that some jurisdictions require police budgets to absorb at least some of the cost of litigation payouts, even then, it is common to budget in ways that limit the financial impact of litigation costs on police operations.[136]

This pattern should be unsurprising. Regardless of the budgeting scheme utilized, it is likely politically unacceptable to deny police departments the

133. *See, e.g.*, Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 859–63 (2001) (discussing this point).

134. *See, e.g.*, Rosenthal, *supra* note 86, at 829 ("If civil litigation is uniquely valuable at ferreting out governmental misconduct because of the financial incentive that the civil plaintiff has to pursue such allegations, then elected officials would presumably pay premiums—beyond the amount necessary to compensate the plaintiff—in order to settle litigation that might otherwise cause embarrassment."); *see also* Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 775–77 (2004) (noting the prevalence of settlements of police misconduct litigation with confidentiality provisions that keep settlements secret). For examples in which public employers settled controversial litigation that could well have been defensible, see Katherine A. Macfarlane, *Accelerated Civil Rights Settlements in the Shadow of Section 1983*, 2018 UTAH L. REV. 639, 650–51, 657–58.

135. *See, e.g.*, NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 279 (Wesley Skogan & Kathleen Frydl eds., 2004); Miller & Wright, *supra* note 134, at 781–82; Schwartz, *supra* note 112, at 956–57; Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model "Pattern or Practice" Statute*, 19 GEO. MASON U. C.R.L.J. 479, 494–95 (2009).

136. *See* Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1166, 1172–73, 1195 (2010) (finding that approximately half of jurisdictions surveyed required some contribution to the payment of judgments from police budgets, but budgetary arrangements rarely produced meaningful budgetary pressure on police departments).

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resources that police executives contend are essential to protect the public. This does not mean, however, that governments are insensitive to litigation costs. If those costs do not come out of the police budget, they must come from someplace else—in the form of either higher taxes, reductions in other government services, or both.[137] In this fashion, litigation expenses exact a political cost as policy makers must expend political capital either by increasing taxes or by reducing other governmental services that could otherwise build political support for incumbents.

Accordingly, because indemnification shifts litigation costs from state and local employees to their employers, the question whether qualified immunity is justified turns on whether damages liability would have undesirable effects on state and local government policy absent some form of immunity.

When it comes to the question whether liability risks shape government policy, the available evidence is mixed. Professor Schwartz's study of twenty-six police departments that had been subjected to external review by court-appointed monitors or external auditors found that most departments rarely, if ever, use information derived from lawsuits to make personnel and policy decisions.[138] In a subsequent study of five large departments that analyzed information generated from litigation, however, she found that although "it is difficult to pinpoint the role of lawsuits in department decisions" and equally "difficult to measure the effect of department decisions on line officer behavior," nevertheless, "lawsuit data has helped identify problems and craft

137. *Cf.* George C. Thomas III, *Judges Are Not Economists and Other Reasons To Be Skeptical of Contingent Suppression Orders: A Response to Professor Dripps*, 38 AM. CRIM. L. REV. 47, 55 (2001) ("The legislature could 'squeeze' the budget of departments that get hit with many damage awards, but the incentives there are mostly perverse. If the legislature cuts salaries, then the quality of policing suffers, probably causing more rather than fewer violations, and less effective policing as well. If the department cuts positions, then policing obviously becomes less effective and, with less time to investigate cases, perhaps creates more Fourth Amendment violations in the bargain. Departments could insure against the risk of paying damages, but insurance simply shifts the costs among departments, depending on how often they violate the Fourth Amendment; the total cost would be the same plus, of course, a profit for the insurance company. So it seems pretty clear that something approaching 100% of the cost of the damage awards would be borne by the taxpayer.").

138. *See* Schwartz, *supra* note 136, at 1041–42, 1066–67. Professor Schwartz focused on jurisdictions that have been subject to external review since those jurisdictions had made available more information about their policies and practices than most police departments. She supplemented the information disclosed by those departments with interviews and correspondence "with knowledgeable practitioners and experts, including court-appointed monitors of settlement agreements, police auditors, former and current police officials, attorneys who defend the city and its officers in civil suits, other city officials, and plaintiffs' attorneys and advocates." *Id.* at 1042–44 (footnotes omitted).

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interventions in these instances."[139] In his study, Professor Rappaport found that "[t]o the extent that researchers have identified successful strategies for combating police misconduct, insurers have been reasonably effective at inducing police agencies to use them."[140] And, Christopher Slobogin has observed that "[t]he single area in which most police departments have both rigorous training and systematic administrative rules is in the use of force, which happens to be one of the few domains where the police are successfully sued for large sums of money."[141]

Given the uncertain state of empirical evidence, one should be slow to embrace the counterintuitive conclusion that state and local policy makers are indifferent to the cost of damages liability, even if they may not always take effective action to reduce their exposure to liability in light of the complex and often conflicting political incentives they face. After all, interventions that reduce potential liability by deterring police from aggressive crimefighting might produce what are regarded as politically unacceptable costs. The threat of liability is likely to put some pressure on state and local governments to avoid liability-creating behavior, even if that pressure may sometimes be offset when liability-creating behavior is likely to produce political benefits.[142]

There are, moreover, additional and likely more powerful reasons to be wary of the effects of governmental damages liability.

2. *The Problematics of Government Damages Liability*

As we have seen, damages liability has different effects on those who seek to maximize profits or revenues than on the government.[143] Accordingly, the case for awarding constitutional tort damages against the government encounters a variety of difficulties not present when assessing tort liability in the private sector.

Justificatory theories for tort liability can be bifurcated into instrumental and deontic accounts. The instrumental account justifies tort liability as

139. Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 860, 861 (2012).

140. Rappaport, *supra* note 129, at 1596.

141. Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 396. Charles Epp has made a related point in which he focuses more on norms than economics. He contends that judicial decisions, by articulating legal constraints on the use of force, have shaped police behavior. They do so by articulating the legal norms that law enforcement agencies—given their concern about compliance with legal norms—come to internalize. *See* CHARLES A. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 59–113 (2009).

142. *See* Rosenthal, *supra* note 86, at 842–43 (discussing political calculation governments must make to determine whether liability-creating behavior is worthwhile).

143. *See supra* notes 123–142 and accompanying text; Rosenthal, *supra* note 86, at 847.

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creating an economic incentive to make efficient investments in safety to reduce exposure to liability.[144] When it comes to the liability of an employer for the torts of an employee acting within the scope of employment in particular, on the instrumental view, vicarious liability is justified so that employers have an incentive both to supervise their employees in a manner that will reduce losses and to minimize the risk that employees with insufficient assets to satisfy judgments will have inadequate incentives to exercise due care.[145] The deontic account focuses on the asserted moral obligation of those who have injured another to compensate the injured party.[146] With respect to employer liability in particular, on this view, an employer is appropriately held liable for the torts of an employee acting within the scope of employment because the employer bears moral responsibility for the actions of those working on its behalf.[147] These justificatory theories, however, have limited application to the public sector.

As for the instrumental account, while a private employer has an economic incentive to maximize revenues or profits and therefore to make cost-justified investments in safety, as we have seen, because the public does not expect the government to maximize revenues or profits, the deterrent effects of tort liability are more uncertain in the public sector, where the political costs associated with diverting funds to investments in loss prevention or with the payment of litigation costs may not always exceed the political benefits of liability-creating behavior, such as aggressive policing in the face of rising crime rates. Damages awarded against the government are therefore unlikely to have the kind of predictable deterrent effect of damages from private entities that are incentivized to maximize revenues or profits.

To be sure, as we have also seen, there is a political cost when scarce public resources are diverted to litigation costs and cannot be allocated by

144. *See, e.g.*, GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 135–73 (1970) (exploring prevention of accidents by imposing liability on the cheapest cost avoider); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 58–77 (1987) (discussing the incentive tort liability creates to invest in loss prevention); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 8–14 (1987) (same).

145. *See, e.g.*, LANDES & POSNER, *supra* note 144, at 120–21; SHAVELL, *supra* note 144, at 172–74; Alan Q. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 569, 608 (1988).

146. *See, e.g.*, JULES L. COLEMAN, RISKS AND WRONGS 303 (1992) (arguing that tort liability represents a moral conception of corrective justice); ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 48–69 (Gerald Postema ed., 1999) (arguing that those who expose others to unreasonable risks have a moral duty to compensate injured parties); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 145–70 (1995) (arguing that tort law is an example of corrective justice).

147. *See, e.g.*, WEINRIB, *supra* note 146, at 185–87.

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elected officials in what they regard as a politically optimal fashion.[148] Moreover, when funds to pay judgments and settlements must be raised either by increasing taxes or by reducing services provided to the public, politically accountable officials are likely to pay a political cost. Accordingly, while the government is unlikely to be indifferent to liability, one cannot confidently predict that the threat of liability will necessarily incentivize cost-justified investments in loss prevention. The government will allocate funds to loss prevention when the political benefits of that allocation exceed its costs, and this balance may be struck differently as local conditions—and politics—change. It is this uncertainty that presumably explains why Professor Schwartz found no consistent pattern by which the government seeks to learn from litigation in order to reduce future liabilities.

Beyond that, a complete accounting of the costs and benefits resulting from government damages liability must also consider the costs to third parties, such as the taxpayers who must fund litigation costs or the members of the public dependent on the government's ability to fund public services. Although voters might be expected to punish incumbent officials who make inadequate efforts to reduce tort liability, it is doubtful whether the political process is adequate to incentivize anything approaching optimal liability-reducing governmental policies. While the owners of a business or shareholders of a corporation have a straightforward incentive to demand that management maximize profits, voters' expectations of the government are far more wide-ranging. Reducing exposure to liability is unlikely to be a leading concern of the electorate.

Even worse, if we reasonably assume that the government will usually be unwilling to incur the political cost of raising taxes in order to pay litigation costs, the funds necessary to pay these costs are likely to come from reductions in other government services. And, in the intense political competition for scarce public resources, the programs most likely to suffer when resources are diverted to the payment of litigation are those serving those with the least political influence—most likely the poor and disadvantaged.[149] Indeed, as we have seen, Professor Schwartz found that litigation costs arising from police misconduct litigation rarely come out of or otherwise reduce police budgets.[150] The political cost of denying the police the resources that they claim are necessary to protect the public is likely to be unacceptably high; instead, the funds to pay litigation costs are likely to come out of the hides of those with less political sway and relatively little ability to influence government policy. Unlike the owners, managers, or shareholders of a private

148. *See supra* note 127 and accompanying text.

149. For a more elaborate argument along these lines, Rosenthal, *supra* note 86, at 845–47.

150. *See supra* notes 135–136 and accompanying text.

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enterprise who can be fairly held accountable when that enterprise fails to make efficient investments in loss-prevention because of their likely ability to influence the enterprise's policies (or else divest their stakes in the enterprise), those most dependent on government services are likely to bear disproportionate costs resulting from government damages liability, while having relatively little ability to influence the government policies that produce those liabilities.

Similarly, while the costs of tort litigation may raise the price of goods and services paid by the public, this is the consequence of requiring those who purchase goods and services to internalize the full costs of their distribution—including the costs of tortious losses flowing from their distribution. In contrast, when government funding of health care for the poor, for example, is reduced in order to pay the costs of litigation against the police, rather than spreading the costs of litigation to the entire population that benefits from police services, costs are concentrated on a discrete population in a manner likely disproportionate to the benefits they receive. In this fashion, the poor and disadvantaged are likely to be the collateral damage of governmental damages liability.

It may be the case that litigation costs are frequently a small proportion of state and local budgets, but it may be equally true that often a small proportion of state and local budgets are likely to be allocated to the needs of their most disadvantaged and politically powerless constituents. Litigation costs could therefore have a significant impact on the ability of state and local governments to aid their most disadvantaged residents. Thus, governmental liability for damages, even if it imposes some political costs on incumbent officeholders, is likely to impose significant costs on innocent third parties as well.[151] One may decry this state of affairs, but it represents a political reality not likely to change.

Thus, the instrumental case for governmental tort liability is fraught. There is a case for governmental damages liability but also a case to mitigate the hardships that unlimited liability may produce, especially when they involve costs imposed on innocent third parties.

As for the deontic account, given indemnification, the cost of judgments against public employees come not from the supervisors or policy makers who have control over the conduct of public employees but rather, as Professor Levinson wrote, "from the pockets of taxpayers," thereby "attenuat[ing] the

151. *Cf.* John C. Jeffries Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 104–05 (1999) ("In itself, the reduction in constitutional violations is an unqualified good, and it is precisely this benefit that the advocates of strict enterprise liability for constitutional torts seek to gain. Of course, one would still have to weigh the value of increased constitutional compliance against the costs of decreased activity levels for the legitimate business of government." (footnotes omitted)).

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connection between moral responsibility and the burden of rectification."[152] To be sure, those who voted for incumbent officeholders that have exercised insufficient oversight over public employees could be fairly taxed with a duty to compensate injured parties, but government damages liability must be funded by all taxpayers, including those who did not vote for incumbents. Moreover, while residents have the option of voting with their feet by leaving jurisdictions that face excessive liabilities, this form of exit involves significant costs as well, which will be especially difficult for poor and disadvantaged residents to incur.[153] Moreover, because damages may be awarded many years after the underlying conduct that produced liability, current officeholders—as well as current taxpayers and residents of the jurisdiction—may experience the consequences of their predecessors' actions in a manner that undermines both political and moral accountability.[154]

The deontic case for imposing liability costs on the government is, accordingly, no less fraught with complication than the instrumental justification for government damages liability.[155] Perhaps, however, one can make a more straightforward case for damages liability by focusing solely on compensation. One could argue, for example, that the government must compensate those injured by its violations of the Constitution, representing as it does a kind of fundamental obligation to the governed.[156] The Constitution, however, does not articulate such an obligation; it requires the payment of compensation to injured parties only in cases involving the taking of private property for a public purpose under the Fifth Amendment.[157] In light of this

152. Levinson, *supra* note 123, at 408.

153. *See, e.g.*, Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 420 (1990) ("Interjurisdictional movement is not cost-free. It is constrained by a variety of economic and social factors that tend to affect poorer people more than affluent ones. First, there are the out-of-pocket costs of relocation—of picking up, selling a home or otherwise disinvesting from one's original locality, searching for a new place to live, transporting one's self and family and finding and paying for a new home. Second, most people can only reside where they have access to work. Thus, corporate investment decisions and local zoning regulations that determine the location of jobs, the education and skills requirements that determine who will be eligible for those jobs and the costs of commuting from home to workplace all limit ease of movement. Poorer, less educated potential movers will have fewer options and will be forced to bear more costs if they attempt to move." (footnotes omitted)).

154. *Cf.* John Rappaport, *An Insurance-Based Typology of Police Misconduct*, 2016 U. CHI. LEGAL F. 369, 384–90 (observing that insurers have limited effect on government policies with respect to "high dollar-long tail" liability risks such as liability for wrongful convictions).

155. *See* Levinson, *supra* note 123, at 408–10.

156. *See, e.g.*, Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 293 (1995) ("The insight at the heart of *Bivens* is that the judiciary has a duty to enforce the Constitution. To discharge this duty, the Court must ensure that each individual before it receives an adequate remedy for the violation of constitutional rights. If the remedy is not forthcoming from the political branches, the Court must provide it." (footnote omitted)).

157. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

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textual limitation on the constitutional obligation of compensation, perhaps unsurprisingly, the Supreme Court has never recognized an invariable constitutional duty to pay compensation outside of the Takings Clause. Although, in *Bivens*, the Court held that the victims of an unreasonable search or seizure within the meaning of the Fourth Amendment have a right to recover damages from the federal agents responsible for the violation, despite the absence of any statute conferring such a right, the Court cautioned that "[t]he present case involves no special factors counseling hesitation in the absence of affirmative action by Congress."[158] Subsequently, the Court stressed that it would not recognize a right to recover damages "when defendants demonstrate special factors counselling hesitation in the absence of affirmative action by Congress," or "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective."[159] Beyond that, the Court has repeatedly declined to recognize a right to recover damages for constitutional violations under *Bivens* in a variety of contexts.[160] And the Court has held that sovereign immunity bars actions for damages against the federal government, its agencies, and its instrumentalities resulting from a constitutional violation.[161]

Accordingly, it is difficult to argue that the Constitution embodies an obligation to pay damages to the victims of constitutional torts. On this point, aside from Takings Clause, the Constitution is silent. The matter instead appears to be left to the domain of legislative and common law judgment.[162]

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158. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392, 396–97 (1971).

159. Carlson v. Green, 446 U.S. 14, 18–19 (1980) (first quoting *Bivens*, 403 U.S at 396–97; and then citing Davis v. Passman, 422 U.S. 228, 245–47 (1979)); *accord* Wilkie v. Robins, 551 U.S. 537, 550 (2007) (citing Bush v. Lucas, 462 U.S. 367, 378 (1983)).

160. *See, e.g.*, Hernandez v. Mesa, 140 S. Ct. 735, 743–50 (2020) (claims involving cross-border shooting); Ziglar v. Abbasi, 137 S. Ct. 1843, 1858–65 (2017) (claims involving detention policy adopted by senior officials after a terrorist attack); *Wilkie*, 551 U.S. at 554–62 (claim of retaliation against federal officials for plaintiff's exercise of rights as a property owner); Schweiker v. Chilicky, 487 U.S. 412, 421–29 (1988) (claim for wrongful termination of disability benefits); Chappell v. Wallace, 462 U.S. 296, 298–304 (1983) (claims by enlisted military personnel); *see also Ziglar*, 137 S. Ct. at 1857 ("[E]xpanding the *Bivens* remedy is now a 'disfavored' judicial activity. This is in accord with the Court's observation that it has 'consistently refused to extend *Bivens* to any new context or new category of defendants.'" (first quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009); and then quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001))).

161. *See, e.g.*, FDIC v. Meyer, 510 U.S. 471, 475 (1994) (first citing Loeffler v. Frank, 486 U.S. 549, 554 (1988); and then citing Fed. Hous. Admin. v. Burr, 309 U.S. 242, 244 (1940)).

162. *Cf.* Richard H. Fallon Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1786–87 (1991) ("[T]he settled law about the necessary availability of constitutional remedies invites a charge of contradiction. On the

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As a policy matter, there may be a justification for what amounts to publicly funded constitutional tort insurance. Of all the demands on the government, however, it is unclear that constitutional tort insurance should be at the top of the list. If a requirement that the government fund tort insurance reduces its ability to fund health care for indigent children, for example, it is far from clear that social welfare of the government's moral standing would be improved. At most, it seems that the type of policy question regarding funding priorities is best left to the political process.[163]

3. *The Case for Qualified Immunity*

Because both the instrumental and deontic accounts of governmental tort liability are problematic, there is a case for some form of immunity. The virtue of qualified immunity, in light of the practical necessity of indemnification, is that it mitigates the problems that inhere in governmental liability on both the instrumental and deontic accounts. Qualified immunity permits damages awards only when officials could not have reasonably believed their conduct was lawful.[164] Accordingly, qualified immunity effectively requires public

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one hand stands a line of cases mandating constitutional remedies and often implying that there must be an effective remedy for all constitutional violations. On the other hand, cases upholding sovereign and official immunity reflect the competing view that claims to effective remedies must sometimes yield to concerns of sovereign necessity and convenience." (footnotes omitted)).

163. *Cf.* Evan J. Mandery, Commentary, *Efficiency Considerations of Compensating the Wrongfully Convicted*, 41 CRIM. L. BULL., no. 4, May–June 2005, at 7 ("Insurance theory suggests that in the open market consumers would not choose to purchase 'constitutional tort insurance.' Generally speaking, people choose to buy insurance against losses that reduce wealth, but do not insure against intangible harms, such as emotional distress or affronts to dignitary [interests], that have no direct or indirect effect on wealth. Since most constitutional torts cause intangible damages, insurance theory argues that requiring citizens to purchase insurance against these kinds of injuries reduces their net welfare."); John C. Jeffries Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 93 (1989) ("Why spread only losses caused by constitutional violations? Why not spread all losses, or at least all losses caused by government? Even if one accepts the (admittedly unprovable) premise that loss spreading decreases total pain, and even if one discounts the (probably decisive) impact of transaction costs, it is still not clear how loss spreading justifies compensation for some losses but not others. Simply put, there is no obvious link between the general rationale of loss spreading and the specific issue of compensation for injuries resulting from constitutional violations.").

164. *See, e.g.*, Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) ("The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" (citation omitted) (first quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009); and then quoting Reichle v. Howards, 566 U.S. 658, 664 (2012)); Anderson v. Creighton, 483 U.S. 635, 638 (1987) ("Our cases have

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employers to minimize the costs of indemnifying their employees by training and supervising them to comply with existing legal obligations if they wish to avoid the political costs of diverting scarce resources to the payment of judgments. Thus, qualified immunity doctrine incentivizes public employers to restrain abusive or overzealous officials.

At the same time, qualified immunity protects both public employers and employees to the extent their legal obligations are uncertain.[165] If liability were imposed merely because public employees and their supervisors failed to anticipate future legal developments, state and local governments could minimize liability only by directing their employees to resolve every debatable judgment in favor of avoiding liability-creating conduct. Requiring the government to avoid all liability risks would be problematic.[166] Encouraging timidity of this type might deter public employees from providing important public services. As one scholar put it, when considering the conduct of police officers on patrol in words that likely echo the views of many elected officials:

> [W]e don't want police officers to be extremely cautious in stopping or arresting someone: we want police officers to intervene on the street and investigate as soon as they have "reasonable suspicion" and we want them to make an arrest just as soon as they have probable cause. This is especially true when the crime is serious.[167]

Indeed, because it would be politically risky to require that public employees exercise this degree of caution, politically accountable officials would be unlikely to adopt such policies even in the face of liability risk.[168] Damages

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accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated."); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions generally are shielded 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.").

165. *Cf.* Malley v. Briggs, 475 U.S. 335, 341 (1986) ("As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.").

166. *Cf. Anderson*, 483 U.S. at 638 (explaining that the fear of personal liability and potential litigation will inhibit officials in the discharge of their duties (citing *Harlow*, 457 U.S. at 814)).

167. WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH 33–34 (1999).

168. *Cf.* Richard H. Fallon Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 496–97 (2011) ("If government entities routinely indemnify their officials, they would certainly have an incentive to provide those officials with training regarding applicable law, including court decisions. But just as we cannot confidently claim

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awards in such cases, accordingly, would be unlikely to alter government behavior and would impose serious costs on innocent third parties, such as taxpayers and those dependent on government services.

Thus, the Supreme Court is onto something when it writes that "the most important special government immunity-producing concern" is "protecting the public from unwarranted timidity on the part of public officials."[169] A regime of damages liability that incentivizes public officials to train, supervise, and discipline public employees to avoid all liability risks would breed timidity, the costs of which would accordingly be externalized to the members of the public that often depend on public employees to discharge their duties in a vigorous fashion.[170]

Beyond that, it is surely a harsh outcome to impose liability merely because an official follows what is reasonably taken to be existing law, failing to anticipate its subsequent constitutional rulings, or makes a reasonable effort to apply existing law to the particular facts that he confronts. By granting immunity in such cases, qualified immunity, as John Jeffries has argued, embraces the hardly radical view that damages liability should be premised on culpable wrongdoing or fault.[171]

In this regard, consider the facts of *Davis v. United States*.[172] After a routine traffic stop, police officers arrested the driver for driving while

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to know how widely indemnification occurs, we might doubt how well we understand how the availability of indemnification would affect the incentives of high level officials to implement continuing education programs for lower level employees." (footnote omitted)).

169. Richardson v. McKnight, 521 U.S. 399, 408 (1997) (citing Butz v. Economou, 438 U.S. 478, 506 (1978)).

170. *Cf.* John C. Jeffries Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 73–74 (1998) ("[I]magine a supervisor instructing police officers (as all police are instructed these days) on the law of the Fourth Amendment. Under the regime of qualified immunity, the instructor would explain the rules of search and seizure and enjoin adherence to them, but would also tell the officers that reasonable mistakes would not be held against them. Now imagine the same situation under a regime of strict liability. The supervisor would instruct her charges not only to be careful about probable cause but also, and more importantly, not to search in any doubtful case. Under strict liability, the supervisor would require a kind of super-probable cause, steering well clear of the constitutional standard in order to avoid liability for inevitable mistakes. In consequence, there would be fewer searches." (footnote omitted)).

171. *See, e.g.*, Jeffries, *supra* note 163, at 102–03 ("[E]mphasis on fault is entirely consistent with the argument from corrective justice. It rightly identifies the defendant's state of mind, not as some extraneous intrusion into the workings of a compensatory regime, but as an essential feature of the normative basis for imposing liability in the first place . . . [I]mmunity claims sometimes evoke a hostility born of the suspicion that any limitation on damages liability for unconstitutional acts is in principle undesirable. This intuition is error. Investigation into the defendant's fault is entirely appropriate. At least in the absence of an argument based on incentive effects, the inquiry into fault is essential to the case for awarding money damages for constitutional violations." (footnote omitted)).

172. 564 U.S. 229 (2011).

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intoxicated and the passenger, Davis, for giving a false name to police and then conducted a search of the vehicle's interior, consistent with then-binding precedent permitting such searches incident to an arrest, and recovered a firearm from Davis's jacket, leading to his prosecution for being a convicted felon unlawfully in possession of a firearm.[173] In a different case, the Supreme Court subsequently held that the interior of a vehicle may not be searched incident to the arrest of a recent occupant absent reason to believe that the vehicle contained evidence of the offense for which the arrest was made, and accordingly, under the new precedent, the search of Davis's vehicle violated the Fourth Amendment.[174] In *Davis*, while acknowledging that the search of Davis's jacket violated his Fourth Amendment rights, the Court refused to exclude the evidence obtained as a result of the search, reasoning: "The police acted in strict compliance with binding precedent, and their behavior was not wrongful."[175]

There is no more reason to award Davis damages for the search of his jacket than to bar the use of the jacket as evidence; the search was consistent with then-existing constitutional doctrine, and the officer therefore complied with extant law.[176] To award damages because public officials failed to anticipate that the law would change would be harsh medicine indeed.[177]

When, however, the government's constitutional obligations are clear, neither individual officials nor those who supervise them are given room by the Constitution to breach those obligations.[178] Accordingly, those who violate such constitutional commands should be required to pay the economic and political costs attendant to the payment of damages awards. In such cases,

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173. *Id.* at 235–36.

174. *Id.* at 239 (discussing Arizona v. Gant, 556 U.S. 332, 351 (2009)).

175. *Id.* at 240.

176. *Cf.* Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 710–15 (2011) (observing that the Supreme Court increasingly requires evidence of systemic or intentional violations in order to justify exclusion of evidence obtained in violation of the Fourth Amendment or to sustain a policy claim against a municipality in ways that track the qualified immunity defense available to damages claims); Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477, 1492–97 (2018) (same).

177. For a similar example, see Fred O. Smith Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2108 (2018) ("Imagine a county clerk in 2014 who, because it is against state law, does not award marriage licenses to same-sex couples . . . Our imaginary county clerk, let us add, is gay and believes deeply in marriage equality. Now imagine that after the United States Supreme Court *does* find that same sex-couples have a right to marry in 2015, couples who were denied this right in 2014 sue . . . for money damages. They contend that even though the right for same-sex couples to marry was not clearly established in 2014, it does not matter." (footnote omitted)).

178. *Cf.* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that officials are generally shielded from liability for damages insofar as the conduct does not violate a clearly established constitutional right).

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the argument for forcing the government to pay the price of damages liability has its greatest force.

Qualified immunity doctrine accordingly represents a middle ground solution that endeavors to accommodate the prerogatives of state and local governments without permitting them to be heedless of their constitutional obligations.[179] Qualified immunity doctrine protects public employees and, to the extent they are indemnified, their employers, as long as they undertake reasonable efforts to comport with their existing legal obligations. When the government's constitutional obligations are clear, however, it can legitimately be faulted for failing to undertake whatever training, supervision, or discipline is necessary to ensure that public employees understand and comply with those obligations. On both the instrumental and deontic accounts, the government should be compelled to pay when it permits public employees to breach reasonably clear constitutional obligations. When such clarity is lacking, however, both the instrumental and deontic cases for imposing costs on the government are far less potent.

As a common law approach to balancing plaintiffs' interests in compensation, the prerogatives of public employees to resolve legal uncertainty in a reasonable fashion, and the interests of the taxpayers and those dependent on the ability of state and local governments to finance public services, qualified immunity doctrine may not be unassailable, but it surely seems to be an eminently plausible effort to resolve the tension between these conflicting and undeniably important interests.

Professor Jeffries has nevertheless complained that "qualified immunity as currently defined and administered goes well beyond shielding reasonable error" because "while mere negligence suffices to negate qualified immunity when there is a factually similar precedent on point, something more is required when there is not," producing "an overly legalistic and therefore overly protective shield against liability for constitutional torts."[180] He has therefore argued that qualified immunity doctrine, rather than focusing on whether the defendant violated a "clearly established" right, should instead be reframed to focus on whether the defendant's conduct was "clearly unconstitutional," an approach "less tied to precedent and less technical . . . . Conduct would be clearly unconstitutional if it contravened

179. *Cf. id.* at 813 ("The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative.").

180. Jeffries, *supra* note 110, at 258. He added:

> [Q]ualified immunity should hew closely to notice as a proxy for fault. It may be in some sense unfair to impose liability for conduct that an officer could reasonably have thought lawful, but it is certainly not unfair to impose liability for conduct that the officer knew or should have known was wrong. Notice as a proxy for fault does not require a precedent precisely on point.

Id. at 259 (footnotes omitted).

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factually specific precedent . . . or if it clearly and unambiguously contravened constitutional principles."[181] If, however, on the view advanced above, qualified immunity is best justified in terms of its effect on the manner in which public employees are trained and supervised, Professor Jeffries's reformulation is problematic. Rather than requiring that public employees be trained to follow extant rules of constitutional law, his approach demands that they become adept at applying "constitutional principles."[182] Training public employees to apply "principles" instead of "rules" may be no easy feat.

Sometimes constitutional law is stated in terms of relatively abstract standards, rather than concrete rules that require public officials to act in specific ways in the face of given facts.[183] There is, indeed, a longstanding debate between those who advocate a jurisprudence of rules, which mandate or prohibit particular conduct on given facts, and those who advocate a jurisprudence of standards, which are bottomed on background legal principles and therefore necessarily leave greater discretion to the actor called on to apply them.[184] When constitutional law is stated in terms of standards

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181. John C. Jeffries Jr., *What's Wrong With Qualified Immunity?*, 62 FLA. L. REV. 851, 867–68 (2010) (emphasis omitted). For similar proposals focusing on the manner in which lawyers and judges would assess a legal claim, see Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497, 1544 (2019) ("[A] court might favor plaintiffs' interests in being made whole and deny qualified immunity whenever the court is certain that the plaintiffs have suffered a legal wrong. The court might then grant qualified immunity only if it is at least significantly unsure of the correct answer."); Michael L. Wells, *Qualified Immunity After* Ziglar V. Abbasi*: The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 434 (2018) ("The Supreme Court could . . . adopt[] a rule that immunity should not be awarded when there is a factual distinction but the distinction does not reflect a legally significant difference.").

182. Jeffries, *supra* note 181, at 868.

183. *Cf. id.* at 854 ("[T]he fact-specific, on-the-ground approach does not mesh with the rhetoric of constitutional law . . . .").

184. For present purposes, Kathleen Sullivan's distinction between "rules" and "standards" will do nicely:

> *(a) Rules.* - A legal directive is "rule"-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere. A rule captures the background principle or policy in a form that from then on operates independently. A rule necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness. But the rule's force as a rule is that decisionmakers follow it, even when direct application of the background principle or policy to the facts would produce a different result.
>
> *(b) Standards.* - A legal directive is "standard"-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation. Standards allow for the decrease of errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules. Standards allow the decisionmaker to take into account all relevant factors or the totality of the circumstances. Thus, the application of a standard in one case ties the decisionmaker's

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rather than rules, however, it will be more difficult to expect government officials, frequently untrained in legal niceties, to conform their conduct to relatively abstract standards.

For example, employing a relatively abstract standard, the Fourth Amendment prohibits "unreasonable searches and seizures,"[185] and tracking this textual formulation, the Court has observed that "reasonableness is always the touchstone of the Fourth Amendment analysis."[186] Nevertheless, the Court has acknowledged:

> [A] responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.[187]

Thus, whatever the virtues of standards or, to use Professor Jeffries formulation, "constitutional principles,"[188] when applicable law is stated at a relatively high level of generality, it may be far more difficult to expect those who train and supervise public employees to provide the kind of concrete guidance that facilitates the kind of supervision that promotes compliance

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> hand in the next case less than does a rule - the more facts one may take into account, the more likely that some of them will be different the next time.

Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58–59 (1992) (footnotes omitted). For an explication of the debate between members of the Court who have advocated the use of rules and those who advocate the use of principles, see *id.* at 56–69.

185. U.S. CONST. amend. IV.

186. Cnty. of Los Angeles v. Mendez, 137 S. Ct. 1539, 1546 (2017) (alteration omitted) (quoting Birchfield v. North Dakota, 136 S. Ct. 2160, 2186 (2016)).

187. Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) (citation omitted). To a similar effect, see Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 338 (2012) ("Officers who interact with those suspected of violating the law have an 'essential interest in readily administrable rules.'" (quoting *Atwater*, 532 U.S. at 347)); Virginia v. Moore, 553 U.S. 164, 175 (2008) ("In determining what is reasonable under the Fourth Amendment, we have given great weight to the 'essential interest in readily administrable rules.'" (quoting *Atwater*, 532 U.S. at 347)).

188. Jeffries, *supra* note 181, at 868.

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with the law without producing undesirable over-deterrence.[189] Accordingly, when the law is stated at a relatively high level of generality, the manner in which such a standard is applied may be so fact-sensitive that only precedents involving a great deal of factual similarity will offer sufficient clarity to justify a denial of qualified immunity.[190] Moreover, it asks too much to expect public employees to apply standard-like "constitutional principles" rather than more rule-like commands; Professor Jeffries's proposed reform in qualified immunity doctrine may do little to improve compliance with the Constitution, while at the same time imposing significant costs on the taxpayers and those dependent on the ability of the government to finance public services. Professor Jeffries offers no data to explain how frequently public employees are currently granted immunity for failing to grasp "constitutional principles,"[191] but to the extent that the difference between "principles" and "rules" is meaningful, that difference could well prove difficult for public employees to grasp and apply.

In any event, if tinkering with qualified immunity doctrine is warranted, the account advanced here suggests that, in light of the reality of indemnification, the critical inquiry is whether a public employer could have been reasonably expected to impose a system of training, supervision, and discipline sufficient to incentivize employees to avoid a particular liability risk without undue risk of over-deterrence. It is unrealistic to expect public employees to know and be able to apply every bit of settled constitutional doctrine; as Professor Schwartz has observed: "There could never be sufficient time to train officers about the hundreds—if not thousands—of court cases that could clearly establish the law."[192] But, if constitutional doctrine becomes so hopelessly complex that public officials could never be expected to grasp and comply with it, then constitutional law would cease to have any real impact on the behavior of public officials. In such a world, the most we could achieve is a form of publicly funded constitutional tort insurance. Surely we should aspire to a constitutional jurisprudence with greater impact on what happens in the real world; constitutional doctrine

189. For a valuable discussion of the case for courts to develop administrable "decision rules" in constitutional law rather than relying on more general principles frequently embodied in constitutional text, see Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 88–100 (2004).

190. *Cf.* Ornelas v. United States, 517 U.S. 690, 695–96 (1996) ("Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible . . . . They are . . . fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed." (citing Illinois v. Gates, 462 U.S. 213, 232 (1983))).

191. *See* Jeffries, *supra* note 181, at 867–69.

192. Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. (forthcoming 2021) (manuscript at 6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659540 [https://perma.cc/WF3M-5J5F].

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should be sufficiently comprehensible and rule-like so that public officials can be realistically expected to learn and comply with it.

To be sure, in especially egregious cases where the illegality of official conduct is plain, qualified immunity should likely be denied even in the absence of a breach of a previously announced rule-like formulation of constitutional law—a point that the Supreme Court has made in its qualified immunity jurisprudence.[193] In the vast majority of cases, however, a focus on clearly established rights asks the right question—at least if we are to focus on facilitating effective training, supervision, and discipline of public employees.[194] It will be much easier for public employers to expect that their employees comply with extant rules of constitutional law than to demand that they also hew to more amorphous, standard-like principles of constitutional law.

B. Does Qualified Immunity Offer Meaningful Protection?

Even if there is a theoretical justification for qualified immunity along the lines sketched out above, the question remains whether, in practice, qualified immunity provides an appropriate middle ground solution to the problems posed by governmental damages liability. Qualified immunity is often attacked as constituting a nearly insuperable obstacle to the vindication of constitutional rights.[195] The empirical evidence, however, suggests that its

193. *See* Hope v. Pelzer, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances . . . . Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding."). *Hope* involved an Eighth Amendment challenge to Alabama's practice of chaining prisoners to hitching posts for extended periods with limited water and bathroom breaks as a disciplinary measure. *Id.* at 733–36. Although Professor Jeffries approved of *Hope*, he argued that a number of factors limited its importance:

> First, the very extremity of the misconduct in *Hope*—the Court called it "antithetical to human dignity"—distanced that decision from application to less flamboyant misbehavior. Second, there were in fact prior decisions very nearly on point, including one that outlawed handcuffing inmates to fences and bars for long periods. Thus, even under a demanding standard of factual similarity, the conduct in *Hope* stood condemned. Finally, the Court's subsequent decisions veered back toward requiring precedential specificity.

Jeffries, *supra* note 110, at 256–57 (footnotes omitted). More recently, however, the Court has stressed that on egregious facts, qualified immunity should be denied regardless whether there are factually similar precedents. *See* Taylor v. Riojas, No. 19-1261, 2020 WL 6385693, at *2 (U.S. Nov. 2, 2020) (per curiam) ("Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution." (footnote omitted)).

194. *See supra* text accompanying notes 165–171.

195. *See supra* text accompanying note 13.

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protections may be much weaker than these critics claim—perhaps even too weak to accomplish much of anything.

1. *The Effect of Qualified Immunity on Litigation*

In her study, Nancy Leong reviewed a random sample of 100 district court and 100 appellate court opinions involving qualified immunity from three time periods—the two years preceding the Supreme Court's admonition in *Siegert v. Gilley* that lower courts should ordinarily consider the merits of a constitutional claim before deciding whether it is barred by qualified immunity,[196] the two years preceding the Court's subsequent and seemingly mandatory admonition in *Saucier v. Katz* that lower courts must decide the merits before reaching qualified immunity,[197] and the two most recent years for which data was then available (2006–2007).[198] The data showed the following:

Table 1[199]

	Immunity Granted; No Ruling on Merits	Violation Found and Immunity Granted	No Violation Found	Violation Found and Immunity Denied
Pre-*Siegert* (District Courts)	18.6%	3.7%	42.2%	32.3%
Pre-*Siegert* (Courts of Appeal)	35.4%	4.2%	34.0%	25.0%
Pre-*Saucier* (District Courts)	13.3%	4.9%	46.0%	32.7%
Pre-*Saucier* (Courts of Appeal)	22.2%	1.4%	52.8%	20.1%
2006–2007 (District Courts)	5.1%	3.6%	61.4%	14.4%
2006–2007 (Courts of Appeal)	4.5%	6.5%	61.9%	26.5%

196. *See* 500 U.S. 226, 232–33 (1991) (explaining that courts should not assume, without deciding, that a constitutional right has been violated before proceeding to examine the qualified immunity claim).

197. 533 U.S. 194, 200 (2001).

198. For a more complete description of the study's methodology, see Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 680–88 (2009).

199. This table is derived from *id.* at 711 tbls.3–4.

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The most interesting data come from 2006 and 2007 when, under *Saucier*, lower courts were required to decide both whether a constitutional claim was meritorious and whether it was barred by qualified immunity, so that the effect of qualified immunity could be considered separately from the merits of a constitutional claim.[200] During that period, in only 3.6% of cases did a district court find that a claim had merit but was barred by qualified immunity, and in only 6.5% of cases did a court of appeals find that a claim had merit but was barred by qualified immunity.[201] This suggests that qualified immunity bars only a small fraction of cases.[202] In the earlier periods as well, only a small fraction of cases were resolved on immunity grounds,[203] although the data from these periods are confounded by the fact that courts often found a claim was barred by qualified immunity without deciding whether it was meritorious.

This result is consistent with other studies.[204] For example, Paul Hughes examined all published decisions of courts of appeals involving qualified immunity in 2005 (during the *Saucier* regime) and found that 42.17% found no constitutional violation, 10.24% found a constitutional violation for which damages were barred by qualified immunity, 46.39% found a meritorious claim not barred by immunity, and 1.2% found immunity without reaching the merits.[205] Greg Sobolski and Matt Steinberg examined a random sample of 750 published court of appeals decisions involving qualified immunity and found that during the *Saucier* regime, 35.3% of cases found no constitutional violation, 36.5% of cases found a constitutional violation not barred by qualified immunity, 13.9% found a constitutional violation for which damages were barred by qualified immunity, 8.3% found no constitutional violation

200. *See id.* at 674–75 (explaining that the legal landscape changed when *Saucier* required that the first inquiry be whether a constitutional right had been violated and the second inquiry be whether the right was clearly established and thus not barred by qualified immunity).

201. *Id.* at 711 tbls.3–4.

202. Professor Leong suggested this pattern is attributable to cognitive dissonance, which could make judges reluctant to acknowledge that a claim has merit but nevertheless is barred by an immunity defense. *Id.* at 702–04. It is unclear, however, why judges would experience cognitive dissonance when awarding immunity, as opposed to grasping the rationale for immunity in cases in which the Constitution has been violated but, at the time of the underlying conduct, the defendant reasonably believed the conduct at issue was lawful. Arguably, awarding damages without finding the defendant knowingly, recklessly, or at least negligently violated the law could itself produce cognitive dissonance; perhaps an award of damages without fault could strike a judge as unwarranted.

203. *See id.* at 711 tbls.3–4.

204. *But cf.* Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 136 n.65, 145 n.106 (1999) (reviewing qualified immunity decisions over a two-year period after *Siegert* and before *Saucier* and finding only twenty percent denied immunity but disregarding decisions in which immunity was denied because of disputed issues of fact).

205. *See* Paul W. Hughes, *Not a Failed Experiment:* Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. COLO. L. REV. 401, 418–22, 422 tbl.1 (2009).

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with an alternative holding barred by qualified immunity, and 5.9% of cases found qualified immunity without reaching the merits.[206] Collin Rolfs examined 100 randomly selected district and court of appeals cases involving qualified immunity and found that during the *Saucier* regime, only 8.8% of appellate cases and 4.5% of district court cases found a constitutional violation but granted qualified immunity.[207] In a review of *Bivens* litigation in five selected judicial districts from 2001 to 2003 (mostly following *Siegert*), Alexander Reinart found that qualified immunity was the basis for dismissal in only five of the 244 complaints studied.[208]

Eight years after *Saucier*, in *Pearson v. Callahan*, the Court changed course and held that the lower courts were no longer required to reach the merits if they could dispose of a case by granting qualified immunity.[209] Because *Pearson* permitted lower courts to grant qualified immunity without reaching the merits,[210] cases decided after *Pearson* are less useful in isolating the effects of qualified immunity than cases decided under the *Siegert* regime, but the post-*Pearson* data nevertheless suggest that qualified immunity has limited effects.[211]

For example, Ted Sampsell-Jones and Jenna Yauch, examining all published post-*Pearson* appellate cases involving qualified immunity defenses between 2009 and 2010, found that a constitutional violation was found but damages were barred by qualified immunity in only 7.9% of published court of appeals cases, while the court found qualified immunity without reaching the merits in 19.5% of cases.[212] Professors Nielson and Walker examined all court of appeals decisions from 2009 through 2012 that involved qualified immunity and cited *Pearson* and found that while courts found a claim was barred by qualified immunity without reaching the merits

206. *See* Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and the Implications of* Pearson v. Callahan, 62 STAN. L. REV. 523, 540–42, 545 tbl.1 (2010).

207. *See* Colin Rolfs, Comment, *Qualified Immunity After* Pearson v. Callahan, 59 UCLA L. REV. 468, 489, 496 tbl.1, 497 tbl.2 (2011).

208. *See* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 813, 835, 843, 845 tbl.4 (2010).

209. *See* Pearson v. Callahan, 555 U.S. 223, 235–36 (2009) (explaining that the two-step protocol under *Saucier* is no longer mandatory).

210. *See id.* at 236 (holding that lower courts should be permitted to exercise their discretion in deciding which of the two prongs should be addressed first).

211. *See, e.g.*, Ted Sampsell-Jones & Jenna Yauch, *Measuring* Pearson *in the Circuits*, 80 FORDHAM L. REV. 623, 627–28, 628 tbl.1 (2011); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 30, 33–34, 37 (2015).

212. Sampsell-Jones & Yauch, *supra* note 211, at 627–28, 628 tbl.1.

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in 26.7% of cases, courts found a constitutional violation for which damages were barred by qualified immunity in only 3.6% of cases.[213]

One might be concerned that studies of judicial opinions—especially appellate opinions—are infected by a form of selection bias. Perhaps cases that result in written opinions or that are appealed are not typical of most civil rights litigation.[214] That problem is avoided by Professor Schwartz's study.[215] She reviewed the dockets of § 1983 cases filed against police officers and other law enforcement officials in five judicial districts in 2011 and 2012,[216] and found that qualified immunity was raised in only 37.6% of all § 1983 cases in which that defense was available.[217] The vast majority of these efforts to claim qualified immunity were unsuccessful:

213. Nielson & Walker, *supra* note 211, at 30, 34, 37.

214. *See, e.g.*, Theodore Eisenburg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 674 fig.5, 676 fig.7, 677 fig.8 (2004).

215. *See* Schwartz, *supra* note 11, at 20–21 (reviewing court dockets rather than published opinions in order to study how often the defense of qualified immunity is raised, how motions raising qualified immunity are decided, and how qualified immunity impacts case dispositions).

216. For a description of the study's methodology, see *id.* at 19–25.

217. *Id.* at 29 tbl.2. There was considerable variation among the five districts studied, with qualified immunity raised in 54.7% of cases in the Southern District of Texas but only 23.9% of cases in the Eastern District of Pennsylvania. *Id.*

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Table 2[218]

Qualified Immunity Denied	31.6%
Qualified Immunity Granted in Part	5.9%
Qualified Immunity Granted in Full	12.0%
No Constitutional Violation Established	11.4%
Motion Granted Without Discussing Qualified Immunity	14.1%
Motion Granted—Reasoning Unclear	2.0%
Motion Granted Without Mentioning Qualified Immunity or Mentioning It in the Alternative	5.9%
Motion Not Decided	17.0%

Based on the low rate at which § 1983 defendants obtain the protection of qualified immunity, Professor Schwartz concluded that qualified immunity "is ill suited to dispose of many cases before trial" and "unnecessary to shield defendants from discovery and trial."[219]

One could, to be sure, question Professor Schwartz's methodology and conclusions. For example, as Professors Nielson and Walker observed, "she only counted cases dismissed on the grounds of qualified immunity if the entire case has been dismissed as a result of the motion," and added, "if you consider all of the decisions that granted qualified immunity in full or in part or in the alternative, it totals 29.3% of the qualified immunity motions filed," while "ignor[ing] settlements, voluntary dismissals, and all other means of dismissal."[220]

218. Table 2 is derived from *id.* at 36–37, 37 tbl.6. There was substantial variation among districts, with qualified immunity faring best in the Southern District of Texas, where it was denied in 21.7% of motions and granted in part or full in 33.3% of motions, while the Eastern District of Pennsylvania granted qualified immunity motions in whole or part in only 6.1% of cases. *Id.* at 37. In another study that examined dockets rather than judicial opinions, Alexander Reinert found that in cases where qualified immunity was raised and went to trial before a jury, no jury instruction or special interrogatory on qualified immunity was proposed by the parties in 70.3% of those cases. Alexander A. Reinert, *Qualified Immunity at Trial*, 93 NOTRE DAME L. REV. 2065, 2081 n.88, 2082–83, 2083 tbl.1 (2018).

219. Schwartz, *supra* note 14, at 52–53, 56.

220. Nielson & Walker, *supra* note 40, at 1879–80 (footnotes and internal quotations omitted). For a more elaborate discussion of the effects of qualified immunity on settlements, see *id.* at 1880–82.

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