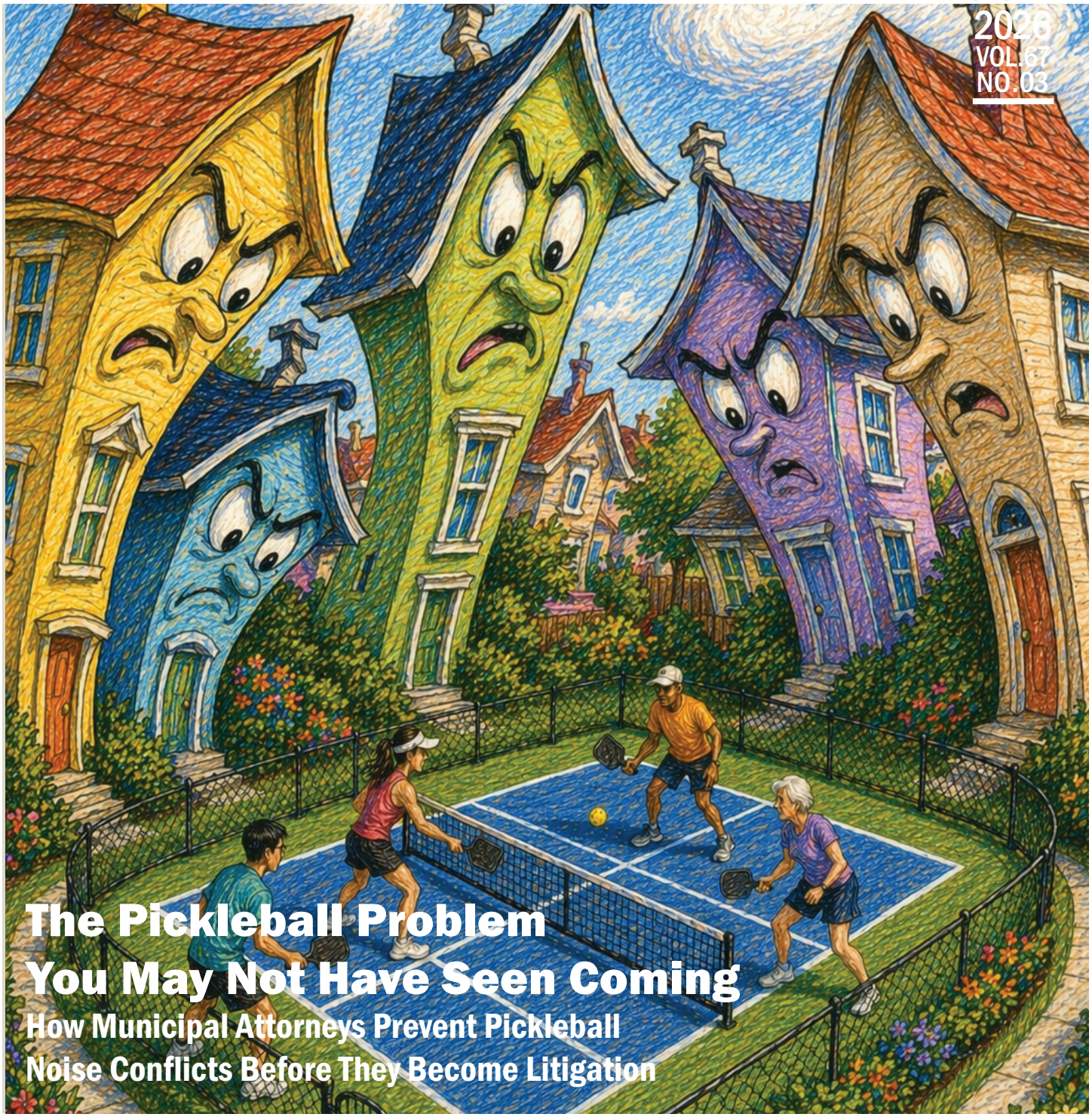
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The Pickleball Problem You May Not Have Seen Coming

How Municipal Attorneys Prevent Pickleball Noise Conflicts Before They Become Litigation



ZORN V. LINTON NEW TRENDS IN QUALIFIED IMMUNITY

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Recently, the Supreme Court expanded its qualified immunity doctrine in *Zorn v. Linton*, 607 U.S. ____. This decision both emphasizes the importance of municipal defendants aggressively utilizing the qualified immunity defense in all § 1983 cases and provides additional avenues for doing so.

The case arose from a 2015 sit-in protest at the Vermont state capitol, where Sergeant Jacob Zorn used a rear wristlock to lift protester Shela Linton to her feet after she refused to leave when the capitol closed to the public. Linton sued Zorn under 42 U.S.C. § 1983, claiming the arrest constituted excessive force in violation of the Fourth Amendment and left her with permanent wrist and shoulder injuries as well as post-traumatic stress disorder. The Second Circuit denied Zorn qualified immunity, relying on its earlier decision in *Amnesty America v. West Hartford*, as a clearly established holding that using a rear wristlock on a passively resisting protester constitutes excessive force.[1]

The Supreme Court summarily reversed in a per curiam opinion, holding that *Amnesty America* did not clearly establish that Zorn's specific conduct violated the Fourth Amendment.

First, the Court noted that *Amnesty America* only established that a "reasonable jury could ... find that the officers gratuitously inflicted pain," while noting that it was "entirely possible that a reasonable jury would find ... that the police officers' use of force was objectively reasonable given the circumstances." This, the Court stated, did not constitute a holding that any of the discussed actions violated the Constitution.

The Court further reasoned that *Amnesty America* did not address circumstances where an officer gave repeated warnings before using force. The Court therefore held that the Second Circuit defined the clearly established law at too high a level of generality in relying on *Amnesty America*, despite the clear factual similarities between the two cases. Because no sufficiently specific precedent put Zorn on notice that his actions were unlawful, the Court concluded he was entitled to qualified immunity.

Justice Sotomayor dissented, continuing her recent pattern of challenging the modern Court's definition of what constitutes a sufficiently low level of generality.[2] Sotomayor made the point that Sergeant Zorn did not issue any warning until after physically engaging with Linton, making *Amnesty America* a fundamentally similar case to the instant matter, which is all that is required to clearly establish the law here. Justice Sotomayor's thorough understanding of the factual discrepancies is unsurprising, given that she wrote the *Amnesty America* opinion herself twenty-two years ago.

She further criticized the Court's "one-sided approach to qualified immunity" as effectively shielding officers from liability, and noted that the majority now appears to require a factually identical case to clearly establish the law moving forward. While Sotomayor's description may be an exaggeration of the Court's holding, the Court has been consistently raising the bar on what it takes for plaintiffs to beat the qualified immunity defense. The onus is now on municipal defendants to demand that trial level courts take notice.

Zorn represents a meaningful expansion of what has now become a clear 20+ year trend of the Court urging lower-level judges to be vigilant in defining clearly established law at a lower level of generality than in the past. However, this is the first time that the Court has taken the time to do so in a seemingly 'run of the mill' § 1983 excessive force case. The Court previously dipped its toes into this pool in *City of Escondido, Cal. v. Emmons*, but it merely remanded to the Ninth Circuit to defend its use of a generalized passive resistance case as clearly established case law rather than overturning it altogether.[3] The Court's decision in *Zorn*, which drew distinctions between similarly situated plaintiffs facing identical uses of force based on the timing of warnings, provided a beacon for municipalities and officers nationwide to cite in excessive force cases, even with the smallest factual discrepancies, compared to previously established case law.

Plaintiffs (and courts denying dispositive motions) are required to cite to sufficiently similar clearly established law at a low level of generality. Municipal defendants should be aggressive in arguing that generalized use of force decisions are no longer sufficient for this purpose. *Zorn* makes clear that this must include factual similarities even at a granular level. If

Zorn makes clear that differing facts and environmental factors are important avenues to attack what was previously thought to be sufficiently similar, clearly established law.

Zorn draws a distinction between identical uses of force based solely on when warnings were given, municipal defendants can certainly argue that cases involving uses of force that are not identical (e.g., tight handcuffing vs. wristlock) cannot serve as relevant, clearly established law. Beyond that, *Zorn* makes clear that differing facts and environmental factors are important avenues to attack what was previously thought to be sufficiently similar, clearly established law.

Municipal defendants can, and should, also take advantage of the Court's clear implication in *Zorn* that nothing short of a final judgment can clearly establish what is and is not unconstitutional. Under this new holding, denials of summary judgment are rendered inert as potential sources of clearly established law. Attorneys writing reply briefs in support of their qualified immunity defense should read cases cited by plaintiffs in opposition with a critical eye for those that do not flatly declare officers' actions to be unconstitutional and alert the deciding court that it cannot take such cases into account based upon the *Zorn* holding. In addition, this holding can serve as a vehicle to prompt reconsideration of recent qualified immunity decisions at the district court level, particularly to the extent they cite to non-final judgment decisions.

In the coming days, expect to see an uptick in appeals citing *Zorn* and carving out increasingly narrow discrepancies between prior clearly established case law and new fact patterns. This may range from arrests involving individuals making minor movements, rather than entirely passive resistance, to officers engaging in uses of force similar to, though not identical to, those dealt with by courts in the past. It will also be interesting to see how quickly the Circuits and Districts begin to shy away from relying on non-final judgments in their qualified immunity analysis. This alone will change the calculus for qualified immunity arguments and decisions in all areas going forward.

On a final note, the current Court once again raised the specter, as they have done before in *Rivas-Villegas v. Cortesluna*, that the bar for what constitutes clearly established case law may not merely be high, but astronomically so.[4] The Court dropped a footnote noting that "[w]e assume without deciding that 'controlling Circuit precedent' can clearly establish law for qualified-immunity purposes." The Court's now repeated choice to note its own lack of decision regarding how the law can be clearly established serves as an invitation for a basic challenge to the use of Circuit-level case law in the coming years that could render qualified immunity a nigh unbeatable force should the Court choose to make it so.

The vast majority of cases used to demonstrate clearly established law, particularly at the levels of generality now required by the Court, are Circuit Court precedents. The removal of those from the equation would be devastating to those seeking to overcome the qualified immunity defense. At a minimum, it may be prudent for municipal defendants to include a short argument in their briefs that anything short of Supreme Court precedent cannot clearly establish the law, simply to preserve the defense. Now that the Court has again opened the door to such arguments, it seems likely that a municipal defendant will soon step through for a challenge that could change the face of Section 1983 litigation as we know it. M.

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ENDNOTES

[1] Amnesty America v. West Hartford, 361 F.3d 113 (2d Cir. 2004).

[2] *See*, *e.g.*, Mullenix v. Luna, 577 U.S. 7 (2015); Kisela v. Hughes, 584 U.S. 100 (2018); Stokes v. Kansas City Board of Police Commissioners, 143 S.Ct. 2422 (2023).

[3] City of Escondido, Cal. v. Emmons, 586 U.S. 38 (2019).

[4] Rivas-Villegas v. Cortesluna, 595 U.S. 1, 5 (2021)